

EXECUTIVE ORDER 12866 SUBMISSION

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1. Agency/Subagency originating
Department of Labor
Employment & Training

3. Title

Birth and Adoption

ifier Number (RIN)

1205-A162

4. Stage of Development

- ☐ Prerule
- ☒ Proposed Rule
- ☐ Interim Final Rule
- ☐ Final Rule
- ☐ Final Rule - No material change
- ☐ Notice
- ☐ Other

5. Legal Deadline for this submission

- a) ☐ Yes ☒ No
- b) Date / /
DD MM YYY
- c) ☐ Statutory ☐ Judicial

6. Designations

Essentially Significant (E.O. 12866)

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Signature of Authorized Regulatory Contact

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Bruce W. Altier/MAA

8/16/99

OMB 83-R

Revision: 12/87 (Previous versions obsolete)

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DEPARTMENT OF LABOR

4510-30

Employment and Training Administration

20 CFR Part 604

RIN 1205-AB21

Birth and Adoption Unemployment Compensation

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Department of Labor (DOL) is issuing for comment a Notice of Proposed Rulemaking to create, by regulation, an opportunity for State agencies that administer the Unemployment Compensation (UC) program to pay, under a voluntary experimental program, UC to parents who take time off from employment after the birth or placement for adoption of a child. This effort responds to the President's Executive Memorandum issued May 24, 1999, directing the Secretary of Labor to allow States the opportunity to develop innovative ways of using UC to support parents taking leave to be with their newborns or newly-adopted children and to evaluate the effectiveness of using the UC system for these or related purposes. This regulation will permit interested States to experiment with methods for allowing the use of the UC program for this purpose.

DATES: DOL invites written comments on this proposal. Comments are to be submitted by *[insert date 30 days after date of publication in the Federal Register]*.

ADDRESSES: Submit written comments to Grace A. Kilbane, Director, Unemployment Insurance Service, Employment and Training Administration (ETA), U.S. Department of

Labor, 200 Constitution Avenue, N.W., Room S-4231, Washington, DC 20210. Prior to issuance of this Notice of Proposed Rulemaking, the DOL received much correspondence on the subject matter of the proposal. This correspondence, along with correspondence received in response to the Notice of Proposed Rulemaking, will be made part of the rulemaking record and will be considered in the development of a final rule.

FOR MORE INFORMATION CONTACT: Gerard Hildebrand, Unemployment Insurance Service, ETA, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-4522, Washington, DC 20210. Telephone: (202) 219-5200 ext. 391 (this is not a toll-free number); facsimile: (202) 219-8506.

SUPPLEMENTARY INFORMATION:

I. Background

A. General Overview

(1) *Need for Birth and Adoption Leave*

On May 23, 1999, the President directed the Secretary of Labor to issue a regulation allowing unemployment fund moneys to be used to offer compensation to new mothers and fathers to be with their newborns or newly-adopted children. In discussing the importance of providing compensation, the President stated: "[T]hose first weeks of life are critical to the bonding of parents and children, and they can have long-term positive developments for the children. No parent should have to miss them." The

President also noted that, "We can do this in a way that preserves the soundness of the unemployment insurance system and continues to promote economic growth."

The President elaborated on this Birth and Adoption UC proposal in a May 24, 1999, memorandum to the heads of executive departments:

First, I hereby direct the Secretary of Labor to propose regulations that enable States to develop innovative ways of using the Unemployment Insurance (UI) system to support parents on leave following the birth or adoption of a child. In addition, I direct the Secretary to develop model State legislation that States could use in following these regulations. In this effort, the Department of Labor is to evaluate the effectiveness of using the system for these or related purposes. In a 1996 study conducted by the Commission on Family and Medical Leave, lost pay was the most significant barrier to parents taking advantage of unpaid leave after the birth or adoption of a child. This new step will help to give States the ability to eliminate a significant barrier that parents face in taking leave.

In response to the President's May 24, 1999, Executive Memorandum, the DOL is exercising its authority to interpret Federal UC statutes, and, in particular the statutes' longstanding "able and available" requirements, by implementing an experimental program to examine the use of the UC program as a means for providing compensation to workers who desire to take leave during the first year following the birth or placement for adoption of a child.

(2) The Federal-State UC System

The Federal-State UC program is administered as a partnership of the Federal government and the States. States collect State UC taxes used to pay compensation while the Federal government collects taxes, used for grants for State UC administration, under the Federal Unemployment Tax Act (FUTA). (The FUTA is codified at 26 U.S.C. 3301 - 3311.) The DOL has broad oversight responsibility for the Federal-State UC program, including determining whether a State law conforms and its practices substantially comply with the requirements of Federal UC law. If a State's law conforms and its practices substantially comply with the requirements of the FUTA, then the Secretary of Labor issues certifications enabling employers in the State to receive credit against the Federal unemployment tax as provided under section 3302, FUTA. If a State and its law are certified under the FUTA, and the State's law conforms and its practices substantially comply with the requirements of Title III of the Social Security Act (SSA), then the State receives grants for the administration of its UC program. (Title III of the SSA is codified at 42 U.S.C. 501 - 504.) The DOL enforces Federal UC law requirements through the FUTA credit and grant certification processes.

(3) Ability to Work and Availability for Work

The DOL has the authority and responsibility to interpret the provisions of Federal UC law such as the "able and available" requirements. Although no explicit able and available requirements are stated in Federal law, the DOL and its predecessors (the Social Security Board and the Federal Security Agency) interpreted four provisions of

Federal UC law as requiring that claimants be able to and available for work. Two of these provisions at section 3304(a)(4), FUTA, and section 303(a)(5), SSA, limit withdrawals, with specific exceptions, from a State's unemployment fund to the payment of "compensation." Section 3306(h), FUTA, defines "compensation" as "cash benefits payable to individuals with respect to their unemployment." The able and available requirements provide a test of a claimant's "unemployment."

The other two provisions found in section 3304(a)(1), FUTA, and section 303(a)(2), SSA, require that compensation "be paid through public employment offices." The requirement that UC is to be paid through the public employment system (the purpose of which is to find people jobs) ties the payment of UC to an individual's search for employment and to his or her ability to work and availability for work.

Agencies administering the Federal-State UC program have for over 60 years interpreted these four statutory provisions to require a participating State to have able and available requirements.

In response to practical economic and societal concerns, the DOL has previously, as discussed below, exercised its authority to interpret Federal UC statutes regarding the able and available requirements to address several specific areas: training, illness, jury duty and temporary layoffs. Under its authority to interpret Federal UC law and consistent with its broad oversight responsibility, the DOL interprets the Federal able and

available requirements to include a voluntary experimental program for examining the use of the UC program to provide compensation to workers who take approved leave or otherwise leave employment to be with their newborns or newly-adopted children. This experiment recognizes the impact of women in the workforce and responds to the dramatic societal and economic changes resulting from the large number of families where both parents work.

(4) Statutory Exceptions

Congress created two statutory exceptions to the able and available requirements. Federal UC laws allow for expenditure of unemployment funds to (1) individuals with a temporary disability and (2) individuals in approved self-employment programs.

Temporary Disability. Section 3304(a)(4)(A), FUTA, and section 303(a)(5), SSA, provide for using unemployment fund moneys for the non-UC purpose of insuring against loss of employment due to temporary disability and, therefore, temporary unavailability. These amendments were added to permit a State to use employee, but not employer, contributions in its unemployment fund for such purposes.

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Self-Employment Assistance. The Federal UC laws create an exception to the Federal availability requirement for individuals in the Self-Employment Assistance (SEA) program. These individuals are seeking to establish their own businesses and need not be available for other work. Since the SEA program assists individuals to become

self-employed, it furthers the purpose of the UC program of returning people to work.

The FUTA provides an explicit exception to the Federal availability requirement whereby "State requirements relating to availability for work, active search for work, and refusal to accept work are not applicable to such individuals." (Section 3306(t)(2)(A), FUTA.)

(5) Minimal Tests of the Able and Available Requirements

Consistent with DOL interpretations, some States have imposed minimal tests of the able and available requirements for specific situations, provided the claimant has demonstrated an attachment to the labor force.

Approved Training. Prior to incorporating the training provision into the Federal laws, the DOL encouraged States to treat individuals in training approved by the State agency as meeting the able and available requirements since such training represents the most effective step available to the individual to return to work. The DOL cautioned that State agencies should only approve short-term training that would make individuals job ready. In 1970, Congress, recognizing the importance of training in remedying unemployment, made this training provision mandatory for all States. (Section 3304 (a)(8), FUTA.) The Federal able and available requirements are preserved because individuals who fail to attend training, except by specific waiver, are held to be unavailable for work and ineligible for UC.

Illness. Eleven States allow an individual who initially meets the able and available requirements, but then becomes ill, to receive UC payments without interruption, provided that no suitable work is offered and refused. The DOL approved such State laws in an effort to deter disqualification for UC where a claimant was not "able and available" for perhaps one day, or even one hour, out of a week. Two States, Alaska and Massachusetts, cap the number of weeks ill claimants can collect UC at six weeks and three weeks, respectively; the other States have no statutory limitations. The Federal able and available requirements are preserved because claimants must initially demonstrate their ability to and availability for work before the illness and must be held ineligible if they refuse an offer of suitable work.

Similarly, under the Federal-State Extended Unemployment Compensation Act of 1970 (EB)(26 U.S.C. 3304, note), an ill individual may receive UC only if no suitable work is rejected. The EB program provides additional weeks of compensation to individuals who have exhausted their rights to regular compensation during times of high unemployment and contains a specific "work search" requirement. This work search requirement is suspended for EB claimants who are hospitalized for an emergency or life-threatening condition (20 CFR 615.8 (g)(3)(i)(B)). This suspension is permitted only if the State law contains a similar provision to those explained above, which must be consistent with the Federal able and available requirements.

Jury Duty. The DOL accepts that States may pay UC to individuals serving on jury duty consistent with the Federal availability requirement. This is reasonable because individuals¹ are compelled under the threat of contempt of court by the judicial branch of the government to go on jury duty, and attendance at jury duty may be taken as evidence that the worker would otherwise be available for work. It would be inconsistent for the State to compel jury service and at the same time disqualify unemployed persons from UC for complying. Most employment is not considered an excuse for avoiding jury duty, and unemployment would also likely not be an excuse from jury duty. Indeed, EB claimants are exempt from the work search provision while on jury duty (20 CFR 615.8(g)(3)(i)(A)).

Temporary Layoffs. In a temporary layoff, the employer is unable to provide work for a short period of time, but both the employer and the worker have the expectation that the worker will return to work on a specific date. When the employer recalls the worker, the worker must accept or be denied UC. In these cases, the availability requirement is essentially limited to the employer who laid off the worker. This recognizes that such workers are frequently career employees who would likely quit a new job to return to their former employer when the layoff ends; therefore, other employers would not likely hire such workers.

B. The Birth and Adoption Unemployment Compensation (BAA-UC) Experiment

(1) *Able and Available Requirements for BAA-UC*

The DOL previously exercised its authority to interpret the able and available requirements in other areas: training, illness, jury duty, and temporary layoffs. Based on this precedent, the DOL's experimental BAA-UC program is designed to test whether expansion of its interpretation of the able and available requirements would promote a continued connection to the workforce in parents who receive such payments. As the number of families with both parents working rises, collecting data under the BAA-UC program to test the existence and magnitude of such a connection 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 DOL wants to test whether providing parents with BAA-UC at a point during the first year of a new-born's life, or after placement for adoption, will help workers maintain their connection to the workforce by allowing them time to bond with their children and to develop stable childcare systems while adjusting to the accompanying changes in lifestyle before returning to work. The expanded interpretation of the Federal able and available requirements applies only to experimental BAA-UC and does not extend to any other facet of the Federal-State UC program.

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(2) *Experimental versus Permanent Program*

This proposed rule will give the State agencies that administer the UC program the opportunity to pay, under an experimental program, UC to parents who take leave

from their employment after the birth or placement for adoption of a child. The DOL chose to proceed with an experimental rather than a permanent program because the limited nature of an experimental program will tend to lessen any potential negative effects to the Federal-State UC program or economy while compiling information that allows the DOL to evaluate the following: whether individuals compensated for birth and adoption leave are more likely to return to employment in the long run, and, therefore, are more available than those who are uncompensated; the effects on employers whose employees take such compensated leave; and the effects on employers throughout a State who bear the BAA-UC costs. The DOL anticipates that creating this experimental program, which States can voluntarily choose to put into practice, will give States the necessary latitude to develop innovative programs permitting the DOL to measure workers' connections to the workforce after availing themselves of BAA-UC, as compared to individuals who take unpaid leave or none at all.

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(3) Experimental Program Limitations

The purpose of the able and available requirements is to assure sufficient attachment to the workforce. There is some evidence to suggest that providing UC to the parents of newborns and newly-adopted children and others who wish to take family or medical leave will, in the long run, increase their attachment to the workforce. The BAA-UC experimental program is intended to test this proposition. Initially, in order to gain information on the impact of adapting the UC program to address the needs of such workers, the DOL is defining the experimental program to cover the parents of newborns

and newly-adopted children. This class of workers with these parental responsibilities is a small, easily-defined group that can be used to test whether compensating their absence from employment will assist them to maintain, or even improve upon, their connection to the workforce by enabling them to better meet their parental responsibilities. The DOL believes that authorizing States to provide unemployment compensation for parents of newborns and newly-adopted children will produce valuable information for evaluating the program, while simultaneously limiting the potential for any negative impact on the UC program and the economy until the data can be properly analyzed. This information may also serve as a basis for further expanding coverage to assist a broader group of workers to better balance work and family needs.

The initial stage of the parent-child relationship is critical to the bonding of parents and children, and this bonding can have long-term positive benefits for both the parents and their children. These parents may experience a disruption in their work relationship, some because they are forced to stay at work despite their desire to bond with their new children, and others because they may choose to quit their employment to spend more time with their new children. Providing unemployment compensation for parents of newborns and newly-adopted children will better allow them to take leave from their jobs to bond with their children.

(4) Experimental Program Time Frame and Evaluation

The Final Rule is expected to be published by December 31, 1999. States may enact legislation and begin operation of a BAA-UC program any time after the effective date of the Final Rule. States wishing to enact legislation prior to completion of the rulemaking process should have a contingency provision in their legislation allowing for State agencies to make changes necessary to comply with Federal regulations prior to the implementation of their programs.

Realistic

The DOL expects to evaluate the impact of BAA-UC after at least four States have enacted legislation and operated a BAA-UC program for a minimum of three years; however, this proposed evaluation time frame is subject to reassessment and may be changed based on the level of State participation in BAA-UC.

The Federal evaluation methodology has not yet been established. Because States will have broad latitude in developing BAA-UC experimental programs, the evaluation methodology must be designed to accommodate the resulting diversity of programs. The evaluation design will proceed after an adequate foundation can be formed based on State-developed BAA-UC programs. Though not required by these regulations, it is anticipated that each State will include, as part of its system development, an evaluation component. Once decisions have been made regarding the Federal evaluation process and how the relevant information will be collected, complete informa-

tion collection instructions will be issued and, if appropriate, published for comment in the Federal Register.

