

Withdrawal/Redaction Sheet

Clinton Library

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

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Ann O'Leary
OA/Box Number: 19580

FOLDER TITLE:

Paid Parental Leave [Folder 1] [2]

2013-0436-S

rc1306

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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

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



**United States
Office of
Personnel
Management**

**FAX
TRANSMITTAL
SHEET**

**OFFICE OF THE DIRECTOR
1900 E STREET, NW., ROOM 5H09
WASHINGTON, DC 20415-0001**

Date: 5/18

Number of Pages
(including this one)

11

**Please
Deliver
To:**

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Telephone:

456-2878

From:

Name: Janice Lachance

Office:

Director

Room:

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Remarks



OFFICE OF THE DIRECTOR

**UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415**

**MEMORANDUM FOR: KAREN A. TRAMONTANO
ASSISTANT TO THE PRESIDENT**

**NICOLE RABNER
SPECIAL ASSISTANT TO THE PRESIDENT FOR
DOMESTIC POLICY AND SENIOR ADVISOR TO THE
FIRST LADY**

Janice R. Lachance

**FROM: JANICE R. LACHANCE
DIRECTOR**

SUBJECT: New Tools for Parents in the New Economy

Attached, as requested, are 1) the draft Executive memorandum to revise Federal regulations to allow employees to use a total of up to 12 weeks of sick leave each year to care for a spouse, son, daughter, or parent with a serious health conditions, and to establish an Interagency Family Friendly Workplace Task Force, and 2) an expanded set of Questions and Answers supporting these initiatives.

Attachments (2)

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES**SUBJECT: New Tools for Parents and Families in the New Economy**

Since my Administration took office in 1993, I have encouraged Federal agencies to adopt a number of family friendly initiatives that would help Federal employees successfully balance their work and family responsibilities. In 1994, I directed the head of each executive department or agency to establish a program to encourage and support the expansion of flexible family friendly work arrangements. In 1996, I directed executive departments and agencies to review their personnel practices and develop a plan of action to use the flexible policies already in place and expand their ability to provide their employees with additional family friendly flexibilities and services.

Initiatives currently being implemented by a number of agencies include on-site child care; flexible working arrangements, including flexible schedules, job sharing, part-time employment; telecommuting; elder care information and referral services; child care resource and referral services; support groups; and policies that promote active inclusion of fathers as well as mothers. Taken together, these family friendly policies provide employees with a range of flexibilities, services, and options that can be utilized throughout one's Federal career.

A number of Federal agencies have taken comprehensive approaches to the challenge of establishing family friendly work environments. Programs include one-stop-service centers, resource centers, information available on the Internet, the formation of mentoring programs, and the establishment of on-site child development centers.

These initiatives have a proven track record for their ability to attract and retain a skilled workforce. Recent evidence suggests that greater loyalty to the agency is an added positive outcome. These policies that are good for families are clearly good for the business of the Federal Government.

My Administration has been particularly supportive of changes in Federal leave policy that are designed to help Federal employees meet their family and medical needs. These efforts began with the enactment of the Family and Medical Leave Act in February 1993. This legislation included separate provisions for Federal employees under which they, like their counterparts outside the Federal Government, may use a total of up to 12 weeks of unpaid leave during any 12-month period for (a) the birth of a son or daughter and care of the newborn; (b) the placement of a son or daughter with the employee for adoption or foster care; (c) the care of a spouse, son, daughter, or parent with a serious health condition; or (d) a serious health condition of the employee that make the employee unable to perform the duties of his or her position. I also supported legislation that authorized a permanent Federal leave sharing program, under which employees may donate their annual (vacation) leave individually or through a leave bank to other Federal employees who need additional *paid* time off because of a medical emergency affecting themselves or a family member.

In 1994, I supported legislation that established a permanent program under which Federal employees may use their paid sick leave for purposes related to the adoption of a child and a separate bill that authorized Federal employees to use up to 7 days of additional paid leave each year to serve as a bone-marrow or organ donor. My Administration issued Governmentwide regulations in late 1994 that authorized ~~most~~ Federal employees for the first time to use up to 13 days of their paid sick leave each year to provide care for a family member who is ill or to arrange for or attend the funeral of a family member. ?

In 1997, I asked Federal agencies to take action to ensure that Federal employees may schedule and be granted up to 24 hours of leave without pay each year for school and early childhood educational activities, routine family medical purposes, and attention to elderly relatives' health or care needs. In addition, Congress enacted legislation proposed by my Administration that authorized the establishment of an emergency leave transfer program for Federal employees affected by a major disaster or emergency.

Today I am taking action to demonstrate more clearly than ever before that the Federal Government, as an employer, is committed to helping its employees meet their obligations to their families. In addition, I am taking action to make sure that both managers and employees are aware of the benefits available to employees to assist them in balancing their work and family needs.

A New Sick Leave Policy for Federal Employees

First, I am directing the Office of Personnel Management to revise its Governmentwide regulations as soon as possible to allow Federal employees to use a total of up to 12 weeks of accrued sick leave each year to care for a spouse, son, daughter, or parent with a "serious health condition," as that term is defined for the purpose of applying the Family and Medical Leave Act of 1993 (FMLA).

The Federal Government already provides its employees with generous amounts of *paid* leave for many of the purposes for which *unpaid* leave is authorized by the FMLA. For example, Federal employees may use a combination of paid annual and sick leave, as appropriate, for absences related to the birth of a child. They may use an unlimited amount of paid sick leave for absences related to the adoption of a child. And, of course, they may use any available paid sick leave for absences necessitated by their own illness or injury and for routine medical, dental, and optical examination or treatment.

Until now, however, the amount of sick leave that could be used to care for a family member who is ill was limited to 13 days a year for most employees. The policy I am directing the Office of Personnel Management to implement by regulation will provide for the use of a total of up to 12 full weeks each year of paid sick leave for the care of a spouse, son, daughter, or parent with a serious health condition—an amount that is equivalent to the amount of *unpaid* leave mandated by the FMLA for this same purpose.

The use of paid sick leave under this policy will be subject to the same conditions as the use of unpaid leave for these same purposes under the FMLA. In particular, the same notification and certification requirements that govern the use of unpaid leave to care for a spouse, son, daughter, or parent under the FMLA will apply to Federal employees who wish to use paid sick leave for this same purpose.

Coordinating Family Friendly Human Resources Programs

Second, I am directing the Office of Personnel Management to establish an Interagency Family Friendly Workplace Task Force within 90 days to be responsible for the promotion, development, and evaluation of Federal family friendly workplace initiatives. The head of each executive department and agency will appoint a family friendly work/life coordinator who will be a member of this task force. The names of these individuals will be forwarded to the Office of Personnel Management (OPM). Agency family friendly work/life coordinators will periodically report on their initiatives, progress, and status to OPM's Interagency Family Friendly Workplace Task Force. Agencies will work collaboratively with OPM to develop and assess new initiatives that support agencies as they create more family friendly work environments.

Conclusion

I believe the new sick leave policy described above, together with a much more visible focal point for the coordination of family friendly programs within each Federal agency, will be a wise investment in the most important resource of the Federal Government—the people who make the Government work on a day-to-day basis. In addition, I believe it is essential for the Federal Government, as the largest employer in the United States, to set an example for other employers to follow. The Family and Medical Leave Act was an important first step in recognizing the needs and protecting the interests of all employees who have family and medical needs that require time away from work. But while much as has been gained from these policies, we must continue the momentum into the new millennium. I therefore urge all employers, both public and private, to follow the example I am setting today and begin the search for ways to ensure that our employees can meet their family obligations without serious financial disruption or hardship.

William J. Clinton

New Tools for Parents in the New Economy

Questions and Answers: A New Sick Leave Policy for Federal Employees

Q. How is the new sick leave policy different from the current policy on using sick leave for family care purposes?

A.. Currently, most Federal employees may use a total of up to 13 days of sick leave for family care purposes, and then must use either annual leave, donated annual leave, or leave without pay, even when they still have sick leave available. The revised regulations would permit employees caring for a spouse, son, daughter, or parent with a serious health condition to use a total of up to 12 weeks of sick leave for this purpose.

This benefit would broaden the options available for employees to meet their family responsibilities. Mothers, fathers, grandparents (who are raising their grandchildren), and employees caring for their spouses and parents would all greatly benefit from this more generous leave benefit. This benefit also would address the dilemmas faced by parents of special needs children when trying to balance their work and family responsibilities.

Q. What is the current leave policy for pregnant employees? How will the new sick leave policy affect pregnant employees?

A. Pregnant employees are entitled to use sick leave for prenatal and postnatal medical appointments, hospitalization, and recovery from childbirth. Complicated conditions may require additional sick leave for periods of incapacitation. In addition, a mother or father is entitled to use up to 12 weeks of unpaid leave under the Family and Medical Leave Act (FMLA) for the birth of the newborn. Unpaid leave under the FMLA may be used within 1 year following the date of birth. In addition, a mother or father may use up to 13 days of sick leave for well baby appointments and to care for a newborn child during minor illnesses.

Under the new policy as well as under the current policy, a new mother may use any available sick leave for any period during which she is incapacitated by pregnancy and childbirth. Under the new policy, a new mother or father may use up to 12 weeks of sick leave to care for a newborn child with a serious health condition. If the new parent has already used 13 days of sick leave for family care purposes, he or she will be entitled to use the balance of the new 12-week entitlement to sick leave.

Q. Does the new proposal permit the use of 12 weeks of sick leave to care for a newborn child?

A. By law, employees may use sick leave only for periods of sickness and other incapacitation or for purposes related to the adoption of a child. OPM has no authority to permit employees to use sick leave for purposes other than those permitted by law. Employees may use annual leave or leave without pay to care for a healthy newborn or newly adopted child.

Q. What is a "serious health condition?"

A. A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves--

- (1) inpatient care in a hospital, hospice, or residential medical facility;
- (2) continuing treatment by a health care provider for a condition that results in **incapacity of more than 3 calendar days**, or would likely result in such incapacity in the absence of medical intervention, and incapacity caused by:
 - a. chronic serious health conditions, even if the individual episodes of incapacity are not more than 3 days in duration;
 - b. pregnancy and childbirth; and
 - c. permanent or long-term conditions for which treatment may not be effective.

Examples of serious health conditions include, but are not limited to, heart attacks, heart conditions requiring heart bypass or valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, kidney dialysis, physical therapy, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job, clinical depression, recovery from major surgery, final stages of a terminal illness, and Alzheimer's disease.

A "serious health condition" includes ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy (such as severe morning sickness), the need for prenatal care, childbirth, and recovery from childbirth.

Q. How is "son or daughter" defined?

A. A "son or daughter" includes a biological, adopted, or foster child; a step child; a legal ward; or a child of a person standing in *loco parentis* who is under 18 years of age or 18 years or older and incapable of self care because of a mental or physical disability. Children incapable of self care require active assistance or supervision in activities of daily living, such as caring appropriately for one's grooming and hygiene, cooking and/or eating, using a telephone, maintaining a

residence, taking public transportation, etc.

Q. How will the new proposal affect new fathers?

A. A new father will be entitled to use a total of up to 12 weeks of sick leave to care for the biological mother while she is incapacitated. This includes prenatal and postnatal doctor's examinations, hospitalization, and recovery from childbirth. In most cases, however, the biological mother's period of incapacitation will not require 12 weeks.

The new father may use up to a total of up to 13 days of sick leave for well baby appointments and to care for the newborn during minor illnesses. If the father has already used 13 days of sick leave for family care purposes, he will be entitled to use the balance of the new 12-week entitlement to sick leave to care for the biological mother or newborn child with a serious health condition.

Q. What requirements apply when an employee requests 13 days of sick leave for family care purposed under the current sick leave policy?

A. An agency may require an employee to receive advance approval to use sick leave to care for a family member receiving medical, dental, or optical examination or treatment, and to the extent possible, for the care of a family member incapacitated by illness or injury. An agency may require an employee to provide administratively acceptable evidence of the need for sick leave to care for a family member.

Q. What must an employee do to request sick leave to care for a spouse, son, daughter, or parent with a serious health condition?

A. Under the new sick leave policy, the requirements for using paid sick leave to care for a spouse, son, daughter, or parent with a serious health condition will be the same as the requirements for using unpaid leave for this same purpose under the FMLA. Generally, an employee must give 30 days advance notice of his or her intent to use FMLA leave, if practicable. In addition, an agency may require an employee to provide medical certification for a serious health condition. If necessary, a second or third opinion from a health care provider may be requested.

Q. Are there any restrictions on the use of sick leave to care for a spouse, son, daughter, or parent with a serious health condition?

A. All employees may use up to 40 hours of sick leave for family care purposes. To use more than 40 hours, an employee must maintain a sick leave balance of 80 hours at all times. This limitation applies to any employee using sick leave to care for a family member.

- Q. Will employees who have previously taken leave without pay under the FMLA to care for a spouse, son, daughter, or parent with a serious health condition be able to substitute sick leave retroactively for the leave without pay?
- A. No. Under OPM's regulations, an employee may not retroactively substitute paid leave for unpaid leave previously taken under the FMLA. An employee must notify his or her agency in advance of his or her intent to substitute sick leave for unpaid leave under the FMLA.
- Q. Won't this proposal encourage the use of sick leave and therefore result in increased costs to the Government?
- A. We anticipate that only a small percentage of the Federal workforce will have a need to use large amounts of sick leave for family care purposes. In addition, not all Federal employees will have 12 weeks of sick leave available to use for this purpose. We believe the ability to use additional sick leave will encourage employees to conserve their sick leave as insurance against the possibility that they will need to care for their spouse, son, daughter, or parent in the future.
- Q. What is the estimated cost of the new sick leave policy?
- A. Based on our experience under the current sick leave program, we estimate that the total cost of the new sick leave policy will be less than \$80 million annually. This estimate is based on the assumption that 0.5 percent of the total Federal workforce will use the maximum amount of sick leave provided under the new policy.

Questions and Answers: New Family Friendly Workplace Initiatives

Q. What has this Administration done to improve the quality of workplace arrangements and family life for Federal employees?

A. This Administration has lead the way in introducing new work and family initiatives.

- In his first official act, the President William J. Clinton signed *The Family and Medical Leave Act* in February 1993 which entitles employees to a minimum of 12 weeks of unpaid leave within a 12-month period.
- The President signed the *Federal Employees Leave Sharing Act* on October 8, 1993, which allows Federal employees to donate annual leave to other employees who have personal or family medical emergencies and who have exhausted their own leave.
- The President issued a directive to Heads of Executive Departments and Agencies on July 11, 1994, calling for expanded use of "flexible family-friendly work arrangements, including job sharing; career part-time employment; alternative work schedules; telecommuting and satellite work locations."
- In February 1995, the President issued Executive Order 12953, calling upon the Federal government to become a model employer in promoting and facilitating the establishment and enforcement of child support.
- On June 16, 1995, President Clinton directed Heads of Executive Departments and Agencies to review all of their programs, policies, and initiatives pertaining to families to ensure that they are father-friendly.
- On June 21, 1996, President Clinton reaffirmed his commitment to creating a family-friendly workplace by issuing a second memorandum to Heads of Executive Departments and Agencies to expand their programs and report back to him.
- On March 10, 1998, President Clinton issued a memorandum to Heads of Executive Departments and Agencies, "Steps to Improve Federally Sponsored Child Care" which directed the General Services Administration, Department of Defense, and OPM to take improved the quality and affordability of Federally sponsored child care centers.