C. Rule Format

In keeping with the Administration's commitment to writing regulations in plain English, the substance and format of this Proposed Rule is presented in a question-and-answer format so that the regulations will be clear and easy to understand. In addition, the DOL has attempted to anticipate and address issues that may arise during this effort.

II. Explanation

As part of the Administration's regulatory reform effort, the DOL is proposing a streamlined rule to give States wide latitude in developing BAA-UC experimental programs. These proposed regulations will be the minimum requirements necessary to comport with Federal UC law.

In accordance with the May 24, 1999, Executive Memorandum, BAA-UC model State legislation has been developed and is appended (Appendix A) for comment. A commentary on the model legislation and policy issues to aid States in the development of methods provided for under the proposed rule is also appended (Appendix B) for comment. Both appendices are subject to change based upon comments. They will be issued in final form as a program letter and will not appear in the Code of Federal Regulations.

Description of the Regulation

The proposed rule adds Part 604 to the Code of Federal Regulations. Subparts are organized by subject matter:

Subpart A discusses the purpose and scope of the regulation and defines critical terms.

Subpart B discusses Federal UC requirements as they relate to this experiment.

Subpart C discusses BAA-UC eligibility requirements.

Following is a brief description of each subpart of the proposed regulation.

Subpart A-General Provisions

Subpart A discusses the purpose and scope of the regulation and defines critical terms. The purpose of the regulation is to establish the opportunity for the State agencies that administer the UC program to pay, under an experimental program, UC to parents who take leave from their employment after the birth or placement for adoption of a child. This proposal will permit interested States to experiment with methods for allowing this use of the UC program.

The scope of the BAA-UC experiment extends to all State UC programs that provide compensation to parents who leave their employment to be with their newborns or newly-adopted children. This group was identified by the President as the focal group for the experiment with possible expansion, if warranted, after the experiment has been evaluated. State participation is completely voluntary.

Definitions of terms specific to BAA-UC are also in Subpart A:

Approved Leave—Because the term "leave" is commonly interpreted as an approved, temporary separation from a specific employer, that definition has been adopted for BAA-UC purposes.

Birth and Adoption unemployment compensation—This is UC paid only to parents on approved leave or who otherwise leave employment to be with their newborns or newly-adopted children.

Newborns—To establish the distinguishing characteristics of the experimental group, it is necessary to define "newborn." For purposes of the experiment, newborns are defined as children up to one-year old.

Newly-adopted children—Adoptive parents are included in the experiment. Because adopted children may not be newborns, and a comparable measurement period is necessary for all parents included in the BAA-UC experiment, "newly-adopted" refers to children, regardless of age, who have been placed within the previous 12 calendar months with an adoptive parent(s).

Parents—For BAA-UC experimental purposes, parents are defined as mothers and fathers—biological, legal or having legal custody of a child during the adoption process. The BAA-UC experiment does not include foster parents unless the child has been placed with the foster parents for adoption.

Placement—The adoption process can be lengthy with completion occurring long after a child has been placed with a family. Consequently, for BAA-UC comparability between parents of newborns and parents of newly-adopted children, "placement" for

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BAA-UC purposes will be the time a parent becomes legally responsible for a child pending adoption.

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Subpart B-Federal UC Requirements

Subpart B discusses how the Federal UC requirements apply to BAA-UC.

Beyond the proposed interpretation of the able and available requirements, this regulation does not change Federal UC requirements. Under its authority to interpret the statutes it administers, the DOL is interpreting the Federal able and available requirements to include BAA-UC. This interpretation will give States the opportunity to experiment with, and demonstrate methods of, providing BAA-UC to parents of newborns and newly-adopted children. The experiment will provide compensation only during the periods when parents take approved leave or otherwise leave employment following the birth or placement for adoption of their child. This interpretation of the Federal able and available requirements applies only for purposes of this experiment.

Federal UC requirements do not encompass: 1) the number of compensable weeks available to claimants; 2) BAA-UC compensation amounts; and 3) whether the number of weeks claimed for BAA-UC will be in addition to or subtracted from regular UC. In addition, States have the authority to limit BAA-UC to individuals on approved leave to be with their newborns or newly-adopted children or to expand it to individuals who otherwise leave employment for the same purposes.

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Subpart C-BAA-UC Eligibility

Subpart C discusses the BAA-UC eligibility requirements. Although implementation of BAA-UC is entirely at State discretion and States have wide latitude in BAA-UC program development, certain eligibility parameters apply. For example, only parents of newborns or newly-adopted children are included in the experiment. Also, because all Federal UC law requirements must be met and the insurance nature of the UC program must be maintained, the introduction of eligibility factors that are inconsistent with Federal UC law requirements is not permitted under BAA-UC programs. The introduction of eligibility factors unrelated to the fact or cause of unemployment, such as industry, employer size or whether the spouse of a UC recipient also receives (or has received) UC, is inconsistent with Federal law. Specifically, in a 1964 conformity decision involving the State of South Dakota, the Secretary of Labor held that Federal law prohibits the introduction of any eligibility test unrelated to the fact or cause of the individual's unemployment. (See Secretary of Labor's Decision of September 25, 1964, In the Matter of the Hearing to the South Dakota Department of Employment Security Pursuant to Section 3304(a) of the Internal Revenue Code of 1954, transmitted by Unemployment Insurance Program Letter No. 787, October 2, 1964.) Therefore, all individuals covered under a State's UC law must be covered for BAA-UC.

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For BAA-UC purposes, the first compensable week is the week in which birth or placement for adoption takes place. States are free to determine whether to prorate the weekly compensation amount based on the day of the birth or placement for adoption or

whether to fully compensate for that week. Weeks preceding the week of the birth or placement and weeks following the end of the one-year period are not compensable. In all cases, all other eligibility requirements must be met. For example, deductible income under the regular UC program must also be deducted under the BAA-UC program.

The purpose of BAA-UC is to provide support to new parents on "leave" from employment to be with their newborns or newly-adopted children. The term "leave" implies that the individual will return to the last employer after a designated period. For experimental purposes, the DOL will allow States to pay BAA-UC to parents who otherwise leave employment or who do not return to employment after approved leave. This will generate data for evaluating how providing compensation affects the connection of these individuals to the workforce. Also, limiting BAA-UC to only those individuals who are assured of job retention could be seen as unfairly excluding parents from BAA-UC who are denied leave by their employers. Consequently, States may make BAA-UC available to individuals who otherwise leave their jobs to be with their newborns or newly-adopted children.

Given the experiment's flexibility, States may choose to deny BAA-UC to individuals who fail to return to work following parental leave. However, based upon Jenkins v. Bowling, 691 F.2d 1225 (7th Cir. 1982), these States may not delay payment until after the individual returns to work. Section 303(a)(1), SSA, requires the full payment of benefits when due, precluding States from delaying payment while awaiting

the individual's return to work. A State may, however, declare an overpayment of benefits after the individual fails to return to work.

Just as under the current UC program, there are no Federal requirements for BAA-UC concerning monetary eligibility, the amount of compensation, or duration. States have full authority and responsibility to make these decisions. States may use the same monetary eligibility requirements and compensation levels used for other claimants or may establish different criteria and compensation levels for BAA-UC. States also have full authority and responsibility for determining whether BAA-UC will be socialized among employers (also called "noncharging").

Drafting Information

This document was prepared under the direction and control of the Director, Unemployment Insurance Service, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, DC 20210. Telephone: (202) 219-7831 ext. 171 (this is not a toll-free number).

Executive Order 12866

This proposed rule is a "significant regulatory action" within the meaning of Executive Order 12866 because it meets the criteria of Section 3(f)(4) of that Order in that it raises novel or legal policy issues arising out of legal mandates, the President's

priorities, or the principles set forth in the Executive Order. Accordingly, the proposed rule has been submitted to, and reviewed by, the Office of Management and Budget.

However, the proposed rule does not require an assessment of anticipated monetary costs and benefits because it will not have an annual effect on the economy of \$100 million or more. The DOL has also determined that the rule, as proposed, will have no adverse material impact upon the economy and that it does not materially alter the budgeting impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof.

Further, the DOL has evaluated the proposed rule and found it consistent with the regulatory philosophy and principles set forth in Executive Order 12866, which governs agency rulemaking. Although the proposed rule will impact States and State agencies, it will not adversely affect them in a material way. The proposed rule would permit States to voluntarily establish experimental programs to determine the effectiveness of using the UC program to support parents taking leave from their employment to be with their newborns or adopted children; it would not impose any new requirements on States.

Paperwork Reduction Act

The DOL has determined that this proposed rule contains no information collection requirements.

Executive Order 12612

These proposed regulations have been reviewed in accordance with Executive Order 12612 regarding federalism. The order requires that agencies, to the extent possible, refrain from limiting State policy options, consult with States prior to taking any actions which would restrict States' policy options, and take such action only when there is clear constitutional authority and the presence of a problem of national scope. Since this proposed rule does not limit State policy options under the current UC program, it complies with the principles of federalism and with Executive Order 12612.

Executive Order 12988

This proposed rule has been drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The proposal has been written to minimize litigation and provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

Unfunded Mandates Reform Act of 1995 and Executive Order 12875

This proposed rule has been reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 et seq.) and Executive Order 12875. The DOL has determined that this proposal does not include any Federal mandate that may result in increased expenditures by State, local, or tribal governments, in the aggregate, or

by the private sector, of \$100 million or more in any one year. Accordingly, no budgetary impact statement has been prepared.

The States have full discretion to decide whether or not to enact a BAA-UC program. Based on legislative activity and expressed interest, the DOL anticipates that a relatively small number of States will enact experimental BAA-UC programs and, on this basis, estimates that the annual aggregate BAA-UC cost to the States will be between \$50 and \$87 million. Within this range, the cost depends upon such factors as the extent to which BAA-UC affects parents' incentives to increase their leave duration and the percentage of leave-takers applying for BAA-UC. The derivation of this estimate begins with the 1997-98 Current Population Survey containing the annual U.S. average number of women in the labor force with a child under one-year old. After this number is disaggregated by State, the likely proportion of leave-takers for newborns and newly-adopted children is determined based on percentages provided in a report by the Commission on Family and Medical Leave, titled *A Workable Balance: Report to Congress on Family and Medical Leave Policies* (April 30, 1996). Other factors used in determining the cost estimate include the percent of leave-takers with employer-paid leave, monetary eligibility rates, and average weekly UC payments.

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Regulatory Flexibility Act

This proposed rule will not have a significant economic impact on a substantial number of small entities. The proposal affects States and State agencies, which are not

within the definition of "small entity" under 5 U.S.C. 601(6). Moreover, States have complete discretion in deciding whether or not they will enact a program permitted under this proposed regulation. Under 5 U.S.C. 605(b), the Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect. Accordingly, no regulatory flexibility analysis is required.

Small Business Regulatory Enforcement Fairness Act

This proposed rule is not a "major rule" as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. Chapter 8). This proposed rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based entities to compete with foreign-based entities in domestic and export markets.

Effect on Family Life

The DOL certifies that this proposed rule has been assessed in accordance with section 654 of Pub. L. 105-277, 112 Stat. 2681, for its effect on family well-being. The DOL concludes that the proposed rule will not adversely affect the well-being of the nation's families. Rather, it should have a positive effect on family well-being by permitting States to enable more parents to take leave from their employment to be with their newborns or newly-adopted children.

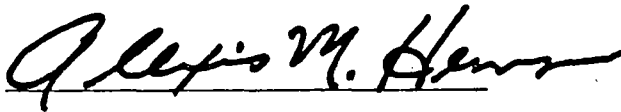
List of Subjects in 20 CFR Part 604

Employment and Training Administration, Labor, and Unemployment Compensation.

Catalogue of Federal Domestic Assistance Number

This program is listed in the Catalogue of Federal Domestic Assistance at No. 17.225, Unemployment Insurance.

Signed at Washington, D.C. on _____, 1999.



ALEXIS M. HERMAN

Secretary of Labor

Words of Issuance

For the reasons set forth in the preamble, the DOL proposes that Chapter V of Title 20, Code of Federal Regulations be amended by adding new part 604 to read as follows:

**Part 604-REGULATIONS FOR BIRTH AND ADOPTION UNEMPLOYMENT
COMPENSATION**

Subpart A-General Provisions

Sec.

§604.1 What is the purpose of this regulation?

§604.2 What is the scope of this regulation?

§604.3 What definitions apply to this regulation?

Subpart B-Federal Unemployment Compensation Program Requirements

§604.10 Beyond the interpretation of the able and available requirements, does this regulation change the Federal requirements for the unemployment compensation program?

Subpart C-Eligibility

§604.20 Who is covered by Birth and Adoption unemployment compensation?

§604.21 When does eligibility for Birth and Adoption unemployment compensation commence?

§604.22 Are parents who leave employment to be with their newborns or newly-adopted children eligible for Birth and Adoption unemployment compensation, or is it limited only to parents who take approved leave?

Authority: 42 U.S.C. 1302(a); 42 U.S.C. 503(a)(2) and (5); 26 U.S.C. 3304(a)(1) and (4); 26 U.S.C. 3306(h); Secretary's Order No. 4-75 (40 FR 18515); and Secretary's Order No. 14-75 (November 12, 1975).

Subpart A-General Provisions

§604.1 What is the purpose of this regulation?

This regulation allows the States to develop and experiment with innovative methods for paying unemployment compensation to parents who take leave from employment to be with their newborns or newly-adopted children. States' experiences with Birth and Adoption unemployment compensation will enable the Department of Labor to test whether its interpretation of the Federal "able and available" requirements promotes a continued connection to the workforce in parents who receive such payments.

§604.2 What is the scope of the regulation?

This regulation applies to and permits all State unemployment compensation programs to provide benefits to parents on approved leave or who otherwise leave employment to be with their newborns or newly-adopted children. A State's participation is voluntary.

§604.3 What definitions apply to the regulation?

The following definitions apply to this regulation:

(a) *Approved Leave* means a specific period of time, agreed to by both the employee and employer, during which an employee is temporarily separated from employment and after which the employee will return to work with that employer.

(b) *Birth and Adoption unemployment compensation* means unemployment compensation paid only to parents on approved leave or who otherwise leave employment to be with their newborns or newly-adopted children.

(c) *DOL* means the United States Department of Labor.

(d) *Newborns* means children up to one-year old.

(e) *Newly-adopted children* means children, regardless of age, who have been placed within the previous 12 calendar months with an adoptive parent(s).

(f) *Parents* means mothers and fathers (biological, legal or who have legal custody of a child during the adoption process).

(g) *Placement* means the time a parent becomes legally responsible for a child pending adoption.

(h) *State(s)* means one of the States of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands.

Subpart B-Federal Unemployment Compensation Program Requirements

§604.10 Beyond the interpretation of the able and available requirement, does this regulation change the Federal requirements for the unemployment compensation program?

No. This regulation does not change the Federal unemployment compensation requirements. Under its authority to interpret Federal UC law, the DOL interprets the Federal able and available requirements to include experimental Birth and Adoption unemployment compensation. The regulation applies only to parents who take approved leave or otherwise leave employment to be with their newborns or newly-adopted children.

Subpart C-Eligibility

§604.20 Who is covered by Birth and Adoption unemployment compensation?