Q. Why should family-friendly work/life coordinators be appointed at every agency?

A. Until now, agencies have had varying successes in implementing family-friendly initiatives. Some have enthusiastically embraced a family-friendly workplace culture while others have actively resisted such change. Even when Federal agencies have adopted family-friendly initiatives, it is not uncommon to learn that managers oftentimes find reasons for not permitting their utilization. Having a coordinator at every agency, will result in an efficient mechanism for disseminating information about family friendly policies and programs and sharing information about overcoming resistance to the adoption of such policies.

Q. What responsibilities will the new family-friendly program coordinator under take?

- **Making the full range of flexibilitates available to employees to meet their personal and family responsibilities (such as alternative work schedules, telecommuting, part-time employment and job sharing).**
- **Establishing and promoting parent support groups, elder care support groups, and on-site nursing mothers' programs.**
- **Providing employees with information about child and elder care resources currently available in their communities.**
- **Working with local interagency groups, like the Federal Executive Boards, to coordinate Federal and community resources.**

Q. Will this encourage more managers to support family-friendly workplace arrangements?

A. Yes, managers will have a contact person who can advise them on the various workplace options, calm their fears, explain their responsibilities as well as those of the employees, and, if the arrangement does not work out for either of the two parties, be there to help dissolve it.

Q. What role will the Office of Personnel Management's new Family-Friendly Workplace Advocacy Office play?

A. The new Family-Friendly Workplace Advocacy Office (FFWAO), established on March 1, 1999, will provide the family-friendly program coordinator with the tools and advice necessary to establish or improve comprehensive family-friendly

programs by aggressively supporting the use of flexible work schedules and sites; leave programs; part-time employment/job sharing; telecommuting; Employee Assistance Programs; on-site child development centers; as well as child and elder care issues. In addition, FFWPO has provided technical information to agencies; convened a national summit on child care issues; has made annual awards to agencies with the most comprehensive and progressive family-friendly initiatives; and has served as the Federal leader in promoting the development of these initiatives.

Also, the FFWAO will work with the agency family-friendly program coordinators to respond to their employees' concerns and suggestions regarding the agency implementation of family-friendly programs. The FFWAO will provide information on the laws and regulations which govern family-friendly policies as well as avenues of redress available for complaints. Working with the agency family-friendly program coordinator, it will assist in resolving problems with family-friendly workplace policies; identify administrative or regulatory obstacles to implementing family-friendly policies and practices; and propose regulatory or legislative changes where needed.

Q. Why should OPM create an Interagency Family-Friendly Workplace Task Force?

A. The creation of a Task Force would establish an infrastructure within the Federal government for disseminating information about family-friendly initiatives and for receiving status reports from the agencies. Family-friendly coordinators can successfully network with each other through membership on the Task Force. Mentoring programs can help agencies learn lessons from the past and efficient ways to implement initiatives.

The current system is a hit-or-miss approach since no one agency has the authority to request feedback information. OPM has a proven track record for disseminating information and developing guidance on family-friendly initiatives.

The Task Force can routinely assess the Federal government's response to the President's directives on family-friendly initiatives and can use the results of such studies to broadly disseminate the Federal initiative to make the government a more family-friendly place to work. The results can also be used by the agencies as benchmarks against which their own practices can be measured.

Grace

Paid leave

U.S. system: - benefit determination:

(1) cause of separation? involuntary
lay off

CD. good cause - states discretion - ad hoc - broadening
domestic violence, FMLA - YES.

another good cause reason.

encourage states - this is good cause reason.

consistent

(2) work search requirement

exemptions in place or 11

illness, jury duty

(3) Availability

key - interpret - DOL - narrow def.

fed leg. - if you're in job training.

(1) 1. MA - write - program statement

a. ready & avail - doesn't apply - state flex

b. 60 yrs holding the line

2. narrow it -

ready & avail still apply - then we deem
it a will not apply for 12 wks.

quickly w/ some

(2) Reg

do it in their pro - control / wait if
ways con - 6 mo.

forum - part of financing -

wait off, other pop.

(3) begin

(3) law

(4) Create a new fund
model legislation

experience
rating

seems the
most likely
way to get
FMLA.

1 a - opper 86

1 b - some DOL

2 Reg - solve yr prob.

4 New fund
model log

3 optms -

pros & cons -
late pm tom -

responses next

DOL - 2 or 4

Treas - fed admin. cost
cc indicators

UI goes up

(sep fund -

reduce sup for FICA

20% incl / yr.

750 mil / yr - now

1/3 on top of current
wk load

admin cost ↑ by a 1/3

→ wouldn't

18 states
different
funds

\$190/wk

substitution effect /

affecting offering of benefits. UI admin based on

MA: highest maximum

estimates.

paid leave offering -

Optms memo: 3 (1) H. R. 1011A -

introp avail - met

deemed to be 2 in PM

calm as closely as
pos

(2) do any reg. speedily -

(3) too many dangers -

pros &
cons of
each.

good opp. -
states might
think of this
than another
fund.

May 19, 1999

NOTE TO: NICOLE RADMER
BILL SAMUEL

FROM: GRACE A. KILBANE

This is additional information regarding the inaccuracy of the statement about good cause for the refusal of suitable work.

In the "Memorandum of Support of the Massachusetts Bill . . .", the Greater Boston Legal Services and the National Employment Law Project state that "Over one-third of all states, including Massachusetts, cover compelling, personal circumstances as nondisqualifying reasons for leaving work, and these reasons also constitute 'good cause' for the refusal of otherwise suitable work." A review of State law does not support the statement that good cause for voluntary quit necessarily carries over to good cause for refusal of suitable work.

Specifically, the most common State provisions for good cause for voluntary leaving include sexual or unwelcome harassment, compulsory retirement, to accept other work, claimant's illness, and to join the armed forces. These reasons do not necessarily carry over to good cause for refusing suitable work.

Generally, the "good cause" associated with refusal of suitable work relates to suitability of the job offer. The usual criteria are the degree of risk of the job offer to a claimant's health, safety, and morals; the physical fitness and prior training, experience and earnings; the length of unemployment and prospects for securing local work in a customary occupation; and the distance of the available work from the claimant's residence. However, there are a few statutory provisions which seem to deal with personal cause:

Maine: If the claimant has refused work for a necessitous and compelling reason, disqualification terminates when such claimant is again able and available.

Oklahoma: A claimant who refuses an offer of work due to illness, death of a family member or other circumstances beyond the individuals's control, is disqualified for the week of occurrence.

Utah: Not disqualified if reasons for such a refusal were under circumstances of such a nature that disqualification would be contrary to equity and good conscience.

Wisconsin: Not disqualified if claimant accepts work which he/she could have refused with good cause and then terminates with good cause within 10 weeks after starting work.

Note: State refusal of suitable work provisions are not related to availability for a single week, although refusing suitable work may be evidence of non-availability in a single week.



STRATEGIC UPDATE

News for UWC Members

APRIL 28, 1999

Ask DOL To Say No to UI Benefits for FMLA Leave

Employers face a dramatic increase in UI costs if the US Department of Labor (DOL) reverses its longstanding position and decides that states may allow workers on leave under the Family and Medical Leave Act (FMLA) to collect UI. At the request of several Senators and organized labor, DOL is now re-evaluating its position on this question. A new interpretation by DOL would not require public notice and comment, and UWC believes it is important for DOL to hear directly from employers, who would be required to pay for this change.

State UI programs must be in conformity with standards set forth in the Federal Unemployment Tax Act (FUTA). DOL has always interpreted FUTA to prohibit payment of UI benefits unless the claimant is able and available for work (there's a statutory exception for pregnant women and workers in approved training). Proposals in a handful of states would allow workers to collect UI while on FMLA leave. By definition, such individuals are not available for employment. A change in DOL's position would open the door to an expansion of the UI system to cover FMLA leave or other situations which would divert UI tax dollars by paying benefits to claimants who are not in the job market.

Although the federal stewardship of the UI program is imperfect – e.g., maintenance of an inflated FUTA tax rate while under-financing UI administration -- UWC has always supported UI as a federal-state partnership. One positive aspect of this partnership has been protection of the basic UI concept as a program for individuals who demonstrate a continued attachment to the labor market by actively seeking

work. As the DOL Bureau of Employment Security (now called the Unemployment Insurance Service) expressed this thought in 1962, "The qualifying requirement and the requirement that claimants be able and available for work are the two halves of a single requirement that protection be limited to unemployed members of the labor force." We believe enforcement of the work search test should be more vigorous, not relaxed by expanding the population of UI claimants to include numerous individuals who are not even *expected* to look for work.

Allowing workers on FMLA leave to collect UI would be a fundamental change in the system. If a policy decision is made that workers on FMLA leave should be guaranteed income support, through the UI program or otherwise, we believe that determination should be debated and approved by Congress, not achieved through the "back door" by a change in longstanding DOL interpretations. Furthermore, a unilateral decision by DOL reversing its position on FMLA leave would call into question the sincerity of its Dialogue with stakeholders (and especially employers) over the future of the UI program

UWC has already urged DOL to maintain its position that workers on FMLA leave are ineligible for UI benefits. We encourage members of the business community to write the Secretary of Labor as soon as possible and let her know if you share our view. The address is as follows:

UWC STRATEGIC UPDATE
Published on Fridays for UWC Members
UWC – Strategic Services on Unemployment & Workers' Compensation
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Washington, D.C. 20005-6143
phone (202) 682-1515 fax (202) 842-2556

The Honorable Alexis
M. Herman
Secretary of Labor
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210



ASSOCIATED INDUSTRIES OF MASSACHUSETTS

222 Berkeley Street • P.O. Box 763 • Boston, MA 02117-0763 • 617-262-1180 • Fax: 617-536-6785

May 5, 1999

99005670

The Honorable Alexis M. Herman
Secretary of Labor
U. S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: UI Benefits for FMLA Leave

Dear Secretary Herman:

On behalf of Associated Industries of Massachusetts, an employer association of more than 5,000 companies and institutions operating in the Commonwealth, I am writing to urge that the Department of Labor maintain its position that workers covered under the Family Medical Leave Act (FMLA) are ineligible for unemployment insurance benefits.

State UI programs must be in conformity with standards set forth in the Federal Unemployment Tax Act (FUTA). The Department of Labor (DOL) has always interpreted FUTA to prohibit payment of UI benefits unless the claimant is able and available for work. A change in DOL's position would open the door to an expansion of the UI system to cover FMLA leave or other situations which would divert UI tax dollars by paying claimants who are not in the job market.

Allowing workers on FMLA leave to collect UI would be a fundamental change in the system. If a policy decision is made that workers on FMLA leave should be guaranteed income support through the UI program or from other sources, it is A.I.M.'s position that the determination should be debated and approved by Congress, not achieved by a change in long-standing DOL interpretations.

I sincerely hope that you take our position on this serious issue into consideration as you review the Department's position regarding the proper use of UI tax revenues.

Sincerely,

John Gould
President and
Chief Executive Officer

cc: Joseph Bruno, SVP - Federal Relations
Richard Lord, Exec. VP - Legislative Policy
A.I.M. Unemployment Insurance Committee
Massachusetts Congressional Delegation

RECEIVED
OFFICE OF THE SECRETARY
DEPARTMENT OF LABOR
WASHINGTON, D.C. 20210

1999 MAY 11 P 4:57

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From:

Bill Samuel

Date:

Subject:

Paid leave - employer obligation

Pages:

1 OF

Time:

Comments:

ULC is the national employer group
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major employers

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January 22, 1998

The Honorable Alexis Herman
Secretary of Labor
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210

**Re: Vermont Authority to Enact Unemployment Compensation Legislation
Expanding Family Leave**

Dear Secretary Herman:

We are writing regarding Vermont's effort to enact unemployment compensation legislation that would provide a modest measure of income support to families who are temporarily separated from work under circumstances that qualify for coverage under the state's family leave law. Consistent with your long-standing commitment to working families, we urge you to authorize Vermont to move forward with the proposed law (SB 143), which has been held up due to objections lodged by Acting Assistant Secretary for Employment and Training, Raymond Uhalde in response to the attached inquiry by Senator Leahy. As set forth below, the federal unemployment compensation laws, enacted in 1935 to provide the states with maximum flexibility to set eligibility standards, require the Department of Labor (DOL) to defer to Vermont's authority to enact the proposed law.

The attached legal memorandum prepared in support of the proposed Vermont legislation outlines the history of the shared federal-state unemployment compensation system focusing on the broad role of the states in setting eligibility and disqualification standards. As stated by Edwin White, the Executive Director of the Committee on Economic Security, which President Roosevelt appointed to draft the Social Security Act: "At the very outset of its final deliberations, the committee decided against federal dictation regarding the content of state unemployment compensation laws. It reached the conclusion that the federal bill should contain only a few necessary standards" Edwin White, The Development of the Social Security Act

The Honorable Alexis Herman

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(University of Wisconsin Press: 1962), p. 125. This is the essential starting point from which to evaluate whether the proposed Vermont law interferes with the limited federal role in setting eligibility and disqualification standards for unemployment benefits.

On several threshold issues discussed in our legal memorandum, the Assistant Secretary agrees that the Vermont law, if enacted, would not raise federal issues. First, Vermont is free to determine that claimants who leave work for reasons associated with family leave are exempt from the state's "voluntary quit" disqualification. In response to our legal memorandum, Mr. Uhalde acknowledges, "States are free to determine if any ineligibility arising from the voluntary quit is applied beyond the week the quit occurred. Since SB 143 modifies the disqualification provision for weeks beyond the quit, this aspect raises no Federal issue." (Uhalde letter to Senator Leahy, attachment entitled "Federal Issues Raised in Legal Memorandum.")

Second, as Mr. Uhalde's letter states, there is "no Federal requirement that an employment relationship must be severed before UI is paid." Therefore, as proposed by the Vermont bill, there is no dispute that an individual can be temporarily separated from her work for reasons deemed appropriate by the state, but not necessarily totally unemployed. In fact, there are many situations where individuals recover unemployment benefits while still employed. For example, many workers receive short-term compensation when their hours are reduced to avoid layoff; workers recover partial unemployment benefits when they lose work with one employer but remain employed with another employer part-time; workers in the public school system who do not receive pay while taking mandatory recess vacations during the holidays have been held eligible (Donahue v. Dept. of Employment Security, 142 Vt. 351 (1982)); workers on unpaid sick leave who maintain life insurance and hospitalization coverage have received unemployment benefits (Pennsylvania Electric Company v. Board of Review, 450 A. 2d 779 (Pa. Cmwlth. 1982)); and the list goes on.