If a State chooses to provide Birth and Adoption unemployment compensation, all individuals covered by the State's unemployment compensation law must also be covered for Birth and Adoption unemployment compensation. Just as with current unemployment compensation programs, individuals may not be denied experimental Birth and Adoption unemployment compensation based on facts or causes unrelated to the claimant's unemployment, such as industry, employer size or the unemployment status of a family member. The introduction of such facts or causes would be inconsistent with Federal unemployment compensation law.

§604.21 When does eligibility for Birth and Adoption unemployment compensation commence?

Parents may be eligible for Birth and Adoption unemployment compensation during the one-year period commencing with the week in which their child is born or placed with them for adoption. Weeks preceding the week of the birth or placement and weeks following the end of the one-year period are not compensable.

§604.22 Are parents who leave employment to be with their newborns or newly-adopted children eligible for Birth and Adoption unemployment compensation, or is it limited only to parents who take approved leave?

The purpose of Birth and Adoption unemployment compensation is to support parents who wish to take time from employment to be with their newborns or newly-adopted children. States may limit Birth and Adoption unemployment compensation to parents who take approved leave or may extend Birth and Adoption unemployment compensation to parents who otherwise leave employment to be with their newborns or newly-adopted children.

States may condition eligibility on whether a claimant returns to work after taking leave and may declare an overpayment upon failure of the claimant to return to work. As with regular unemployment compensation, payments of Birth and Adoption unemployment compensation must be made as soon as administratively feasible and may not be withheld pending a claimant's return to work.

The following appendix will not appear in the Code of Federal Regulations.

Model State Legislation

Section _____. Birth and Adoption Unemployment Compensation.

(a) An individual who is on a leave of absence from his or her employer or who left employment to be with the individual's child during the first year of life, or during the first year following placement with the individual for adoption, shall not be denied compensation under Section _____ for voluntarily leaving employment, Section _____ relating to availability for work, Section _____ relating to inability to work, or Section _____ for failure to actively seek work.

(b) Section _____, concerning the reduction of the amount of compensation due to receipt of disqualifying income, shall apply to payments under this section. In addition, the following payments shall cause a reduction in the compensation amount:

(1) any payment from the employer resulting from a birth or adoption described in subsection (a); and

(2) any payment resulting from a birth or adoption described in subsection (a) from a disability insurance plan contributed to by an employer, in proportion to the employer's contribution to such plan.

(c) Compensation is payable to an individual under this section for a maximum of 12 weeks with respect to any birth or placement for adoption.

(d) Each employer shall post at each site operated by the employer, in a conspicuous place, accessible to all employees, information relating to the availability of Birth and Adoption unemployment compensation.

(e) Any compensation paid under this section shall not be charged to the account of the individual employer.

(f) This section shall be applied consistent with regulations issued by the U.S. Department of Labor.

The following appendix will not appear in the Code of Federal Regulations.

**Commentary on Model State Legislation,
Including Policy Issues**

General

Must States implement a Birth and Adoption unemployment compensation (BAA-UC) program?

No. This program is voluntary for the States.

Must the States use the Model State Legislation?

No. The Model State Legislation is provided for the convenience of the States. States using the Model State Legislation will need to modify it to agree with State usage and any policy decisions where States have discretion.

May a State pay UC for other types of family or medical leave?

No. The Department of Labor's (DOL) interpretation of the "able and available" requirements pertains only to the BAA-UC experiment for parents taking approved leave or who otherwise leave employment to be with their newborns or newly-adopted children. Permitting payment of UC for other types of family leave or care would be inconsistent with this experimental program.

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Monetary Qualifications and Benefits

What are the earnings and employment requirements for BAA-UC?

The Model State Legislation assumes that States will use the same earnings and employment criteria that apply to all other individuals. However, States are free to establish different criteria.

What is the weekly benefit amount for individuals eligible for BAA-UC?

The Model State Legislation assumes that individuals eligible for BAA-UC will receive the same weekly benefit amount as other individuals eligible for UC. However, States are free to establish a different weekly benefit amount.

How does the receipt of other income effect payment of BAA-UC ?

States will determine whether BAA-UC will be reduced by other income. Under the Model State Legislation, the amount of BAA-UC will be reduced in the same manner as any other payment of UC as provided under State law. The Model State Legislation also provides for the deduction of any payment from the employer as a result of the birth or placement for adoption, and for the deduction of any disability insurance payment received as a result of the birth or placement for adoption in proportion to the employer's contribution to the disability insurance plan. This provision, which is limited to payments triggered by the same event which triggers BAA-UC, reflects the view that the unemployment fund should not be held responsible when wage replacement is available

from other sources, particularly when both payments are financed by the employer.

States should examine their laws to determine if all types of appropriate income are, or should be, deductible. For example, some leave payments which are not normally deductible under State law may cover costs of birth and adoption leave.

How does the BAA-UC entitlement relate to regular UC payments?

States are free to determine whether amounts of BAA-UC count (or do not count) toward the maximum amounts or maximum number of weeks of regular UC payable under State law, or whether BAA-UC has separate maximums.

Period of Eligibility

When may BAA-UC benefits begin?

Under Section 604.21 of the proposed regulations, parents may receive BAA-UC only during the one-year period commencing with the week in which the child is born or placed for adoption. For example, an individual taking leave in the 51st week following birth or placement for adoption, would be eligible for BAA-UC only for weeks 51 and 52. Periods preceding the week of birth or placement for adoption are not compensable.

States are free to reduce the one-year period. For example, a State may choose to limit receipt of BAA-UC to the first 12 weeks following birth or placement.

How many weeks of BAA-UC may individuals receive?

States are free to determine this. The Model State Legislation establishes a maximum duration of 12 weeks per individual with respect to any one birth or adoption. Since the Family and Medical Leave Act of 1993 (FMLA) allows up to 12 weeks for such events, States may wish to have an identical amount. States may also relate the duration of leave to the individual's weekly amount of UC. For example, for each birth or adoption, an individual may receive an amount equal to 12 times the individual's weekly UC.

To prevent confusion between FMLA and BAA-UC, States should inform potential BAA-UC beneficiaries of the dissimilarities between the two programs (i.e., BAA-UC does not guarantee job retention; not all approved FMLA leave may be compensable under the BAA-UC program).

If a child is born in the middle of the week or the placement occurs in the middle of the week, is BAA-UC payable for this week?

Under the Model State Legislation, BAA-UC would be payable, assuming all applicable eligibility conditions, such as the deductible income provisions, are met. States are free to determine whether to compensate this week and, if they do, whether the individual will receive the full weekly amount of BAA-UC or whether to prorate the weekly amount to reflect only periods following birth or adoption. If the amount is prorated, the State may pay the remaining balance for the last partial week if the individual is still on leave.

Must the individual serve a waiting period?

No. Nothing in Federal law requires States to have a waiting week for regular UC or BAA-UC. However, not having a waiting week for BAA-UC would eliminate the 50 percent Federal share for the first week of *all* Extended Benefits claims. Under 20 CFR 615.14(c)(3), a State is not entitled to a Federal share for the first week of Extended Benefits if the State's law provides "at any time or under any circumstances" for the payment of UC for the first week of unemployment.

When is a child considered "placed" for adoption?

Under 604.3(g) of the proposed rule, placement occurs at the time a parent becomes legally responsible for a child pending adoption. State UC agencies should consult the adoption laws of their States to determine precisely when placement occurs.

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Other Eligibility Issues

May both parents receive BAA-UC? If so, may they both receive such compensation at the same time?

The answer to both questions is "yes." States implementing BAA-UC must allow both parents, if otherwise eligible, to receive BAA-UC concurrently or consecutively. A State may not prohibit payment of BAA-UC simply because the other parent is taking leave for the same purpose. A State law which does so is inconsistent with Federal law because the eligibility of one parent will be determined based on whether the other parent is

receiving UC. Specifically, in a 1964 conformity decision involving the State of South Dakota, the Secretary of Labor held that Federal law prohibits the introduction of any eligibility test unrelated to the fact or cause of the individual's unemployment. (See Secretary of Labor's Decision of September 25, 1964, In the Matter of the Hearing to the South Dakota Department of Employment Security Pursuant to Section 3304(a) of the Internal Revenue Code of 1954, transmitted by Unemployment Insurance Program Letter No. 787, October 2, 1964.) The recipient status of the other parent is unrelated to the fact or cause of an individual's unemployment. Thus, both parents may receive BAA-UC, whether concurrently or consecutively. Similarly, States may not limit use of BAA-UC to the "primary" parent.

Must BAA-UC apply to individuals employed by all covered employers?

Yes. As explained in the previous answer, States may not impose eligibility conditions not related to the fact or cause of the individual's unemployment. Assuming the services are taxable for UC, States may not, therefore, limit BAA-UC based on employer size.

Issues concerning size of firm requirements may arise because the FMLA does not cover individuals employed by employers with fewer than 50 employees and there may be a desire to parallel the FMLA provisions. However, paralleling the FMLA in this case would not be consistent with Federal UC law.

Are States establishing BAA-UC required to pay individuals who otherwise leave employment (not on approved leave) to be with their newborns or newly-adopted children?

No. However, there are compelling reasons for doing so. Many parents work for employers which are not covered under a Federal or State family leave law and which are not, as a result, required to grant birth and adoption leave. Although many of these employers may grant such leave, others may not. The DOL believes that all parents should be treated identically for UC purposes when they take time away from employment to be with their newborn or newly-adopted child. As such, their eligibility for BAA-UC should not be based on whether an employer is required to grant the leave, but on the parent's reason for wanting to take the leave.

May an individual be paid BAA-UC under the Federal-State extended benefit program or any of the federally funded benefit programs?

It depends on the program. Benefits under the UC for Federal Employees (UCFE) and UC for Ex-Servicemembers (UCX) are, by Federal law, required to be paid on the same terms and subject to the same conditions as State benefits (with exceptions not relevant here). Therefore, BAA-UC will be paid to individuals under these programs to the same extent as under State law.

Individuals may only receive Disaster Unemployment Assistance (DUA) when their unemployment is caused by a disaster as provided in 20 CFR Part 625. However, if they

meet their State's Birth and Adoption UC provisions, then they will satisfy the availability requirement at §625.4(g), and so may qualify for DUA. For example, an individual who is unemployed due to a major disaster may later give birth. If this individual satisfies the BAA-UC requirements in the State's law, she may receive DUA.

Extended benefit claimants may not receive Birth and Adoption UC since they must meet the systematic and sustained work search requirements in 20 CFR 615.8(g).

Individuals claiming trade readjustment allowances (cash benefits) under the Trade Adjustment Assistance and the North American Free Trade Act Transitional Adjustment Assistance programs will be ineligible since such individuals are required to either be in full-time training or conduct the systematic and sustained work search required for the extended benefit program.

May eligibility be conditioned on whether the individual gave notice to the employer?

Yes. Although the Model State Legislation does not provide for such a condition because it may result in denials due to the technicality of when the individual requested leave, States may impose it. The basis of such a requirement is that employers should be given sufficient time to accommodate the leaving/absence of the individual. If such a provision is included, the DOL recommends that the notice be required to be given no more than 30 days prior to birth or placement, but only where practicable. The FMLA contains a 30-

day requirement or shorter notice period where giving 30-day notice is not practicable; it does not require notice when the necessity to take leave is unforeseeable. (Section 102(e), Family and Medical Leave Act, Pub. L. 103-3 (February 5, 1993).)

May eligibility be conditioned on whether the individual returns to work?

Yes, however, based upon Jenkins v. Bowling, 691 F.2d 1225 (7th Cir. 1982), States may not delay payment until after the individual returns to work. Section 303(a)(1), SSA, requires the full payment of benefits when due, precluding States from delaying payment while awaiting the individual's return to work. A State may, however, declare an overpayment of benefits after the individual fails to return to work.

Financing costs of Birth and Adoption UC

Must BAA-UC costs be socialized among employers?

No, but the Model State Legislation socializes costs--also called "noncharging." An employer may be reluctant to bear all the costs of BAA-UC caused by an employee taking leave since the employer will not have caused the individual's unemployment. Since noncharging is permitted when the unemployment is caused by the employee, it is permitted in this situation. This position applies to both contributory and reimbursable employers.

May BAA-UC costs be paid from a State fund other than the State's unemployment fund, for example, a State's temporary disability (TDI) fund?

Yes. Nothing in Federal UC law governs the treatment of moneys in these funds because they are financed by a separate tax and held separately from the State's unemployment fund. For example, a State with a TDI program may enact a special disability insurance tax on employers and deposit the proceeds in a disability fund. If the State chooses to use one of these funds (or create such a fund) to pay birth and adoption leave benefits, the requirements of DOL's BAA-UC regulation will not apply.

Administrative Costs

May States use administrative grants received from the Federal government to pay for the administration of a BAA-UC program?

Provided that all the requirements of the BAA-UC regulation are met, the use of administrative grants is permissible, including for purposes of studying and evaluating the BAA-UC program. However, if the regulation's requirements are not met, the expenditures of grant funds are not for the proper and efficient administration of the State's law as required by section 303(a)(8) of the Social Security Act.

Reporting

Will States need to amend their laws to address any Federal reporting requirements concerning BAA-UC?

Although this is a matter for States to determine, the DOL anticipates that few, if any, States will need to amend their laws since most State laws already contain language concerning reporting. Many of these laws are based on the language on page 95 of The Manual of Employment Security Legislation, as revised September 1950, which requires that the agency "make such reports, in such form and containing such information as the Secretary of Labor may from time to time require, and shall comply with such provisions as the Secretary of Labor may from time to time find necessary to assure the correctness and verification of such reports."

What are the reporting requirements?

The DOL has not yet established a methodology for evaluating State BAA-UC programs. When that methodology is established, State reporting requirements will be issued in a separate information collection request and, if appropriate, published for comment in the Federal Register.

file: UI-DAA reg

► Daniel I. Werfel
04/11/2000 04:34:32 PM
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Record Type: Record

To: Debra J. Bond/OMB/EOP@EOP, Carole Kitt/OMB/EOP@EOP, Ann O'Leary/OPD/EOP@EOP
cc: Stuart Shapiro/OMB/EOP@EOP, Wendy A. Taylor/OMB/EOP@EOP, John F. Morrall III/OMB/EOP@EOP
Subject: Birth and Adoption Unemployment Compensation Final Rule

The final rule has been officially submitted for OMB review as of today. I have sent you a copy of the rule through office mail which you should receive shortly.

In previous discussions with DOL, we promised an expedited review of this regulation. Therefore, please send me any comments on the rule no later than **COB Wednesday, April 19**. I will then compile all the comments and schedule a meeting or call with DOL to go over. Thanks.

please send comments
to both Stuart Shapiro
and myself. Thanks

REGULATORY REVIEW WORKSHEET

OMB NUMBER: 1205-A166
 RIN NUMBER: 1205-AB21
 CHRONOLOGY: 1205-A162 10/29/1999

RECEIVED : 04/11/2000
 E.O. DUE DATE: 05/26/2000
 EXTENDED : (Y/N)
 APPEALED : / /

AGENCY : Department of Labor
 SUBAGENCY : Employment and Training Administration

TITLE: Birth and Adoption Unemployment Compensation

STAGE: Final Rule - No material change ECONOMICALLY SIGNIFICANT: No
 LEGAL DEADLINE: No UNFUNDED MANDATE : No

DESK OFFICER: Daniel Werfel
 ANALYST : Richard Theroux

ACTION:

- ☐ (1) Consistent Without Change
- ☐ (2) Consistent With Change
- ☐ (3) Withdrawn by Agency
- ☐ (7) Returned - Sent Improperly
- ☐ (9) Returned for Reconsideration
- ☐ (11) Emergency
- ☐ (12) Statutory or Judicial Deadline

ECONOMICALLY SIGNIFICANT: ☐ Yes ☐ No
 MAJOR : ☐ Yes ☐ No
 UNFUNDED MANDATE : ☐ Yes ☐ No
 (If yes, check all that apply)
☐ State, local, tribal governments
☐ Private Sector

REGULATORY IMPACT:
☐ (D) Deregulatory
☐ (R) Regulatory
☐ (N) Nonregulatory

FEDERALISM CERTIFICATION: ☐ Yes ☐ No
 (Applies only to Final Rules)

SIGNATURES AND DATES:

RMO	Desk Officer	Economist	OIRA
-----	-----	-----	-----
Date: _____	Date: _____	Date: _____	Date: _____

AGENCY NOTIFIED: / /

04/10/00

NOTE TO REVIEWER:

BECAUSE OF THE HIGH PRIORITY OF THIS FINAL RULE, THE DEPARTMENT OF LABOR IS REQUESTING AN EXPEDITED 30-DAY REVIEW. THANK YOU FOR YOUR ASSISTANCE IN THIS MATTER.



GERARD HILDEBRAND
CHIEF
DIVISION OF LEGISLATION
OFFICE OF WORKFORCE SECURITY

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EXECUTIVE ORDER 12866 SUBMISSION

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1. Agency/Subagency originating request Department of Labor Employment & Training Administration	2. Regulation Identifier Number (RIN) 1205-AB 21 <i>1205-A166</i>
3. Title Birth and Adoption Unemployment Compensation	
4. Stage of Development ☐ Prerule ☐ Proposed Rule ☐ Interim Final Rule ☐ Final Rule ☒ Final Rule - No material change ☐ Notice ☐ Other Description of Other _____	5. Legal Deadline for this submission a) ☐ Yes ☒ No b) Date ____ / ____ / ____ DD MM YYYY c) ☐ Statutory ☐ Judicial
7. Agency Contact (person who can best answer questions regarding the content of this submission) Gerard Hildebrand Phone (202) 219-5200 X391	6. Designations a) Economically Significant (E.O. 12866) ☐ Yes ☒ No b) Unfunded Mandate (2 U.S.C. 1532) ☐ Yes ☒ No If either of the above is "Yes," submit four (4) complete packages to OIRA

Certification for Executive Order 12866 Submissions	
The authorized regulatory contact and the program official certify that the agency has complied with the requirements of E. O. 12866 and any applicable policy directives.	
Signature of Program Official <i>Raymond L. Brown</i>	Date <i>4/10/2000</i>
Signature of Authorized Regulatory Contact <i>Bruce W. Allen</i>	Date <i>4-10-2000</i>

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 604

RIN: 1205-AB21

Birth and Adoption Unemployment Compensation

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Final Rule.

SUMMARY: The Department of Labor (Department) is issuing this Final Rule to create an opportunity for State agencies that administer the Unemployment Compensation (UC) program to provide partial wage replacement, on a voluntary, experimental basis, to parents who take approved leave or who otherwise leave employment following the birth or placement for adoption of a child. This regulation permits interested States to experiment with methods for allowing the use of the UC program for this purpose.

EFFECTIVE DATE: This Final Rule is effective [enter the date 30 days after the publication in the FEDERAL REGISTER.]

FOR MORE INFORMATION CONTACT: Gerard Hildebrand, Office of Workforce Security, Employment and Training Administration (ETA), U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-4231, Washington, DC 20210. Telephone: (202) 219-5200 ext. 391 (this is not a toll-free number); facsimile: (202) 219-8506; e-mail: ghildebrand@doleta.gov.

SUPPLEMENTARY INFORMATION:

I. INTRODUCTION

On December 3, 1999, we published for comment in the Federal Register a Notice of Proposed Rulemaking (NPRM) proposing to add new part 604 to 20 CFR. Part 604 will permit the State agencies that administer the UC program to provide partial wage replacement, on a voluntary, experimental basis, to parents who take approved leave or who otherwise leave employment following the birth or placement for adoption of a child. The NPRM invited the public to comment over a 45-day period. We believed this period was ample because of the simple nature of the experiment and the relatively short length of the proposed rule, although we did receive a number of requests for additional time. To accommodate the holiday season, we extended the comment period 15 days, through February 2, 2000. Comments were accepted by mail and electronic media. All comments regarding the proposed rule submitted by this date, including correspondence received prior to publication of the proposed rule, were considered in developing this Final Rule.

The preamble in the NPRM contained a detailed explanation, by subpart, of each proposed section. Where the provisions of this rule are the same as those contained in the proposal, the explanation has not been repeated. However, portions of the explanation provided in the NPRM may be repeated in this document as necessary to adequately respond to comments. Where substantive changes to the proposed rule are made, the changes are discussed in the relevant preamble section of this Final Rule. Technical

revisions, however, are not discussed in this preamble. Unless otherwise mentioned, references in this preamble to changes are comparisons between the NPRM and Final Rule.

Appendices A and B of the NPRM are not included in the Final Rule. The Model State Legislation (Appendix A), which is optional draft legislation that States may use as a guide, and the Commentary (Appendix B) will be published in the Federal Register through an Unemployment Insurance Program Letter (UIPL). Comments received regarding the appendices are, however, discussed in this preamble.

II. COMMENT OVERVIEW

A. Pre-NPRM Publication Correspondence

Approximately 500 pieces of correspondence were received before the NPRM was published in the Federal Register. These comments came largely from employers, both for-profit and not-for-profit, and employer associations. We also received comments from members of Congress, State legislators, and private citizens.

The bulk of the pre-NPRM publication correspondence addressed compensation to individuals on leave under the Family and Medical Leave Act (FMLA) without regard to the differences between the FMLA and the Birth and Adoption UC (BAA-UC) experiment. Because the majority of the comments stated opinions regarding compensating employees on leave under the FMLA and because the correspondence

preceded publication of the NPRM, we cannot discern specifically many writers' opinions concerning BAA-UC. (For example, concerns about the costs of wage replacement for employees on leave under the FMLA do not necessarily translate into concerns about the costs of BAA-UC which apply to a different, though overlapping, universe of potential recipients.) However, the specific issues (i.e., the reasons that support the opinions) noted in the pre-NPRM publication correspondence are included, as appropriate, with the post-NPRM publication comments.

B. Post-NPRM Publication Comments

Approximately 3,800 pieces of correspondence were submitted by the close of the comment period. Of those expressing an opinion, the post-NPRM publication correspondence indicated almost equal levels of support for and against BAA-UC. As with the pre-NPRM publication correspondence, the respondents included employers and employer associations, members of Congress, State legislators, State Employment Security Agencies (SESAs), and private citizens. As with the pre-NPRM publication correspondence, much of the post-NPRM correspondence solely addressed the FMLA without distinguishing the FMLA from the BAA-UC experiment. All the timely comments were, however, considered, and all correspondence is included in the rulemaking record.

We also received comments that were beyond the realm of both the BAA-UC regulation and the UC program (e.g., prison reform, income tax reform, Federally-

mandated vacations, availability of compensatory time in lieu of overtime pay under the Fair Labor Standards Act, eligibility of BAA-UC recipients for employer-paid benefits). Because these comments exceed the parameters of the UC program and this regulation, they are not addressed herein.

We appreciate the time and attention that respondents gave to reviewing the NPRM. Although some respondents requested that we contact them individually about their comments, the large volume of comments prevented us from doing that and we believe this document adequately responds to their comments.

III. THE ISSUES

A. General Overview

Generally, proponents of BAA-UC commented that BAA-UC is a logical extension of the UC program that would help new parents balance work and family responsibilities, keep people off welfare, and could be easily and inexpensively administered. Many proponents referred to studies that discussed the positive effects on the workforce attachment of individuals who receive paid parental leave. Conversely, those opposing the rule urged that we withdraw the rule because the costs would be too great, child care and rearing are the personal responsibility of parents and beyond the scope of government, and the BAA-UC initiative runs counter to the intent of both the UC program and the FMLA. Some respondents consider the idea of partial wage

replacement for new parents who are not working commendable, but think that the UC program is the incorrect vehicle for such a benefit.

B. Misconceptions About The Rule

Analysis of the comments revealed two significant misconceptions regarding BAA-UC: (1) that BAA-UC is for leave under the FMLA, and (2) that BAA-UC is a new program, separate and apart from the regular UC program.

(1) Relationship Between BAA-UC and the FMLA

Many respondents referred to BAA-UC as "paid FMLA" leave or "paid family leave." It was also apparent from the many comments expressing concerns about the potential for employee abuse, personal illness, and time away from work to care for family members, as well as the administrative burdens on employers in regard to the FMLA, that respondents viewed BAA-UC as tied to FMLA leave. The misconception that BAA-UC is for leave taken under the FMLA is understandable, as an impetus for BAA-UC was the finding in the 1996 study conducted by the Commission on Family and Medical Leave that new parents were not taking available leave because they could not afford the pay loss. Although there may be many cases where parents of newborns and newly-adopted children will be simultaneously eligible for BAA-UC and leave under the FMLA, the two are legally unrelated to each other. For example, the FMLA applies to employers with 50 or more employees and guarantees job retention for up to 12 weeks for employees on leave of absence for a variety of circumstances, including personal illness,

family illness, and maternity leave. The BAA-UC initiative, on the other hand, is voluntary on the part of the States, may not be contingent on employer size, is limited to parents of newborns and newly-adopted children, does not guarantee leave, and has no job retention component.

(2) BAA-UC Is Not a "New" Program

Some respondents commented that BAA-UC is a new program, separate and apart from the regular UC program. Some comments included administrative questions regarding the relationship between "the new benefit program" and the UC program. Other respondents referred to BAA-UC as "a new and disparate benefit unrelated to legitimate" UC and stated that development of BAA-UC was beyond our authority. Concerns were also expressed that this "entirely different benefit" would artificially inflate the unemployment rates that trigger the extended benefit program. Based on the idea that BAA-UC is a separate program, many respondents contended that the unemployment funds that would be used to finance BAA-UC should be refunded to the employers.

BAA-UC is not a new program. Rather, it creates a new basis for eligibility under the "regular" UC program. BAA-UC is an experimental opportunity that is based on an expanded interpretation of the Federal requirements that UC recipients be able to work and available for work (commonly known as the A&A requirements). As discussed

below, interpretation of Federal UC requirements is our responsibility and within our authority.

The fact that the BAA-UC regulation affords States broad latitude to establish eligibility requirements for work history and benefit levels does not set BAA-UC apart from the rest of the UC program. States currently have the authority to designate differing eligibility criteria for different categories of employees. For example, States may limit the payment of UC to individuals working in a seasonal industry as defined under State law.

The comments regarding the NPRM fell into broad categories and are discussed, by category, in the following section.

C. The Comments

(1) Legal Authority For BAA-UC

(a) Presidential directive

We received comments arguing that Congress should act on this proposal through legislation and that the President's directive to the Department to use the UC system to pay benefits in this manner is unconstitutional and violates the Administrative Procedure Act (APA). As the agency overseeing the Federal-State UC program, the Department has the authority to interpret the Federal UC laws, and we are exercising this authority through notice-and-comment rulemaking. The President's directive in no way limits the

Secretary's discretion to consider comments in developing a final BAA-UC rule. Nor does this rulemaking usurp Congress's legislative authority; this rule represents the Department's interpretation of existing Federal UC law requirements.

(b) Federal authority

We received comments regarding the Federal government's authority under the Federal UC laws to authorize the payment of BAA-UC. Some respondents argued that the Federal UC laws necessarily prohibit the payment of BAA-UC and others suggested that the BAA-UC proposal is inconsistent with the Federal A&A requirements, as they have been interpreted in the past, as part of the Federal-State UC program. Other respondents argued that Federal law sets a floor, but not a ceiling or cap, on UC coverage so that the States may pay benefits to whomever they wish (e.g., even those on leave to care for a parent). Several respondents suggested that no Federal A&A requirements exist and that States do not need a regulation to permit BAA-UC and can provide even broader coverage regarding eligibility beyond the payment of BAA-UC.

These issues, for the most part, were addressed in the preamble to the NPRM. The Department and its predecessors (the Social Security Board and the Federal Security Agency) have interpreted and enforced Federal A&A requirements since the inception of the Federal-State UC system. Several respondents noted that the A&A requirements are not clearly stated in the Federal UC statutes. Although no explicit A&A requirements are stated in Federal law, the Department and its predecessors interpreted four provisions of

Federal UC law, contained in the Social Security Act (SSA) and Federal Unemployment Tax Act (FUTA), as requiring that UC claimants be able to and available for work. Two of these provisions, at section 3304(a)(4), FUTA, and section 303(a)(5), SSA, limit withdrawals, with specific exceptions, from a State's unemployment fund to the payment of "compensation." Section 3306(h), FUTA, defines "compensation" as "cash benefits payable to individuals with respect to their unemployment." The A&A requirements provide a test of an individual's "unemployment." The other two provisions, found in section 3304(a)(1), FUTA, and section 303(a)(2), SSA, require that compensation "be paid through public employment offices." The requirement that UC be paid through the public employment system (the purpose of which is to find people jobs) ties the payment of UC to an individual's ability to work and availability for work.

Some respondents noted that we could authorize the payment by States of BAA-UC simply by issuing a UIPL rather than issuing a regulation. Other respondents encouraged notice-and-comment rulemaking, rather than issuing a UIPL. Because permitting States to pay UC for birth and adoption represents a change in interpretation and in order to permit public input into the decision-making process, we engaged in notice-and-comment rulemaking.

As noted, other respondents suggested that no Federal regulation is needed to permit the States to pay BAA-UC or to provide even broader coverage because Federal UC law only sets a floor, but not a cap on UC coverage. Contrary to these arguments,

Federal UC law does set caps since the SSA and FUTA contain specific provisions that regulate substantive eligibility and disqualifying requirements to be included in State law as a condition of its participation in the Federal-State UC program. Indeed, Federal UC law contains restrictions, such as requirements that an individual who has received UC during his or her benefit year must have had work since the beginning of such year in order to qualify for compensation in the next benefit year under section 3304(a)(7), FUTA. Similarly, restrictions on an individual's eligibility for compensation are contained in the FUTA at section 3304(a)(13), regarding athletes between seasons, section 3304(a)(14), regarding aliens, and section 3304(a)(15), regarding an individual's receipt of a pension. Finally, the "withdrawal standard," contained in section 3304(a)(4), FUTA, and section 303(a)(5), SSA, sets another Federal limitation on State benefits requiring that all money withdrawn from the unemployment fund of the State shall be used solely for the payment of UC, which is to be paid through public employment offices, as required by section 3304(a)(1), FUTA, and section 303(a)(2), SSA. The A&A requirements are instrumental in implementing these limitations. Thus, the Federal UC laws do set parameters for States on substantive eligibility and disqualifying requirements.