The only remaining issue on which we differ with the Assistant Secretary is whether Vermont has the authority under federal law to determine that a claimant may be exempt from the requirement that she be "able and available" for work at the time she applies for unemployment benefits. The Assistant Secretary apparently does not dispute that the states have the authority to exempt claimants from the availability requirement in cases where the law applies to circumstances that arose immediately after the claimant applied for benefits. Indeed, many states have enacted such laws. For example, in eleven states, including Vermont, claimants who become ill or disabled after applying for unemployment benefits may continue to receive their benefits although they are not available to work. The Vermont proposed law would simply go a small step further by applying the availability exemption to a limited class of claimants at the time they apply for benefits, thus accommodating their separation from work due to family leave.

Unfortunately, Mr. Uhalde's letter takes issue with this approach, as follows: "To operate an acceptable UI program a State must, therefore, establish a genuine test to determine if an

The Honorable Alexis Herman

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January 22, 1998

individual is unemployed due to lack of work. The able and available requirement is a longstanding, accepted test for determining this." This position, which suggests that federal law preempts a state from defining the scope of its availability requirement, is simply not supported by a fair reading of the federal law. Most important, the federal statute does not on its face require that claimants be "able and available" for work to recover unemployment benefits. The Committee on Economic Security merely devised a model state unemployment compensation bill which contained a "willingness-to-work test" -- an approach intended to provide the states with "wide latitude" to determine the content of their state laws. See Report of the Committee on Economic Security in the Senate Hearings Record, dated January 22 to February 20, 1935 ("Senate Committee Report"), p. 1314.

Given the conspicuous absence of express statutory authority for his position, Mr. Uhalde relies instead on general language in the statute and legislative history for the proposition that federal law requires the states to have an "availability" requirement that does not exempt family leave. The federal statutes cited in support of this proposition contain extraneous references to "unemployment" in relation to experience rating standards and conditions on the withdrawal of state unemployment trust funds. For example, Mr. Uhalde cites 26 U.S.C. § 3306(h), which is the section of the Federal Unemployment Tax Act (FUTA) that defines "compensation" as "cash benefits payable to individuals with respect to their unemployment," (emphasis added). To impose a federal "availability" requirement on the basis of this language reaches far beyond DOL's authority. Indeed, these references to "unemployment" in the federal law provide compelling support for Vermont's position given the state's authority to define "unemployment" under state law. For example, as the Assistant Secretary apparently concedes, the states are free to cover situations where an individual is temporarily separated from work as proposed under the Vermont law.

The Assistant Secretary erroneously relies on a statement in the Act's legislative history, namely, a section of the Report of the Committee on Economic Security to the Senate entitled "Suggestions for State Legislation." This describes elements of the model state unemployment compensation bill, not federal law mandates. It is in this section of the report, which covers the "willingness-to-work test" found in the model state law, that the Committee included the following statement quoted in Mr. Uhalde's letter: "The employees compensated must be both able and willing to work and must be denied benefits if they refuse to accept other suitable work." See Senate Committee Report, p.1328. As indicated, this language is merely a description of the model state law recommendations or "suggestions," as the heading to this section of the report states. It is not a description of a federally required constraint on state law.

Moreover, there are numerous statements in the legislative history that make clear that the states retain significant latitude in defining their state eligibility requirements. Most notably, the Committee's report states: "The plan for unemployment compensation that we suggest contemplates that the States shall have broad freedom to set up the type of unemployment compensation they wish. We believe that all matters in which uniformity is not absolutely

The Honorable Alexis Herman

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January 22, 1998

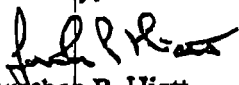
essential should be left to the States to decide." See Senate Committee Report, p. 1326.

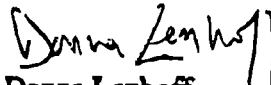
Finally, and perhaps most important, there is no debate that the Vermont proposed law still retains an "able and available" requirement. It simply makes adjustments to cover certain specific situations just as numerous other states have done, without interfering with federal law by exempting those who become ill or disabled while receiving unemployment benefits. Thus, even assuming arguendo that federal law could be interpreted to impose an "availability" requirement on the states, Vermont's proposed law falls well within any such federal mandate.

All over the country, states are returning trust fund dollars to employers or cutting benefits even as only one-third of the unemployed receive UI. Unlike this debilitating national trend, the Vermont proposal would make a modest step toward spending state funds on state residents who must leave work through no fault of their own -- the primary purpose of unemployment compensation. Indeed, as described in DOL's recent draft program letter entitled "Equity and Access - Unemployment Compensation Program", including "compelling personal reason as 'good cause' reflects the concept of family values as implemented by the Family [and Medical] Leave Act." Similarly, here, availability standards should be interpreted to promote the goals of balancing work and family.

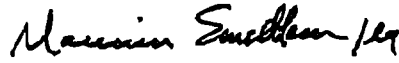
If Vermont citizens, businesses, and state agencies can agree to spend their unemployment funds on FMLA-covered workers, the least the Department of Labor should do is allow their desires to be carried out. We appreciate your consideration and look forward to your response.

Sincerely,


Jonathan P. Hiatt
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AFL-CIO
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Washington, D.C. 20006


Donna Lenhoff
General Counsel
Women's Legal Defense Fund
1875 Connecticut Avenue, N.W.
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The Honorable Alexis Herman

- 5 -

January 22, 1998

encls: Letter of Raymond Uhalde to the Honorable Patrick Leahy
Memorandum in Support of Vermont Bill Amending the Unemployment Compensation
Law to Cover Separation from Work Due to Family and Medical Leave
SB 143

cc: Senator Patrick Leahy
Hon. Jan Backus, Vermont Legislature

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U.S. Department of Labor

Assistant Secretary for
Employment and Training
Washington, D.C. 20210

JUL 17 1997

The Honorable Patrick Leahy
United States Senate
Washington, D.C. 20510-4502

Dear Senator Leahy:

Your letter to Cynthia Metzler, former Acting Secretary of Labor, concerning the Department's objections to Vermont Senate Bill (SB) 143 was sent to me because the Employment and Training Administration has oversight responsibility for the Federal-State Unemployment Insurance (UI) Program.

As you know, SB 143 provides that a worker taking leave under Vermont's family leave law "shall be deemed able and available for work" for UI purposes. Our Regional Office in Boston has advised the Vermont agency that SB 143 would conflict with Federal UI law since a worker would be considered able and available for work regardless of the facts of the situation. Although we appreciate your concerns regarding family leave and Vermont's potential fund surplus, we believe the Regional Office has taken the correct position. Following are our reasons.

As conditions for participation in the Federal-State UI program, Federal law requires payment of UI through public employment offices and limits withdrawals from a State's unemployment fund to payments of cash benefits to individuals with respect to their unemployment. 26 U.S.C. §§ 3304(a)(1) and (4), and 3306(h); 42 U.S.C. §§ 503(a)(2) and (5). We have consistently interpreted these provisions as requiring that State UI laws contain tests to assure that UI is paid only to workers who lose their positions when employment slackens and who, while maintaining their connection to the labor force, cannot find other work.

That this was the intent behind these provisions is clearly demonstrated by the history of the 1935 legislation creating the Federal-State UI program. The creation of the UI program was recommended by the Committee on Economic Security's Report to the President which stated that, to serve its purposes, UI "must be paid only to workers involuntarily unemployed. The employees compensated must be both able and willing to work and must be denied benefits if they refuse to accept other suitable employment." (Page 18 of Report.) According to the Senate Committee report for the legislation, the "essential idea in unemployment compensation is the creation of reserves during

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periods of employment from which compensation is paid to workmen who lose their positions when employment slackens (that is, the worker loses his/her job) and who cannot find other work." (Emphasis added.) S. Rep. No. 628, 74th Cong. 1st Sess. 11 (1935). The report goes on to say that UI differs from relief "in that payments are made as a matter of right, not on a needs basis, but only while the worker is involuntarily unemployed." Id.

To operate an acceptable UI program a State must, therefore, establish a genuine test to determine if an individual is unemployed due to lack of work. The able and available requirement is a longstanding, accepted test for determining this. Since 1937, issuances by the Department and its predecessor agencies have advised that State laws must contain able and available requirements to conform with Federal law. Section 5000.B in Part V of the Employment Security Manual states that States must assure that UI will be paid "only to individuals who are unemployed and who are able to work and available for work."

Under the Vermont proposal, the availability of all workers on family leave is presumed without consideration of individual circumstances. As a result, no real test of availability for suitable work is applied to a worker on family leave even though, in most cases, a suitable job (that is, the job from which the worker is on leave) is available for that worker.

Your letter forwarded a legal memorandum supporting SB 143 which made several points touching on Federal UI law. The enclosure responds to these points. Note that Item 4 of the enclosure addresses a narrow situation where workers on family leave may be considered available, and thus potentially eligible for UI.

Although the UI program is not, in most cases, the appropriate vehicle for providing income replacement to individuals on family leave, other approaches exist. Vermont could establish a separate program with benefit and administrative costs funded either from general revenues or a special payroll tax. If the State establishes a payroll tax, it could be accompanied by a corresponding reduction in employer UI contributions so that the program would initially be cost neutral for employers. We note that this approach is being proposed in Vermont for other purposes. As always, we are willing to work with Vermont to accomplish the aims of SB 143 in a manner consistent with Federal law.

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I hope that I have been able to clarify the Department's position with regard to SB 143. If you have any further questions, please feel free to contact Grace Kilbane, Director, Unemployment Insurance Service. Her telephone number is (202) 219-7831.

Sincerely,



RAYMOND J. CHALDER
Acting Assistant Secretary

Enclosure

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FEDERAL ISSUES RAISED IN LEGAL MEMORANDUM

1. The determination of a "voluntary quit" is reserved to the States.

One of the basic Federal law tests of unemployment is whether a worker is able and available for the week for which UI is claimed. If a voluntary quit occurs in a week claimed, an availability issue is created because the quit suggests the individual has taken him/herself out of the labor market. States are free to determine if any ineligibility arising from the voluntary quit is applied beyond the week the quit occurred. Since SB 143 modifies the disqualification provision for weeks beyond the quit, this aspect raises no Federal issue.

The Department is developing a directive encouraging liberalization of voluntary quit provisions when good personal cause exists. Workers available for work should not be penalized by reason of separation from work for good cause.

2. "Vermont and 10 other states exempt workers who are ill or disabled from their work-search requirements".

All eleven States apply these provisions to workers whose illness occurs after separation from work, who had already registered for work with the State employment service, and who were not offered (and therefore did not refuse) suitable work. Under these provisions, workers demonstrate availability by seeking work through the employment service and by being required to accept suitable work. Thus, these States apply an availability test. Under SB 143, however, availability is presumed even though, by remaining on leave when a job is available, the individual may be unavailable for work.

3. Workers may maintain an employment relationship while collecting UI.

There is no Federal requirement that an employment relationship must be severed before UI is paid. Workers regularly receive UI due to reduced workweeks and short-term layoffs. However, the workers must continue to be available for work. The court cases cited in the memorandum recognize the importance of availability requirements since the courts applied them in each case based upon each claimant's individual circumstances.

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4. States have latitude to determine what constitutes availability for work.

Although this is true, States must still have a genuine test of availability. The Vermont proposal eliminates any test for workers on family leave by substituting a conclusive statutory presumption of availability even when facts demonstrate the individual is unavailable. No examination of the individual's circumstances is made.

Only after a genuine test of availability is applied may a worker on family leave be determined eligible. For example, a worker on the night shift may be forced to take family leave because the employer is unable to accommodate the worker's request to work the day shift. The worker remains available for day work. If this is the case, no Federal issue is raised concerning availability.

5. The Commission on Family and Medical Leave established by Congress recommended that States modify their UI laws to make it possible for workers to take leave.

The Commission's report did not discuss Federal law requirements for the UI program, nor did it explicitly recommend what provisions of State law be amended. We assume that the Commission recommended States enact only amendments consistent with Federal UI law.

As noted above, when the facts and circumstances indicate a worker on family leave is able and available, such worker may be eligible for UI. Also as noted above, States may modify their voluntary quit provisions concerning family leave.

** TOTAL PAGE.06 **

February 26, 1997

**Memorandum in Support of Vermont Bill Amending
the Unemployment Compensation Law to
Cover Separation from Work Due to Family and Medical Leave**

prepared by

**AFL-CIO
National Employment Law Project
Women's Legal Defense Fund**

Summary

The Vermont Legislature has a bill pending to provide unemployment compensation to individuals who are on unpaid leave under circumstances that qualify for coverage under the state family and medical leave law. 21 Vt. Stat. Ann. §§ 471-474. The main question addressed by this memo is whether the proposed legislation complies with the federal laws, specifically the Federal Unemployment Tax Act (FUTA) and the Social Security Act (SSA), that regulate the shared federal-state unemployment compensation system. 26 U.S.C. §§ 3304, 3306; 42 U.S.C. § 503.

As detailed below, the proposed law complies in all respects with federal unemployment law given the substantial deference accorded the states in defining the relevant terms of disqualifications and continuing eligibility necessary to implement the bill. In addition, the Family and Medical Leave Act (29 U.S.C. §§ 2610 *et seq.*) and the Employee Retirement Income Security Act (29 U.S.C. §§ 1001 *et seq.*) do not preempt the proposed legislation. Thus, consistent with federal law and sound policy considerations, we support the legislation as a model for states to better address the current needs of working men and women to balance the demands of work and family.

Purpose of the Shared
Federal/State Unemployment Law

The federal-state unemployment system, as enacted in 1935, left the states with the primary discretion to dictate the scope of their unemployment laws. The federal-state framework was adopted after significant debate which led to the rejection of proposals for a national unemployment system. Thus, as certified by the U.S. Department of Labor, the states must comply with a limited set of federal mandates to qualify for federal administrative funding and the federal tax credit applied against an employer's state unemployment taxes.

As described by the Executive Director of the Committee on Economic Security, which was appointed by President Roosevelt to draft the Social Security Act "At the very outset of its final deliberations, the committee decided against federal dictation regarding the content of state unemployment compensation laws. It reached the conclusion that the federal bill should contain only a few necessary standards . . ." Edwin Witte, The Development of the Social Security Act (University of Wisconsin Press: 1962), p. 125. According to the federal Advisory Council on Unemployment Compensation, a federal role exists where "necessary to secure basic national

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interests." Advisory Council on Unemployment Compensation, Defining Federal and State Roles in Unemployment Insurance (January 1996), p. 26.