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We received some comments suggesting that existing interpretations of the A&A requirements, such as those regarding approved training and temporary layoffs, are not comparable to the payment of BAA-UC because they are directed toward re-employment. However, the goal of the BAA-UC experiment is to test the proposition that providing

UC to new parents can enhance and strengthen their attachment to the workforce through the provision of benefits during a time when they are faced with the added responsibilities of a newborn or newly-adopted child so that they will remain in the workforce.

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While paying BAA-UC is a departure from past interpretations, it is a permissible departure which we see as a natural progression evolving from our prior interpretations. At the inception of the Federal-State UC program, the A&A requirements were narrowly interpreted, but the realities of working life have, over the years, led us to revise our interpretation. We have gone from a strict interpretation of the A&A requirements to a more flexible one. While the A&A requirements are a test of unemployment measuring an individual's attachment to the workforce, our interpretation recognizes that people can still be attached to the workforce even though there are situations and circumstances affecting their lives, like illness, jury duty, approved training, or temporary layoffs.

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Each of our four prior interpretations of the Federal A&A requirements recognize situations in which the classic definitions of A&A should not apply for reasons of practicality or economic reality. The illness interpretation recognizes that it is unreasonable to penalize an individual who is otherwise available for work simply because he or she becomes ill for a short time. The jury duty interpretation recognizes that it is unreasonable to hold an individual unavailable for work when the State has compelled his or her attendance in court for jury service. Both of these interpretations deviate from a strict application of the A&A requirements because we want a practicable,

sound, workable system. The purpose of UC is to provide partial wage replacement during temporary spells of unemployment. Terminating or denying UC to someone for serving on a jury or because the individual has a short illness undermines this purpose by leaving the individual without financial support for no good reason. It would deprive the individual of UC support without regard to the realities of working life, that is, that no one can be constantly available for work. The approved training interpretation recognizes the economic reality that, in some cases, making oneself unavailable for immediate work opportunities produces a greater benefit to an individual's ability to obtain good work and strengthen his or her attachment to the workforce. The temporary layoff interpretation recognizes the economic reality that if an individual already has a job to which he or she plans to return, it does not make sense to compel him or her to look for work that may only be temporary or where another employer would be unlikely to hire the worker since he or she would only leave to return to the previous job. All of these interpretations recognize the reality that attachment to the workforce--the ultimate aim of the A&A requirements--can be demonstrated in other ways than by a continuous availability for any job. While none of these interpretations precisely parallels the payment of BAA-UC, they do operate on the same premises: that situations exist in which it is counterproductive to require a strict demonstration of availability and in which attachment to the workforce can be demonstrated, and indeed strengthened, without requiring a current demonstration of availability.

Thus, in response to practical economic and societal concerns, we have revised our interpretation of the A&A requirements for the limited purposes of the BAA-UC experiment to include parents of newborns and newly-adopted children. States may wish to experiment in providing UC to these individuals to measure whether such payments will increase these individuals' attachment to the workforce. We acknowledge that this is a reversal of our position taken in 1997, denying the State of Vermont's proposal to use UC in this manner to pay individuals on family and medical leave. The subsequent interest shown by several States, by various members of Congress, and by private organizations in using the UC system in this manner led us to analyze and re-evaluate our policy on this subject. While the interpretation that supports this rule is a change from the interpretation we expressed in our 1997 letter to Vermont, we believe that the change is supported by studies showing the benefits of providing cash benefits to those seeking to take parental leave. As demonstrated above, our new interpretation is part of an evolving interpretation of the Federal A&A requirements that recognizes practical and economic realities.

Several studies potentially relevant to BAA-UC were mentioned in the comments submitted by BAA-UC proponents. A few of these studies examined United States (U.S.) parental leave practices, while others studied European or other parental leave systems. A few studies examined paid leave, while others studied unpaid leave; at least three studies examined both, to some extent. The studies also examined differing time periods, controlled for different factors, and used differing statistical methodologies.

Nonetheless, these studies collectively contained the following potentially relevant findings: (1) family leave coverage increased the likelihood that a woman will return to her employer after childbirth in the U.S., Britain, and Japan (Waldfogel, Jane, et al. "Family Leave Policies and Women's Retention After Childbirth: Evidence from the United States, Britain, and Japan." *J. Popul. Econ.* (1999) 12:523-545); (2) U.S. women with fully-paid leave worked later into their pregnancies than women with partially paid leave or women with no leave (O'Connell, Martin. "Maternity Leave Arrangements: 1961-85." *Work and Family Patterns of American Women*. U.S. Bureau of the Census, Current Population Reports, Special Studies Series P-23, No. 165. (March 1990), 17-20); (3) U.S. women with paid leave started back to work sooner than women with unpaid leave once their infants were at least two months old (Joesch, Jutta M. "Paid Leave and Timing of Women's Employment Before and After Birth." *J. Marriage & Fam.* (November 1997). Vol. 59, No. 4, 1008-1022); (4) women used almost all parental leave available, and rights to paid leave were found to raise the percentage of women employed in nine European countries (Ruhm, Christopher J. "The Economic Consequences of Parental Leave Mandates: Lessons From Europe." *Q. J. Econ.* (February 1998). Vol. CX 113, Issue 1, 285-317); (5) extending paid maternal leave programs was shown to raise rates of labor force participation for women in the prime child-bearing years in 17 industrialized countries (Winegarden, C.R. and Bracy, Paula M. "Demographic Consequences of Maternal-Leave Programs in Industrial Countries: Evidence from Fixed-Effects Models." *S. Econ. J.* (April 1995). Vol. 61, No. 4, 1020-1035); and (6) U.S.

women who stayed at jobs, instead of quitting or changing jobs, were those with the longest maternity leaves and highest levels of “workplace social support” (Glass, Jennifer L. and Riley, Lisa. “Family Responsive Policies and Employee Retention Following Childbirth.” *Social Forces* (June 1998). 76(4):1401-35.).

While we do not find these studies controlling, they do appear to support the premise of the BAA-UC experiment, that BAA-UC will strengthen workforce attachment.

(2) Funding Issues

(a) Costs

A number of respondents viewed the proposal’s costs as minimal. Comments also indicated that the use of abundant State unemployment funds for this purpose is beneficial and would have the long-term effect of keeping individuals off welfare. Many respondents mentioned that high State unemployment fund balances have allowed employers in a number of States to receive contribution rate reductions. Some respondents also believed that the costs of administration would be limited because systems for providing UC are already well established.

Some respondents raised general concerns regarding costs. Some also disagreed with our BAA-UC cost estimates. While some stated that our estimate was too high and costs would be minimal, others felt the estimate was too low, suggesting figures up to

\$18 billion. Some respondents presented alternative methodologies which did not account for some important factors that would significantly reduce the cost of BAA-UC.

For example, several respondents assumed that all leave-takers would use 12 weeks of BAA-UC payments. This is unlikely to be the case, based on the behavior cited in A Workable Balance: Report to Congress on Family and Medical Leave Policies (April 30, 1996), hereinafter called the "FMLA study." In fact, the distribution of leave duration shown in the FMLA study, along with an assumed increase in duration due to the availability of BAA-UC, results in an estimated BAA-UC average duration of about 6 weeks for unpaid leave-takers. This average varies depending on whether a State has a waiting week before paying benefits.

Another cause for overestimation was the assumption of a 100% take-up rate for both States and individuals. Several respondents assumed all States would provide BAA-UC, and all parents would receive benefits. As explained below, we do not think all States will adopt BAA-UC. Also, not all new parents are employed or covered by UC, either because they are self-employed or they do not have a sufficient work history to be eligible. Of those who are eligible, some will receive some form of income support from their employers such as paid annual leave. These individuals either would not apply for BAA-UC or would receive BAA-UC for a shorter duration. Even among those who are not paid by their employer, not all leave-takers would apply for BAA-UC. Based on studies on UC take-up rates, about 65% of eligible employees actually applied for UC

before phone claims were available. The introduction of phone claims increased take-up rates by about 15%.

Several respondents provided alternative methodologies for estimating the cost of BAA-UC. For example, one respondent suggested starting with the overall employment-population ratio and adjusting it to the participation rates for women ages 16 to 44, assuming that the majority of women taking leave for a child under one year old would be under 44. This methodology is imprecise compared to the data we relied on from the Current Population Survey, published in the Bureau of Labor Statistics publication, "Employment Characteristics of Families in 1998." This publication provides the employment-population ratio for mothers with a child under one year old (54%). This same respondent also pointed out that parents adopting babies from foreign countries should be included in the estimate. Though it is true that these parents were excluded from the original estimate, the effect of adding them to the total cost is negligible.

Another respondent cited problems with using data from the FMLA study. Although we did use some of the percentages gathered in this study, the findings were tailored to suit the differences between the FMLA and BAA-UC. On one hand, the BAA-UC proposal has a broader scope, in some respects, because those who work for companies with fewer than 50 employees will be able to receive BAA-UC while they would be ineligible for FMLA leave. Therefore, the percentages of men and women taking leave are found by weighting the average percentages of both FMLA-covered and

non-covered leave-takers. On the other hand, BAA-UC is more limited than FMLA-covered leave because it covers only those taking leave to care for a newborn or newly-adopted child. The respondent was also concerned that the FMLA study did not account for incentives and changes in leave-taking patterns since the FMLA was enacted, thus representing a "premature look at the FMLA." The FMLA study provided some categorized data showing that, in fact, 98% of women needing leave for newborn care actually took it. There is, therefore, only a small margin for an increase in leave-taking by women because of incentives under either the FMLA or BAA-UC. Even so, we increased the percentage of women leave-takers by 1% to account for these potential incentives and increased the percentage of men by 5% for the same reason. Even among all those needing leave for birth or adoption, 91% actually took leave, according to the study. Thus, any additional incentive effect is likely to be small.

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In the NPRM, we estimated that the BAA-UC costs would range from zero to approximately \$68 million. This figure was based on the "expressed interest" of a small number of States as measured by whether BAA-UC legislation was introduced in a State. A respondent suggested that the four States cited would not enact BAA-UC. Since the publication of the NPRM, we determined that "expressed interest," as measured, is not a sound indicator of costs as it does not take into account the likelihood of enactment. Consequently, based on the likelihood of enactment, we have revised the estimated possible annual aggregate BAA-UC cost to range from \$0 to approximately \$91 million.

The likelihood of State enactment was determined by using three criteria. The first was whether a bill was introduced. The second was whether the State's unemployment fund contained sufficient balances to meet needs under a recessionary scenario. We assumed that if a State's unemployment fund is not above our recommended level (i.e., an average high cost multiple above 1.0), solvency concerns would make enactment of BAA-UC unlikely. The third criterion was whether the State was receptive to the philosophy of paying BAA-UC. We assumed that if the State's reciprocity rate (the ratio of insured unemployment to total unemployment) was below the national average, the State would be unlikely to enact BAA-UC because the State had historically chosen not to expand benefit eligibility.

Costs beyond the cost specific to BAA-UC were also discussed in the comments. For example, some respondents believe that the costs to government would be reduced because BAA-UC would increase individuals' workforce attachments and keep them off welfare. We expect to have more information in this area as a result of the BAA-UC experiment.

Other respondents, however, expressed concern about additional costs, citing lost productivity as a key problem of paying BAA-UC. However, the FMLA study found that most employers found no effect of the FMLA itself on productivity, and if they did report an effect it was, "as likely to be positive as negative on business productivity and growth" (p. xviii). Another study of nearly 300 employers in November 1993 also found that

mandated leave policies can improve morale, public relations, and supervisory relationships, as well as decrease the level of absenteeism. (William M. Mercer et al. "Survey Results: Family and Medical Leave Act" (January 1994); see Final Rule for Family and Medical Leave Act, 60 FR 2237 (January 6, 1995).) Another concern was the loss of income taxes as a result of increased leave-taking. However, those receiving BAA-UC benefits would be required to pay taxes on their benefits. Therefore, although some individuals will pay income taxes on reduced income, some individuals who would have taken unpaid leave will pay more taxes than otherwise. Also, many employers use temporary employees to perform the duties of a person taking leave to care for a new baby. Thus, we believe there would be a minimal loss in income taxes collected.

Administrative costs were not included in the cost estimate. We assumed that ongoing costs due to increased workloads would be funded through the normal contingency funding process, just as are increased workloads due to any other cause. One-time implementation costs may also be funded if contingency funds are available. If not, the State would have to absorb the cost through other means.

(b) Experience rating

Several respondents expressed concerns regarding the effect of BAA-UC on State experience rating systems and employer contribution rates. They argued that charging employer accounts for BAA-UC payments conflicts with Section 3303(a)(1), FUTA; that contribution rates will go up as a result of replacement employees being laid off; that

noncharging will shift the costs from one group of employers to another; and that employers who reimburse States for payments of UC (e.g., local governments and non-profit organizations, such as hospitals, school districts, and health care organizations) would have no relief from charges in some States. A respondent also suggested that contributing employers would be subsidizing reimbursing employers.

Section 3303(a)(1), FUTA, provides that "no reduced rate" of unemployment insurance taxes may be assigned except on the basis of an employer's "experience with respect to unemployment or other factors bearing a direct relation to unemployment risk." The objections to charging employers for BAA-UC costs are apparently premised on the fact that the employer may exercise little or no control over an employee's taking of leave. While this may be true, it is well established that employers may be charged for situations where they did not create the unemployment. For example, we have never taken the position that a State must "noncharge" (i.e., spread costs so experience ratings are unaffected) an employer when an employee quits for a good cause not attributable to the employer. Section 3303(a)(1), FUTA, permits a State, in this example, to charge an employer so that the employer possibly pays a higher tax rate; however, the State could noncharge the costs if it so chooses.

Concerning the statements that contribution rates will go up as a result of replacement employees being laid off, we believe that, because many employers already

respond to leave-taking by using temporary employees or shifting the duties of current employees, the effect on contribution rates is likely to be small.

Concerning the statements that noncharging employer accounts for BAA-UC costs would shift costs from one group of employers (those with maximum rates) to other employers, effectively creating a situation where UC payments attributable to employers paying maximum rates are being subsidized by other employers, we note that this is not an issue specific to BAA-UC. States currently noncharge employers in specific situations, especially when the separation is beyond an employer's control. Just as States currently consider the effects of noncharging, we expect States to consider the effects of noncharging BAA-UC payments on the overall contribution system.

As with experience rated employers, States may noncharge reimbursing employers. Specifically, in situations where the State determines that the UC paid is not attributable to service in the employ of the reimbursing employer, States may choose not to require reimbursement. As the commentary in Appendix B of the NPRM pointed out (64 FR 67979 (December 3, 1999)), reimbursing employers may be noncharged for BAA-UC payments just as the accounts of contributory employers may be noncharged. A respondent suggested that we make noncharging options for reimbursable employers more clear; however, the BAA-UC regulation makes no changes to the experience rating or reimbursement requirements and we see no reason to single out this one facet of the UC program for elaboration. For more information regarding the noncharging of

reimbursable employers, interested individuals are referred to UIPL No. 21-80 and UIPL No. 44-93 (58 FR 52790, 52792 (April 12, 1993)).

(c) Other funding methods

Some respondents suggested that benefits like BAA-UC could be funded in ways other than the current method of financing benefits through employer contributions to State UC programs. Suggested funding methods for BAA-UC included using Federal unemployment tax revenues, using Social Security funds, allowing tax-free withdrawals from retirement plans, and creating Federal loan programs similar to student loans. Suggestions for State funding included the introduction of an employee-paid tax, such as currently exists for temporary disability insurance in some States. There was also a suggestion that individuals obtain private insurance.

The FUTA dictates how Federal unemployment tax revenues may be used. Except as specified under the FUTA, there is no Federal provision for allowing payment of UC with these funds. The other suggested Federal funding mechanisms are beyond the Department's jurisdiction. As for the suggested State funding mechanisms, States are (and always have been) free to develop means outside the UC program to provide income support for new parents who are not working. Also, if a State elects to use a funding source outside the UC program, the State's program would not be subject to the requirements of the BAA-UC regulation.

(d) Potential loss of administrative funding and employer tax credits

We also received some comments expressing concern about the loss of Federal unemployment tax credits and UC administrative funding if, after a State enacts BAA-UC, a Federal court were to strike down our regulation authorizing it. We are the only agency authorized to institute conformity and compliance proceedings against States which could result in the loss of these tax credits to employers. We will not withhold certification for administrative funding and employer credits for States participating in an effort that we have sanctioned. While we do not believe a court would strike down this rule, prior to any conformity and compliance proceeding, we would follow the normal procedures outlined in 20 CFR 601.5(b) to permit the State a reasonable time to change its laws in order to come into compliance.

(e) Unemployment fund solvency

Some respondents expressed concern that BAA-UC would jeopardize the financial solvency of the UC program, in particular the program's ability to handle future recessions. Others thought we should require States that enact BAA-UC to meet and maintain an unemployment fund solvency requirement of a 1.00 average high cost multiple (AHCM) or another measure that reflects a reasonable index of fund solvency. Some respondents recalled that we have expressed concern over many States' insufficient unemployment fund balances and pointed out that the Federal Government has had to rescue State unemployment funds in the past.

We have never interpreted Federal law to require "solvency." While we will continue to encourage all States to meet and maintain an AHCM of 1.00, we do not think we should tie BAA-UC specifically to fund solvency. Just as States currently assess the costs to their unemployment funds whenever coverage, benefit expansions, or tax changes are considered, we expect States to consider the costs of BAA-UC before enactment.

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(3) Fundamental Program Changes

(a) The FMLA program

As stated above, we received many comments that relate the BAA-UC proposal to the FMLA. The respondents see the payment of BAA-UC as an attempt to require paid leave under the FMLA, which contains no such requirement. They contended that this proposal violates and/or amends the FMLA by converting unpaid leave under the FMLA into paid leave under the Federal-State UC program and runs counter to the notion that the FMLA would never require paid leave. Other respondents questioned whether BAA-UC requires the employer to hold the job for a BAA-UC claimant.

The FMLA is a distinct and entirely different statute than the SSA and FUTA which established the Federal-State UC system. The FMLA guarantees certain employees unpaid leave for up to 12 weeks for a variety of personal and family-related purposes. While the FMLA in no way mandates paid leave, it does not prohibit employers from providing paid leave to employees exercising their right to leave under

the FMLA. Furthermore, the FMLA contains language saying that nothing in it should be construed to prohibit States from offering benefits greater than those contained in the FMLA. Consequently, neither the BAA-UC regulation nor the implementation of BAA-UC in the States would violate the FMLA. This regulation does not impose paid leave or address employment rights. Rather, it permits the States, through the UC system, to pay partial wage replacement to employees who choose to take time off for the very narrow purpose of caring for a new child. The provision of BAA-UC is voluntary for States, and this regulation does not amend or change the FMLA. Thus, while nothing in BAA-UC changes the basic understanding that the FMLA does not require paid leave, States are free to enact BAA-UC as part of an effort to provide benefits greater than those contained in the FMLA. Indeed, we are not interpreting the FMLA, but the Federal UC laws. The FMLA does not constrain our interpretation.

(b) The UC program

Based on the premise that Federal UC law requires recipients to be involuntarily unemployed and actively seeking work, many respondents view BAA-UC as a fundamental change to the UC program. We received many comments suggesting that the group covered under this experiment constitutes persons not entitled to UC because they presumably would be voluntarily leaving their employment to be with their newborns or newly-adopted children. However, we have never interpreted Federal UC law to require that an individual's separation from employment be "involuntary" as a condition of entitlement to benefits. Indeed, in those situations where a job relocation

forces a spouse to quit his/her job to follow the other, some States allow the payment of UC without disqualification.

We also received many comments alleging that the group of employees covered by the proposed regulations are not truly "unemployed" as that term has been understood in common usage. The comments focused on the fact that these new parents would not, for the most part, be laid off by their employers but would be leaving a job the employer would continue to allow them to have. These comments appear to assume that there is a requirement in the UC program that in order to be considered unemployed, an individual must have been laid off or terminated by an employer. This is not the case. We have taken a different but very simple view of unemployment. The Disaster Unemployment Assistance (DUA) regulations define "total unemployment" as "a week during which the individual performs no work and earns no wages." 20 CFR 625.2(w)(1). Most States define unemployment in these or similar terms. Persons receiving BAA-UC would come under this definition since they would not be working or earning wages. Moreover, the DUA regulations highlight that an individual need not completely sever his or her connection to his or her employment to qualify for UC since 20 CFR 625.2(w)(1) also provides payments to individuals for partial unemployment.

We also received comments expressing concern that the regulation does not require BAA-UC recipients to demonstrate, prior to the end of the leave period, that they intend to go back to work. There was a similar concern that individuals who otherwise

leave employment, but do not intend to return to the workforce, will receive BAA-UC. Still other respondents were concerned that BAA-UC recipients are not required to actively seek work and that the regulation will eliminate the "refusal of suitable work" disqualification. Respondents also noted that BAA-UC would conflict with existing eligibility requirements under State UC laws.

The BAA-UC regulation defines "approved leave" as "a specific period of time, agreed to by both the employee and employer or as required by law or employment contract, during which an employee is temporarily separated from employment and after which the employee will return to work for that employer." Therefore, by definition, BAA-UC recipients on approved leave from their employers have demonstrated their intent to return to work by agreement or by contract. States may establish BAA-UC overpayments if individuals on approved leave choose not to return to work. As for individuals who otherwise leave employment, the BAA-UC experiment will also test whether their workforce attachment is strengthened.

As for work search requirements and the "refusal of suitable work" disqualification, these are not generally applicable Federal UC requirements but are permissible restrictions contained in various State UC laws. Except for the extended benefits program, there is no Federal requirement that States ensure that UC recipients be actively seeking work. While the BAA-UC experiment neither specifically mandates nor eliminates these State-imposed requirements, States would need to amend their State UC

laws with regard to these requirements to the extent they interfere with the payment of BAA-UC should they wish to implement BAA-UC.

(4) Scope

Several respondents stated that BAA-UC should be extended to all adults who fulfill parental responsibilities, such as foster parents, step-parents, domestic partners, or any individual who stands in loco parentis to a child. Still others think that experimental BAA-UC should be expanded to other types of medical and family leave, such as leave during pregnancy, for personal illness, and to care for ill family members. There was also a suggestion that we clarify that States may provide "supplemental" BAA-UC for occurrences when parents need to take additional time from work for parental responsibilities.

No decisions regarding expanding the potential universe of recipients will be made until we have evaluated BAA-UC. Because BAA-UC is an experimental effort, there must be limitations, as with any experiment. Consequently, we have limited BAA-UC to the parents of newborns and newly-adopted children. This small, easily-defined group can be used to test whether compensating absences from employment will assist individuals to maintain, or even improve upon, their connection to the workforce. Changing the definition of parents to include all parents as defined under the FMLA or to extend UC to all FMLA leave will not enhance the experiment.

As for “supplemental BAA-UC,” States currently have the authority to provide supplemental (commonly known as additional) UC. The BAA-UC regulation does not require that BAA-UC be claimed only for consecutive weeks, nor does it restrict current UC law in this regard. States may currently provide additional UC and the BAA-UC regulation permits such payments within the parameters established by the regulation.

(5) Eligibility

A number of respondents noted with approval that the States would have the opportunity to determine eligibility criteria (work history requirements) and benefit amounts and durations, as is currently done. Others indicated that the BAA-UC regulations should be more prescriptive in terms of eligibility and benefits for BAA-UC. A few respondents felt the UC system would discriminate against the poorest workers by tying benefit levels to past wages. Others said that BAA-UC claimants should receive the same benefit levels as regular UC claimants.

(a) Breadth of eligibility

We received comments characterizing the potential eligible population as overly broad. The stated concerns included:

- no limitations on the number of times parents may claim BAA-UC, allowing parents to take extensive periods of leave multiple times;

- no limitation on the number of parents per child who may make a claim for BAA-UC, thereby allowing both the biological and adoptive parents of a child to claim benefits;
- no requirement that the child actually live with the parents or be cared for by the parents;
- silence in the regulations regarding continuing eligibility in cases where an adoptive parent ceases to be the parent or in cases where the child dies; and
- silence in the regulations regarding the age of an adopted child (adults can and do adopt each other).

States have broad latitude regarding UC eligibility requirements. Consequently, we designed the regulation in a manner, consistent with the general structure of the UC program, that is not overly prescriptive. By so doing, the States have the flexibility necessary to best meet the needs of their respective populations. States are free to consider many of these kinds of issues in developing eligibility rules for their BAA-UC experiments.

Although State flexibility and innovation are key elements of BAA-UC, all Federal UC law requirements must be maintained, such as making payments when due (which also means not making payments that are not due) as required by section 303(a)(1), SSA, and not introducing eligibility factors unrelated to the fact or cause of an individual's unemployment. For example, restricting BAA-UC eligibility based on the

number of times an individual has previously received BAA-UC is unrelated to the fact or cause of the individual's unemployment, and, therefore, would be inconsistent with Federal law.

In regard to the concern of adults adopting adults, the BAA-UC effort is designed for parents of young children. As stated in the NPRM, the purpose of the experiment is to test whether providing parents with BAA-UC during the first year of a child's life or placement for adoption will help maintain or even promote their connection to the workforce by allowing them time to bond with their children and develop stable child care systems while adjusting to the accompanying changes in lifestyle before returning to work. Acknowledging that adopted children may be more than one year old and to provide States maximum flexibility, we have not established any regulatory age requirement for adopted children. The Model State Legislation will, however, be amended to limit BAA-UC to parents of adopted children aged 18 years or less to reflect the intent of the BAA-UC effort.

(b) Length of eligibility period

One respondent felt that the availability of BAA-UC any time within the year following the birth or placement for adoption of a child was longer than needed for parent/child bonding. Several respondents advocated a period of at least one year because they believed it would encourage breast-feeding for the health and well-being of the child, while shorter periods may encourage premature weaning. Another respondent

stated that, as long as benefits began within the first year, States should be allowed to extend the eligibility period beyond the first year.

Research suggests that parental leave is beneficial for early childhood development. In terms of the eligibility period, we selected one year as the eligibility period because it correlates the needs related to introducing a new child into a family with the current benefit year under the UC program. States are free to establish a shorter eligibility period. *or a longer?*

(c) Employer-provided benefits

Some respondents expressed the opinions that employers should be able to require employees to take employer-paid leave before being eligible for BAA-UC, and that employers who provide paid leave or disability coverage should be excepted from BAA-UC coverage. Other respondents suggested that employers who currently provide paid leave will reduce or eliminate those benefits to avoid paying twice.

BAA-UC is part of the UC program and applies to all employers covered by State UC law. Therefore, just as there is no basis for excepting employers who provide private unemployment insurance to their employees, there is no basis for excepting employers from BAA-UC based on employer-provided benefits. As stated earlier, the introduction of factors unrelated to the fact or cause of an individual's unemployment would be inconsistent with Federal law. Neither can employers force employees to take employer-

provided leave before the employee can be eligible for benefits. States may, however, reduce BAA-UC by the amounts of the employer-paid benefits and wages. As a result, States and employers would have lower costs if employers continue to provide benefits. The Model State Legislation assumes that employer-provided wages and benefits will be deducted from BAA-UC.

(d) Relationship to regular UC

A few respondents requested clarification as to what happens after BAA-UC is exhausted. These respondents questioned whether States could pay regular UC upon exhaustion and whether States could demand repayment of BAA-UC if an individual failed to return to work.

States have broad latitude in designing BAA-UC and are free to determine BAA-UC's relationship to regular UC. Thus, a State could pay an individual regular UC after BAA-UC is exhausted if the individual meets all regular UC eligibility requirements. Whether BAA-UC counts toward the maximum number of weeks of regular UC in this case is also a State decision. This was explained in the questions and answers of Appendix B that accompanied the NPRM. A State need not count BAA-UC weeks toward the maximum UC entitlement, although the Model State Legislation took this approach. Concerning overpayments, the questions and answers that accompanied the NPRM indicated that a State may declare an overpayment of BAA-UC when the individual did not return to work after receiving BAA-UC. We note, however, that there

may be cases where the individual is unable to return to work. For example, the employer may have had a general layoff. In cases such as this, a more equitable approach is to determine whether the individual meets all other State UC requirements, including actively seeking work.

(6) Experimental Nature of BAA-UC

(a) Experiment versus non-experiment

We received numerous comments concerning the experimental nature of BAA-UC. Some respondents argued that we do not have the authority to conduct an experiment. Some respondents stated that there was no need to experiment because other studies have already proven the benefits of compensated parental leave. Noting that the Department did not require a period of experimentation in other areas, such as allowing payment of UC to individuals in approved training programs or to ill individuals, some respondents asked why experimentation was necessary for BAA-UC. A respondent suggested that if we intended to conduct a test we should fully fund a pilot involving a few States.

Other respondents questioned whether BAA-UC really is an experiment. Among the comments were claims that it would be difficult and politically unpopular to stop once started, and that the purpose of the experiment (that is to test whether the provision of BAA-UC would promote a continued connection to the workforce) "is an unmeasurable, wholly subjective concept." Other respondents suggested that BAA-UC was not truly

experimental because the proposed regulation did not include specific measures and lacked definitive beginning and ending periods. Still other respondents saw BAA-UC as the first phase of an inevitable, continued expansion of the UC program.

Some respondents approved of our approach. They likened the BAA-UC experiment to the UC program design and quoted President Franklin Roosevelt in his message to Congress encouraging enactment of the SSA: "[T]he Federal act should require high administrative standards, but should leave wide latitude to the States in other respects, as we deem varied experience necessary within particular provisions in unemployment compensations laws in order to conclude what types are most practicable in the country." 79 Cong. Rec. 546 (1935).

BAA-UC is indeed an experiment. We have the authority to interpret Federal UC law, and we chose an experimental approach to test whether BAA-UC promotes parents' continued connection to the workforce. Limited funding constrains our options. Thus, through voluntary State participation, the BAA-UC experiment will allow us to gather the necessary facts on whether a positive correlation exists between the provision of UC to parents of newborns and newly-adopted children and a demonstrated connection to the workforce by these parents. The fact-finding in this experiment is critical in assisting us to fulfill our authority and responsibility to assure that the States' UC programs conform to Federal UC law.