In the end, rather than impose specific federal restrictions on state legislation on general matters of eligibility, coverage and disqualifications, the Committee on Economic Security decided to draft suggested state legislation which meets the minimum federal requirements. Social Security Board, Draft Bills for State Unemployment Compensation of Pooled Funded and Employer Reserve Account Types (Washington, D.C.: 1936). Most states, including Vermont, adopted the suggested legislation of the Committee on Economic Security. This model, in fact, formed the basis of the nation's unemployment laws, which continue to evolve to meet the changing needs of the workforce.

Elements of Federal Compliance Related to the Vermont Unemployment Compensation Bill

The proposed Vermont law, providing for unemployment benefits when workers are on leave for family and medical needs, amends the state's unemployment law in two key areas: 1) "voluntary quit" is defined to limit the disqualification for claimants who leave work temporarily for family and medical leave purposes; and 2) "able and available" for work is defined to exempt claimants who are on family and medical leave from the work-search requirement. We address each of these provisions in turn to determine whether they comply with the requirements of the federal unemployment law.

1. The proposed state law, limiting the duration of the voluntary quit disqualification for claimants who leave work for family and medical leave reasons, complies with federal law.

While the definitions section of the federal unemployment law defines numerous terms, including "employer", "wages" and "compensation", conspicuously absent is any definition of the phrase "voluntary quit". 26 U.S.C. §§ 3306 *et seq.* In contrast, the suggested state laws drafted by the Committee on Economic Security include a proposed definition of "voluntary quit" which has been incorporated into most state unemployment laws with variations in scope from state to state. The absence of language defining "voluntary quit" in the federal law, contrasted with the presence of the phrase in the suggested state laws, convincingly demonstrates that this was an issue reserved for the states to decide.

Indeed, there are numerous examples of state laws that go further than the proposed Vermont law (the Vermont bill continues to disqualify claimants for "voluntarily" leaving their jobs but limits the duration of the disqualification when they leave work to take family or medical leave). For example, over one-third of the states cover compelling individual circumstances requiring an individual to leave her job, which are not limited to reasons directly connected with the employment. Advisory Council on Unemployment Compensation, Unemployment Insurance in the United States: Benefits, Financing, Coverage (February 1995), pp. 110-112. These laws cover claimants who leave their jobs for reasons related to compelling family circumstances. Another 23 states, including Vermont, have enacted special provisions for employees who leave

page 3

work due to an illness or disability not necessarily connected with the individual's employment. U.S. Dept. of Labor, Comparison of State Unemployment Insurance Laws (January 1996), Table 401.1.

Among them, Maine, California, Washington, Iowa and Illinois have statutes that excuse voluntary separations from work under circumstances most similar to those warranting FMLA protected leave. For example, the Illinois law states that the voluntary quit disqualification shall not apply to a claimant who left work voluntarily to care for the individual's medical needs or the health needs of a spouse, child or parent. Ill.Stat. § 601(B)(1) (exempting a claimant who leaves work "because he is deemed physically unable to perform his work by a licensed and practicing physician, or has left work upon the advice of a licensed and practicing physician that his assistance is necessary for the purpose of caring for his spouse, child or parent who is in poor physical health, and such assistance will not allow him to perform the usual and customary duties of his employment, and he has notified the employing unit of the reasons for his absence.")

2. The proposed state law exempting claimants who are on unpaid family and medical leave from the work-search requirements, complies with federal law.

The states also have considerable latitude to set "able and available" for work standards. Here too, there is no federal statutory law on the subject, which contrasts with the Committee on Economic Security's suggested state law. Thus, the proposed exemption from the work-search requirement for claimants who are on unpaid family and medical leave complies with the shared federal-state framework of the unemployment compensation system.

Many states exempt workers in similar situations to those that would be covered by the proposed Vermont law. Most on point, Vermont and 10 other states exempt workers who are ill or disabled from their work-search requirements. U.S. Dept. of Labor, Comparison of State Unemployment Insurance Laws (January 1996), Table 401.1. The current Vermont law, which would be extended under the proposed bill to apply to family and medical leave, provides that "no claimant shall be considered ineligible in any week of unemployment for failure to comply with the provisions of this paragraph if such failure is due to an illness or disability which occurs after he has registered for work . . ." 21 Vt. Stat. Ann. § 1343(a)(3).

U.S. Department of Labor
Guidance Interpreting the Federal Law

In reaching the conclusion that Vermont's unemployment law may cover claimants on unpaid family and medical leave consistent with federal law, we are not unmindful of a 1970 statement of the U.S. Department of Labor (DOL) interpreting the federal law to require payment of unemployment benefits "only to individuals who are unemployed and who are able to work and available to work . . ." Employment Security Manual, Part 5000(B) (August 31, 1970). DOL's interpretation is based on the provision of FUTA defining "compensation" as "cash benefits payable to individuals with respect to their unemployment." 26 U.S.C. § 3306(b). From this language, combined with the requirement that funds withdrawn from the federal trust fund

page 4

"shall be used solely for the payment of unemployment compensation," DOL reads into the law a requirement that the claimant be "unemployed" and "able and available" for work.

To the extent that the 1970 subregulatory manual is still DOL's standing policy, it only indicates that states are expected to maintain these general requirements in their state law. Wisely, the DOL manual did not attempt to define for the states the terms "unemployed" or "able and available" for work. The states have broad latitude to define "able and available" for work, as described above. Whether an individual is sufficiently "unemployed" is also a matter for state law to decide. As with the other general standards of eligibility and disqualification described above, the term "unemployed" is not defined in federal law and was left for inclusion by the Committee on Economic Security in the suggested state laws.

Certainly, federal law allows claimants to be considered "unemployed" and recover benefits while on unpaid leave, as proposed in the Vermont law. Indeed, there are many circumstances where workers are entitled to unemployment benefits while maintaining an ongoing relationship with their employer. For example, nearly all states (including Vermont) operate a "partial" unemployment benefits program, meaning that benefits are paid to workers who are still employed but whose hours have been reduced below full time. U.S. Dept. of Labor, Comparison of State Unemployment Insurance Laws (January, 1996), Table 306. The same is true of "short-time compensation" or "work-sharing" programs that have been adopted by 17 states (including Vermont), where unemployment benefits are paid to current workers whose hours were reduced in order to avoid layoffs. *Id.* at p. 3-17.

The case law also highlights that the states are free to determine whether and to what extent the employer-employee relationship must be severed for the worker to be considered unemployed. In Donahue v. Dept. of Employment Security, 142 Vt. 351, 355 (1982), the Vermont Supreme Court held that "nowhere does the statute require that an individual be wholly unattached to any employer" to be considered "unemployed". As a result, the Court awarded benefits to a group of hourly paid, nonprofessional school employees during the three-weeks of Christmas, mid-winter and spring vacations observed by the Vermont public schools. During that time, the claimants did not perform any work and did not receive any pay. However, as the Court noted, the "claimant's relationship with his or her employer had not been severed by these regularly scheduled vacation period recesses."

In Pennsylvania Electric Company v. Board of Review, 450 A.2d 779 (Pa. Cmwlth. 1982), the court specifically addressed whether a claimant was "unemployed" while on unpaid leave. The claimant was properly awarded benefits, the court found, when she placed on unpaid sick leave after becoming pregnant and presenting medical certification that her job threatened her and her child's safety. While separated from the work and without pay, she continued her life insurance and hospitalization coverage. She was entitled to receive holiday pay, when applicable, and to return to work when released by her physician. The court found that to be "unemployed" it was sufficient that "the claimant has not performed any services, nor has she received any remuneration." *Id.* at 782. See also Tetterman v. Appeal Board, 1988 Del.Super. LEXIS 3 (1987) ("the fact that the employer-employee relationship was not completely severed does not

page 5

disqualify the claimant from benefits as the statute does not require such severance.")