As stated in the NPRM, this experiment recognizes the impact of women in the workforce and responds to the societal and economic changes resulting from the large number of families where both parents work. We intend to gather information and evaluate the impact of the provision of partial wage replacement on employees, employers, and States' unemployment funds. We have chosen not to adopt a permanent position because the introduction of BAA-UC represents a significant shift in our view of the Federal UC requirements. We believe the impact on not only employees, but also on employers and State unemployment funds should be studied. Consequently, we chose an experimental approach to compile the necessary information to evaluate the effects of paying BAA-UC. Several respondents suggested that the U.S. lags behind other developed countries in providing paid family and medical leave and pointed to studies that discussed the positive effects of paid leave in other countries. However, the benefits programs of other countries are dissimilar to the UC program in the U.S. Other respondents pointed to existing studies in this country that indicated positive effects on workforce attachment from paid parental leave. While these studies support our initiative, we believe it advisable to independently study the effects of partial wage replacement for parents of newborns and newly-adopted children on the States' UC systems, since no study was specific to the UC program. Therefore, we see experimentation with BAA-UC as a logical step.

Statistics reported for the regular UC program will include all data related to BAA-UC. Additional administrative data will be collected, using an existing data

collection mechanism, from participating States as they implement experimental BAA-UC. Several respondents proposed specific elements that should be evaluated. While the specifics have yet to be determined, we anticipate that the administrative data will include, among other items, initial claims, weeks claimed, weeks compensated, and benefits paid. As States gain experience with BAA-UC, we will evaluate the effect of BAA-UC on each implementing State's UC program.

A comprehensive evaluation will be conducted when at least four States have operated BAA-UC for at least three years. Some respondents criticized the regulations for not placing any formal sunset or termination provisions or time frame for the study. Nonetheless, in light of the flexible nature of the BAA-UC regulations, the BAA-UC experiment has set a target that would trigger a comprehensive evaluation of BAA-UC when at least four States have implemented legislation and operated BAA-UC for a minimum of three years, as noted in section I. B. (4) of the preamble to the NPRM (64 FR 67974). While we plan to begin evaluating State experiments upon their enactment, the original legislation introduced by the first four States that wished to provide BAA-UC varied substantially—an early indication that BAA-UC among the States would differ greatly. As a result, we believe that this length of time is necessary to conduct a proper evaluation that takes into account the variations among the States' BAA-UC experiments when evaluating the impact of BAA-UC on States' unemployment funds, employees, and employers' contribution rates, in addition to determining the workforce connections of BAA-UC recipients. We are committed to completing a

comprehensive evaluation, and this evaluation will serve to determine whether to make BAA-UC permanent, to expand it, or to end it entirely. If four States do not enact BAA-UC legislation, we will then consider how best to comprehensively evaluate the experiment given the limited data.

(b) Impact of experimental BAA-UC on employees, employers, and families

Employees. Numerous respondents commented on the potential negative impact of BAA-UC on employees. Some speculated that, because of costs associated with BAA-UC, employers would be discouraged from providing employer-paid benefits to employees or from hiring individuals of childbearing age. Others asked about the effects of BAA-UC on an individual's eligibility for various employer-paid benefits and on Federally-mandated benefits, such as private health insurance benefits under the Consolidated Omnibus Budget Reconciliation Act of 1985 and the Health Insurance Portability and Accountability Act of 1996. Others expressed concern that employers would move jobs out of the country, causing employees to lose jobs. Some, noting that the work of absentee employees would likely be spread among co-workers, predicted "negative effect[s] on co-workers and their families." Among claims that BAA-UC discriminates against employees who do not meet the eligibility requirements, there was speculation that implementation of BAA-UC would pit childless employees against employees with children in addition to pitting employees unemployed as a result of economic downturns against BAA-UC recipients vying for benefits from diminishing unemployment funds.

There were also numerous comments focusing on the positive impact of BAA-UC on employees. Respondents suggested that providing BAA-UC would decrease worker anxiety and reduce employee turnover, resulting in greater productivity.

Employers. As with employees, we received many comments about the impact of BAA-UC on employers. Many speculated that employer costs and administrative burdens would be excessive, that litigation would increase, and that worker shortages would be exacerbated because employees would be more able to take off work. Some employers worried that their global competitiveness would suffer, and some small employers were concerned that they would be subsidizing leave taken by employees of FMLA-covered businesses. Many employers urged a tax cut for businesses instead of expanding UC. A few respondents suggested that, as increased employer State UC taxes are passed on, employees and consumers will suffer. Others suggested that employer costs would be minimal and employers would benefit from a more stable workforce resulting in lower employee turnover and greater productivity. Respondents also referred to studies that indicate that women who have paid maternity benefits take less time from work and are less likely to quit their jobs than women with access to unpaid leave or women who have no leave available. Others suggested different ways of reporting FMLA leave on UC forms as an alternative to providing BAA-UC.

Families. There seems to be general agreement in the comments that families would benefit from parents and children having the opportunity to bond. Many

respondents commented that quality day care is expensive and scarce. However, as noted above, some respondents think that there will be a negative impact on the families of the co-workers of BAA-UC recipients due to increased workloads and overtime required to cover for persons on leave. There were also comments that BAA-UC would be bad for families because it would encourage both spouses to work and promote parental attachment to the workforce instead of the family. Some respondents criticized us for encouraging population growth, and others stated that income tax cuts or child tax credits would be more beneficial than BAA-UC in helping families with children.

Although the effects of BAA-UC on employers, employees, and families have not yet been documented, these effects concern us, and we expect that States will consider potential effects prior to enacting BAA-UC. As part of our study of the BAA-UC experiment, we will compile the necessary information needed to evaluate the effects of BAA-UC on employees and employers.

As stated in the NPRM, we believe that providing BAA-UC will have a positive impact on families because it will allow more parents to take leave to be with their newborns or newly-adopted children. Although studies suggest a positive impact on the workforce from compensated maternity and family leave, this is the first test of the effects on employers and employees of using the UC program to provide partial wage replacement for parents following the birth or adoption of a child. Because our cost estimates for the BAA-UC experiment are relatively low as a percentage of overall UC

costs, we do not believe that BAA-UC will move jobs out of the country, impair U.S. global competitiveness, or otherwise adversely affect employers. For that same reason, we do not believe that litigation or employer administrative burdens would significantly increase. Regarding size-of-employer concerns, BAA-UC applies to employees of both small and large employers, and States are free to offer BAA-UC to individuals who otherwise leave their employment as a result of being ineligible for leave under the FMLA. The effect that the receipt of BAA-UC might have on either employer-paid benefits or non-UC Federally-mandated benefits would be determined by those programs and/or applicable statutes. But these effects are among the things we will review when evaluating the BAA-UC experiment. Finally, we have no data to suggest that providing partial wage replacement promotes higher birth rates, discriminates against individuals of childbearing age, or creates worker shortages, and as we noted earlier, other options to help families, such as tax cuts or credits, are outside our purview.

(7) Voluntary Effort

Some respondents referred to BAA-UC as a mandate by the Administration. There were also some comments maintaining that the experiment is not really voluntary in that all States will be impacted because of interstate and combined-wage claims. Noting that each State participating in the Interstate Arrangement for Combining Employment and Wages must act as an agent for other participating States, one respondent held that it would be "impossible for one [S]tate to have an experimental program without impacting other [S]tates."

BAA-UC is a State option, not a mandate. States currently have wide latitude in determining most eligibility criteria. Indeed, with a few exceptions, States determine most aspects of their UC programs, such as earnings requirements, "good cause" for voluntary quit occurrences, disqualifications, benefits amounts and durations, and continuing eligibility requirements. In this regard, there are substantial variations among the State UC programs. As a result, there are situations where benefits are paid in one State that would not be paid in another, and this is reflected in combined-wage claims. We agree that, just as there now is some financial impact on States resulting from combined-wage claims, there will be some impact on non-BAA-UC States resulting from combined-wage claims which are also BAA-UC claims. That impact is the result of State participation in the Federal-State UC program.

(8) Administration

Some respondents, particularly SESAs, submitted a broad range of administrative questions. The scope of the questions included how to count BAA-UC claims on Federal reporting forms, required documentation for eligibility determinations, and confidentiality of information.

We will issue specific reporting and other administrative guidance on these issues and others to SESAs in a directive separate from this rule. States will be required to report specific BAA-UC claims data. When States implement BAA-UC, statistics reported for the regular UC program will include all data related to BAA-UC. To identify

only BAA-UC activity, we will use the "Quick Response Report" (the report used when collections involve fewer than 10 States, assuming that fewer than 10 States implement BAA-UC) under the standard reporting requirement authority in section 303(a)(6), SSA. This report provides for the collection of up to 12 items of information. It is anticipated that data collected will include, among other items, initial claims, weeks claimed, weeks compensated, and benefits paid. If 10 or more States enact BAA-UC, reporting requirements will be issued in a separate information collection request in accordance with the Paperwork Reduction Act.

Concerning administrative methods, States are required under section 303(a)(1), SSA, to have "methods of administration . . . reasonably calculated to insure the full payment of unemployment compensation when due." For BAA-UC, this means that, as is the case for all types of UC, States must have reasonable administrative methods to assure that an individual is eligible. States are expected to obtain the requisite documentation, for example, that an individual is on approved leave or has left his or her employment, that the individual has a newborn child under one year old, or that a child has been placed for adoption. States must have reasonable methods to assure that the individual is eligible for each week claimed and methods for detecting and collecting overpayments. Each State already has all of these methods in place for the regular UC program; States need only modify them as appropriate to accommodate BAA-UC requirements. If we identify a need for further guidance on any "methods of administration," we will issue guidance as appropriate. Concerning confidentiality of

information, States must treat BAA-UC claims information in the same manner as claims information for the regular UC program. Guidance on confidentiality is found in UIPL No. 34-97 (62 FR 40118, 40119 (July 25, 1999)).

(9) Inconsistency With Welfare to Work (WtW) and Workforce Investment Act (WIA) Initiatives

Some respondents contended that experimental BAA-UC is inconsistent with the WtW and WIA initiatives. As they pointed out, these programs are designed to help and encourage individuals to join the workforce. Comparing BAA-UC to the pre-1996 welfare program, one respondent asserted that BAA-UC was counter to the WtW and WIA initiatives in that it would "create a disincentive for individuals to access WIA training and child care programs, and encourage them not to enter or stay in the workforce." Respondents also were concerned that BAA-UC would discourage personal responsibility.

We view BAA-UC and the WtW and WIA initiatives as compatible efforts. Just as the WtW and WIA initiatives help individuals enter into the workforce, BAA-UC may help them maintain a connection to the workforce. As with all UC recipients, experimental BAA-UC recipients must have a sufficient work history, as determined by each State, to be eligible for benefits. Consequently, implementation of BAA-UC provides no inducement to avoid entering into the workforce. Indeed, the whole premise of BAA-UC is that individuals who receive these benefits will be more attached to the

workforce. Because, as with all UC programs, experimental BAA-UC will provide only short-term, partial wage replacement, we see no disincentive to individuals to remain in the workforce.

(10) Fraud and Abuse

Some respondents expressed concern about the potential for fraud and abuse, noting that the regulation does not condition receipt of BAA-UC on any evidence of parent-child bonding efforts, on the parent(s) and child sharing a residence, or on whether the parent(s) support and/or actually spend time with the child. Some respondents surmised that BAA-UC would be "a paid vacation plan."

The purpose of the regulation is to test whether compensating absences from employment will help parents of newborns or newly-adopted children maintain or improve their connection to the workplace; it is not designed to test whether the parents and children actually bond. We do not presume that any specific parental activity or circumstance is more (or less) appropriate for promoting bonding between parents and children. The regulation, therefore, does not impose upon States the burden of verifying specific bonding activities, although States may consider these issues in tailoring BAA-UC to their State UC programs. As is the current practice, methods of fraud detection and overpayment collection will be developed as deemed appropriate by the SESAs.

(11) UC Program Reform

We received several recommendations that BAA-UC should be aligned with other State UC program reform efforts and that we should track and measure all reform efforts of States that implement BAA-UC. We believe that UC reform is of the utmost importance and have been diligently working to promote UC reform through the legislative process. Although we would like to see broad reform of the UC program, such reform is beyond the scope of this rule.

(12) Comment Period

Under the Administrative Procedures Act (APA), an agency is required only to provide a 30-day comment period and public hearings are not required by the APA for notice-and-comment rulemaking. We received several hundred responses from interested parties requesting that we extend the initial 45-day comment period ending on January 18, 2000, and/or that public hearings be held in venues around the country. Given the simple nature of the experiment and the relatively short length of the proposed rule, we thought that a 45-day comment period was adequate and that hearings were unnecessary. Some of the initial comments noted that the comment period fell during the holiday season, so we decided to extend the comment period 15 days through February 2, 2000.

A few respondents requested in their timely submissions that we permit them to submit additional comments after February 2, 2000. However, the sheer volume of comments, as well as the extensive detail of some of the comments received, including

the timely comments from the respondents asking to submit additional comments, convinced us that sufficient time was allotted for comments and that additional time was not necessary.

(13) Rulemaking Requirements

We received comments that this rule is subject to the Regulatory Flexibility Act requirements because it will have a significant economic impact on a substantial number of small entities, and it violates the Unfunded Mandates Reform Act of 1995.

Respondents challenging our conclusion that BAA-UC is not subject to the Regulatory Flexibility Act requirements suggested that the experiment will undoubtedly have a significant economic impact on a substantial number of small entities since the experiment will result in a potentially higher payment of UC due to the expansion of coverage to include new parents, thus requiring a regulatory flexibility analysis.

However, the BAA-UC regulations impose no regulations upon small entities (American Trucking Association v. EPA, 175 F.3d 1027, 1044 (D.C. Cir. 1999)), rather, we are regulating the States that choose to experiment with BAA-UC. Furthermore, the Unfunded Mandates Reform Act of 1995 (UMRA) is not applicable to this regulation since this is not a "Federal intergovernmental mandate" as defined in section 421(5) of the Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. 658), as amended by section 101(a)(2) of the UMRA. Indeed, we are not mandating that a State,

local or tribal government, or the private sector expend anything, much less \$100 million or more.

(14) Model State Legislation

We received some comments about the Model State Legislation that was appended to the proposed rule in the NPRM. Some comments indicated that respondents interpreted the Model State Legislation to be required legislative language. Others suggested that the Model State Legislation be restructured with affirmative language to guarantee payment of BAA-UC.

The Model State Legislation is provided only as a guide to aid the States that enact BAA-UC in developing State legislation and was written in the style that States typically use in their statutes. There are no requirements that States use it or any part of it. States that elect to follow the Model State Legislation must adapt it to their State UC laws. The Model State Legislation will be slightly modified for clarity and re-issued in a UIPL.

IV. EXPLANATION OF FINAL RULE AND CHANGES TO PROPOSED RULE BY SECTION

There is little difference between the proposed rule and the Final Rule. An explanation is provided where differences occur. Readers are referred to the NPRM for

explanations of those sections unchanged in this Final Rule. Technical changes are not discussed.

Subpart A--General Provisions

Subpart A of rule discusses the purpose of the rule, the scope of the rule and critical definitions. The definitions of “approved leave,” “placement,” and “parents” warranted amendment and are discussed below. All other aspects of Subpart A remain unchanged from the proposed rule.

Definition of "Approved leave"

Respondents raised two concerns about "approved leave" as it is described in the NPRM—one that it would make individuals eligible for benefits while still employed and the other that it would inhibit eligibility by forcing legally permissible leave to pass an employer approval test.

In the preamble to the NPRM, "approved leave" was described as "an approved, temporary separation from a specific employer." Pointing to the phrase "specific employer," concerns were expressed that this would permit employees who work for multiple employers to be eligible for BAA-UC based on a separation from one employer while continuing to work for other employers and that the individual's UC would be charged to the other employers. We also received comments about whether individuals

could receive partial BAA-UC while working a reduced number of hours for the same employer.

The Federal-State UC system already is designed to accommodate situations where an individual separates from one job while continuing another and where individuals are continuing to work at reduced hours. We expect States to handle these types of BAA-UC situations just as they currently handle similar situations. For example, an individual continuing to hold a job will have earnings; these earnings will affect the individual's eligibility, including the amount payable, under BAA-UC.

Other respondents expressed concern that the "approved leave" definition limits the availability of BAA-UC; some respondents suggested that the definition of "approved leave" be amended to include "required" leave. The concern was that some employees are granted leave under law or contract, regardless of whether the employer "approves" the leave. The respondents were concerned that, under the definition of "approved leave" in the NPRM, these employees would not be eligible for BAA-UC.

We do not intend to exclude from BAA-UC eligibility employees who are provided leave by law or contract. To assure that this group of employees is not unintentionally excluded from BAA-UC, the definition of "approved leave" is amended to read "a specific period of time, agreed to by both the employee and employer or as required by law or employment contract (including collective bargaining agreements),

during which an employee is temporarily separated from employment and after which the employee will return to work for that employer."

The other concerns about the definition of "approved leave" stemmed from the notion that only employers covered by the FMLA would approve leave and that, as a result, employees of smaller businesses would not be eligible for BAA-UC. As a result, some respondents thought there was conflicting information within the NPRM regarding eligibility because employees of smaller businesses would not be eligible for BAA-UC if eligibility is conditioned on approved leave. Some respondents suggested as a remedy that the State option to limit BAA-UC to individuals on approved leave be eliminated. States are free to evaluate whether employees of small businesses would be unable to obtain approved leave and can choose to cover these individuals under 20 CFR 604.10 which applies to employees who otherwise leave their employment.

Definition of "Placement"

Respondents also raised concerns about the definition of "placement."

"Placement" was defined in the NPRM as "the time a parent becomes legally responsible for a child pending adoption." Comments indicated a concern that individuals in the process of adopting a child and who have actually received the child would be precluded from receipt of BAA-UC because adoption agencies may retain legal responsibility for a child until the adoption is complete. Therefore, to assure that these parents are not excluded on a technicality, the word "legally" has been deleted from the definition.

Generally, foster parents are excluded from BAA-UC; however, this change may, in some situations, permit some foster parents in the adoption process to be eligible for BAA-UC.

“Placement” is defined in this rule as: “the time a parent becomes responsible for a child pending adoption.” A minor change was made to the definition of “parents” to make it more compatible with the definition of “placement.”

Subpart B--Federal UC Requirements

No changes were made to this section. Readers are referred to the NPRM for a discussion of Federal UC requirements.

Subpart C--BAA-UC Eligibility

No changes were made to this section. Readers are referred to the NPRM for a discussion of Federal UC requirements.

Executive Order 12866

This rule is a "significant regulatory action" within the meaning of Executive Order 12866 because it meets the criteria of Section 3(f)(4) of that Order in that it raises novel or legal policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Accordingly, the rule was submitted to, and reviewed by, the Office of Management and Budget.

However, the rule is not considered an "economically significant" rule because it will not have an annual effect on the economy of \$100 million or more, will not adversely impact a specific sector of the economy, and will not materially alter the budgeting impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof. Please refer to our earlier discussion for more information regarding the cost estimates.

Further, we have evaluated the rule and find it consistent with the regulatory philosophy and principles set forth in Executive Order 12866, which governs agency rulemaking. Although the rule will impact States and State agencies, it will not adversely affect them in a material way. The rule would permit States to voluntarily participate in an experiment to determine the effectiveness of using the UC program to support parents taking leave from their employment to be with their newborns or adopted children; it would not impose any new requirements on States.

Paperwork Reduction Act

We have determined that this rule contains no information collection requirements.

Executive Order 13132

This regulation has been reviewed in accordance with Executive Order 13132 regarding federalism. The order requires that agencies, to the extent possible, refrain

from limiting State policy options, consult with States prior to taking any actions which would restrict States' policy options, and take such action only when there is clear constitutional authority and the presence of a problem of national scope. We do not believe that Executive Order 13132 applies. In the interest of consultation, however, we invited major intergovernmental associations to a meeting at which we briefed the associations on the proposed rule.

Executive Order 12988

This rule has been drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The rule has been written to minimize litigation and provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

Unfunded Mandates Reform Act of 1995 and Executive Order 12875

This rule has been reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 et seq.) and Executive Order 12875. We have determined that this rule does not include any Federal mandate that may result in increased expenditures by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year.

States have full discretion to decide whether or not to enact BAA-UC. See the section entitled "Executive Order 12866" for further information on the BAA-UC cost estimate.

Regulatory Flexibility Act

This rule will not have a significant economic impact on a substantial number of small entities. The rule affects States and State agencies, which are not within the definition of "small entity" under 5 U.S.C. 601(6). Moreover, States have complete discretion in deciding whether or not they will enact BAA-UC under this regulation. Under 5 U.S.C. 605(b), the Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect. Accordingly, no regulatory flexibility analysis is required.

Small Business Regulatory Enforcement Fairness Act

This rule is not a "major rule" as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. Chapter 8). This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based entities to compete with foreign-based entities in domestic and export markets.

Effect on Family Life

We certify that this rule has been assessed in accordance with section 654 of Pub. L. 105-277, 112 Stat. 2681, for its effect on family well-being. We conclude that the rule will not adversely affect the well-being of the nation's families. Rather, it should have a positive effect on family well-being by permitting States to enable more parents to take leave from their employment to be with their newborns or newly-adopted children.

Congressional Review

Consistent with the Small Business Regulatory Enforcement Fairness Act of 1996, we will submit to Congress a report regarding the issuance of this Final Rule prior to the Effective Date set forth at the outset of this document. (See 5 U.S.C. 801, et seq.) The report will note the Office of Management and Budget's determination that this rule does not constitute a "major rule" under section 804 of that Act.

List of Subjects in 20 CFR Part 604

Employment and Training Administration, Labor, and Unemployment Compensation.

Catalogue of Federal Domestic Assistance Number

This experiment is listed in the Catalogue of Federal Domestic Assistance at No. 17.225, Unemployment Insurance.

Signed at Washington, D.C. on _____, 2000.

ALEXIS M. HERMAN

Secretary of Labor

Words of Issuance

For the reasons set forth in this preamble and in the NPRM, Chapter V of Title 20, Code of Federal Regulations, is amended by adding new part 604 to read as follows:

Part 604–REGULATIONS FOR BIRTH AND ADOPTION UNEMPLOYMENT
COMPENSATION

Subpart A–General Provisions

Sec.

§604.1 What is the purpose of this regulation?

§604.2 What is the scope of this regulation?

§604.3 What definitions apply to this regulation?

Subpart B–Federal Unemployment Compensation Program Requirements

§604.10 Beyond the interpretation of the able and available requirements for Birth and Adoption unemployment compensation, does this regulation change the Federal requirements for the unemployment compensation program?

Subpart C–Eligibility

§604.20 Who is covered by Birth and Adoption unemployment compensation?

§604.21 When does eligibility for Birth and Adoption unemployment compensation commence?

§604.22 Are parents who leave employment to be with their newborns or newly-adopted children eligible for Birth and Adoption unemployment compensation, or is it limited only to parents who take approved leave?

Authority: 42 U.S.C. 1302(a); 42 U.S.C. 503(a)(2) and (5); 26 U.S.C. 3304(a)(1) and (4); 26 U.S.C. 3306(h); Secretary's Order No. 4-75 (40 FR 18515); and Secretary's Order No. 14-75 (November 12, 1975).

Subpart A—General Provisions

§604.1 What is the purpose of this regulation?

This regulation allows the States to develop and experiment with innovative methods for paying unemployment compensation to parents on approved leave or who otherwise leave employment to be with their newborns or newly-adopted children.

States' experiences with Birth and Adoption unemployment compensation will enable the Department of Labor to test whether its interpretation of the Federal "able and available" requirements promotes a continued connection to the workforce in parents who receive such payments.

§604.2 What is the scope of the regulation?

This regulation applies to and permits all State unemployment compensation programs to provide benefits to parents on approved leave or who otherwise leave employment to be with their newborns or newly-adopted children. A State's participation is voluntary.

§604.3 What definitions apply to the regulation?

The following definitions apply to this regulation:

(a) Approved Leave means a specific period of time, agreed to by both the employee and employer or as required by law or employment contract (including collective bargaining agreements), during which an employee is temporarily separated from employment and after which the employee will return to work for that employer.

(b) Birth and Adoption unemployment compensation means unemployment compensation paid only to parents on approved leave or who otherwise leave employment to be with their newborns or newly-adopted children.

(c) Department means the United States Department of Labor.

(d) Newborns means children up to one year old.

(e) Newly-adopted children means children, regardless of age, who have been placed within the previous 12 calendar months with an adoptive parent(s).

(f) Parents means mothers and fathers (biological, legal, or who have custody of a child pending their adoption of that child).

(g) Placement means the time a parent becomes responsible for a child pending adoption.

(h) State(s) means one of the States of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands.

Subpart B–Federal Unemployment Compensation Program Requirements

§604.10 Beyond the interpretation of the able and available requirement for Birth and Adoption unemployment compensation, does this regulation change the Federal requirements for the unemployment compensation program?

No. This regulation does not change the Federal unemployment compensation requirements. Under its authority to interpret Federal unemployment compensation law, the Department interprets the Federal able and available requirements to include experimental Birth and Adoption unemployment compensation. The regulation applies only to parents who take approved leave or otherwise leave employment to be with their newborns or newly-adopted children.

Subpart C–Eligibility

§604.20 Who is covered by Birth and Adoption unemployment compensation?

If a State chooses to provide Birth and Adoption unemployment compensation, all individuals covered by the State's unemployment compensation law must also be covered for Birth and Adoption unemployment compensation. Just as with current unemployment compensation programs, individuals may not be denied experimental Birth and Adoption unemployment compensation based on facts or causes unrelated to the individual's unemployment, such as industry, employer size or the unemployment status of a family member. The introduction of such facts or causes would be inconsistent with Federal unemployment compensation law.

§604.21 When does eligibility for Birth and Adoption unemployment compensation commence?

Parents may be eligible for Birth and Adoption unemployment compensation during the one-year period commencing with the week in which their child is born or placed with them for adoption. Weeks preceding the week of the birth or placement and weeks following the end of the one-year period are not compensable.

§604.22 Are parents who leave employment to be with their newborns or newly-adopted children eligible for Birth and Adoption unemployment compensation, or is it limited only to parents who take approved leave?

States may limit Birth and Adoption unemployment compensation to parents who take approved leave or may extend Birth and Adoption unemployment compensation to parents who otherwise leave employment to be with their newborns or newly-adopted children. However, the intent of Birth and Adoption unemployment compensation is to support all parents who wish to take time from employment to be with their newborns or newly-adopted children.

The Honorable Nancy L. Johnson
Chairman, Subcommittee on
Human Resources
Committee on Ways and Means
U.S. House of Representatives
Washington, D.C. 20515

Dear Madam Chairman:

This is in response to your recent letter expressing concern about several aspects of the proposed Birth and Adoption Unemployment Compensation (BAA-UC) regulation and the Family and Medical Leave Act (FMLA). Specifically, you raised three issues: (1) the compatibility of BAA-UC with the regular unemployment compensation (UC) program; (2) the costs and funding of the proposed BAA-UC regulation; and (3) the fact that the BAA-UC regulation does not address perceived problems with the FMLA.

BAA-UC is indeed compatible with UC. As explained in the BAA-UC Notice of Proposed Rulemaking and at the March 9 hearing before your subcommittee, BAA-UC is an experiment being conducted within the UC program to test whether the provision of partial wage replacement for individuals in this group strengthens their labor force attachment. Significantly, some studies indicate that this is indeed the case.

It appears from your letter that your opinion that BAA-UC is incompatible with the UC program is based on a belief that UC is available only to individuals who are involuntarily laid off from work and that BAA-UC recipients are not attached to the labor market and available for work. There is, however, no Federal requirement that UC be limited only to individuals who have been involuntarily laid off. In fact, every State provides for the payment of UC in certain situations, determined by the State, where an individual has voluntarily left a job. For example, some States pay UC to individuals who quit work to follow a spouse who has been relocated by his or her employer.

As for labor market attachment and an individual's availability for work, the Department of Labor interprets Federal law to require that UC recipients be able to work and available for work. However, we have not applied a strict interpretation that an individual must be immediately and continuously available for work under several circumstances: temporary layoffs, jury duty, illness and State approved training. While none of these interpretations precisely parallels the payment of BAA-UC, they

operate on the same premise: that situations exist where it is counterproductive to require a strict demonstration of availability and where attachment to the workforce can be demonstrated, and indeed strengthened, without requiring a current demonstration of availability. As a result, experimental BAA-UC is a natural outgrowth of the UC program.

I have reviewed the materials submitted by Deputy Assistant Secretary Ray Uhalde in follow-up to his testimony and believe that the Department of Labor's Employment and Training Administration did an excellent job in constructing the cost estimates for the proposed rule. As I indicated during our telephone conversation on April 14, in light of State legislative activity and the likelihood of enactment of various BAA-UC proposals, we are reconsidering our initial cost estimates as part of the process of issuing a final rule. In regard to our shared concern about the solvency of State unemployment funds, the Department of Labor remains confident that States will be prudent enough to consider the effects of this option on solvency as they do when contemplating benefit expansions or changes in coverage or taxes.

As you pointed out in your letter, UC and the FMLA are fundamentally different programs. We believe, therefore, it is best to allow BAA-UC and FMLA efforts to proceed separately rather than combine them in one comprehensive package. While we are aware of, but do not necessarily agree with, the concerns raised by some on various aspects of FMLA, it is clear that these concerns are not joined to the issue of whether an individual receives unemployment compensation while on leave for the birth and adoption of a child.

As I offered in our telephone conversation, we would be pleased to conduct a briefing for your staff on our administration of the FMLA. If your staff would like a briefing, please contact T. Michael Kerr at 693-0051.

Sincerely,

Alexis M. Herman

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.WPD

cc: ETACS, ECO, OCIA, Kilbane, Hildebrand, Webb, Bryant, File