Indeed, as described in Donahue, supra, existing Vermont law defining "unemployed" simply requires that the claimant not be earning wages and not be performing services, which encompasses the right to coverage while on unpaid leave. 21 Vt. Stat. Ann. §§ 1301(9)(A), (B) (the claimant "performs no services and with respect to which no wages are earned."). As recommended by the Advisory Council on Unemployment Compensation, there is a strong federal interest which should be promoted by DOL to encourage state laws that expand access to unemployment benefits where workers leave their jobs for "legitimate family reasons". Advisory Council on Unemployment Compensation, Defining Federal and State Roles in Unemployment Insurance (1996), pp. 12-13. Thus, the proposed Vermont law, and its definition of "unemployed" which encompasses unpaid leave, are consistent not only with federal law but also with the policies that the ACUC has identified as necessary for increased national support on the part of the DOL.

No FMLA & ERISA Preemption

Finally, the Vermont bill, as proposed, is not preempted either by the FMLA or ERISA. FMLA clearly states that it does not preempt any provision of state law that is more beneficial to the covered employees. 29 U.S.C. § 2651. States therefore may provide more beneficial family and medical leave protections, but not less than what is required by FMLA. For example, Vermont's state law applies to employers with at least 10 employees compared with the FMLA, which covers only employers with at least 50 employees. With respect to ERISA, the statute specifically exempts state unemployment compensation from its broad preemption provision. 29 U.S.C. § 1003(b)(3).

Policy Considerations In Support of the Vermont Bill

The proposed bill is also supported by sound policy considerations. According to the bipartisan Commission on Family and Medical Leave, which was established by Congress to study the impact of the FMLA, the major reason why employees in FMLA-covered businesses do not take FMLA leave is that they cannot afford to do so. In order to make it possible for workers to take needed leave, the Commission on Family and Medical Leave recommended that serious consideration be given to the development of a uniform system of wage replacement. Specifically, the Commission suggested that states extend unemployment compensation qualifications to employees on family and medical leave. Commission on Family and Medical Leave, A Workable Balance: Report to Congress on Family and Medical Leave Policies (1996), p. 199-199. The Carnegie Corporation made similar suggestions to finance family and medical leave. Carnegie Corporation, Starting Points: Meeting the Needs of Our Youngest Children (1994), p. 47.

The bill is also a response to the well-recognized need for state unemployment compensation programs to adapt to changes in the labor market, particularly the expanding role of women in the workforce. As indicated above, the Advisory Council on Unemployment

page 6

Compensation recommended strongly that the unemployment compensation system expand access to employees, mostly women, who lose their jobs due to compelling "individual" circumstances, including family responsibilities. Advisory Council on Unemployment Compensation, Unemployment Insurance in the United States: Benefits, Financing, Coverage (1995), Recommendation 21, p. 19; Defining Federal and State Roles in Unemployment Insurance (1996), Recommendation 8, p. 12-13.

Extending unemployment compensation to workers on unpaid leave also allows them to return to work rather than forcing them to search for new jobs. This promotes stability in employment and strengthens the national economy, which are key policy objectives of the unemployment system. See Advisory Council on Unemployment Compensation, Defining Federal and State Roles in Unemployment Insurance, p. 27. The proposed Vermont law effectively creates less unemployment by allowing workers to keep their jobs while on leave and less hardship on those separated from work when necessary to care for themselves or their families.

Conclusion

Accordingly, consistent with federal law and sound policy considerations, we strongly support the proposed Vermont legislation as a model for states to better address the current needs of working men and women to balance the demands of work and family.

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**BILL AS INTRODUCED
1997**

**S.143
Page 1**

S.143

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Introduced by Senator Backus of Chittenden County and Senator Bartlett of Lamoille

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County

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Referred to Committee on

5

Date:

6

Subject: Labor; unemployment compensation; family and parental leave

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Statement of purpose: This bill proposes to authorize funding of wage replacement

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benefits for employees taking family or parental leave.

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**AN ACT RELATING TO UNEMPLOYMENT COMPENSATION AND FAMILY
AND PARENTAL LEAVE**

11

It is hereby enacted by the General Assembly of the State of Vermont:

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Sec. 1. FINDINGS AND PURPOSE

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The General Assembly finds that family and parental leave laws enacted in this state and the nation are largely ineffective, because workers who most need the law's protections are least able to afford to take leave when they are eligible to do so. It is therefore the purpose of this act to amend Vermont's unemployment compensation laws to make workers eligible for compensation in circumstances in which they take family or parental leave.

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To: Maurice Emsellem, Esq. at NELP
From: Wendelline De Zan, Intern
Subject: State UI Laws:
Date: November 6, 1998

MEMORANDUM

State UI Laws Exempting Workers on Recall from Work Search

State:	Arkansas
Citation:	Ark. Stat. Ann §11-10-507 (1997)
Brief:	Employee on short-term layoff, expecting recall to a full-time job w/in 8 weeks is not required to register for work or to seek other work.
Provision:	An insured worker shall be eligible to receive benefits... (3)(E) An individual on short-term layoff who expects to be recalled by his employer to a full-time job and whose employer intends to recall the individual to a full-time job within eight (8) weeks after the initial date of his layoff shall not be required during the layoff to register for work at an Arkansas Employment Security Department office or to seek other work.
State:	Michigan
Citation:	Mich. Comp. Laws § 421.28 (1979) (Mich. Stat. Ann. § 17.530 (1998))
Brief:	Employee on short term layoff, expecting recall w/in 45 days is not required to register for work and be available if employer notifies commission in writing that Employer will take back Employee within 45 days.
Provision	(a) ...The requirements that the individual report at an employment office, ... register for work, ...be available to perform suitable full-time work, and ...seek work may be waived by the commission if the individual is laid off and the employer who laid the individual off notified the commission in writing or by computerized data exchange that the layoff is temporary and that the work is expected to be available for the individual within a declared number of days, not to exceed 45 calendar days... ...if individual is not recalled within the specified period, the waiver shall cease to be operative with respect to that layoff... ...requirement that the individual shall seek work may be waived by the commission where it finds that suitable work is unavailable both in the locality where the individual resides and in those localities in which the individual has earned base period credit weeks...

**State Family-Leave Insurance Initiatives:
Making Family Leave More Affordable**

Around the country, activists for women, children, seniors, and working families are organizing to make family leave more affordable. Efforts are underway in at least seven states to provide family leave insurance by expanding unemployment or disability insurance to provide partial wages during periods of unpaid family and medical leave.

* Most Americans -- fully 82% of women and 75% of men -- support such proposals. (National Partnership for Women & Families, Family Matters: A National Survey of Women and Men (1998)).

In addition, at least two other states are exploring other models for providing family leave benefits.

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

* The bipartisan Family Leave Commission found that nearly two-thirds of employees who needed but did not take family or medical leave cited lost wages as the reason. (Commission on Leave, A Workable Balance: Report to Congress on Family and Medical Leave Policies (1996)).

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

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

Here is a sampling of current state efforts:

California

A bill was introduced in the 1998 legislative session to study the cost of extending the state's TDI program to include employees taking family leave. A dynamic coalition of advocates for women, children, and labor is working on a family leave agenda for the 1999 session.

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

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

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

Patricia Shiu
Employment Law Center
(415) 864-8848

Iowa

A bill introduced during the 1998 legislative session aimed to establish a fund for providing benefits to employees who took family leave and proposed to create a work and family task force to examine the impact of this program.

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

Maryland

A bill was introduced during the 1998 legislative session to create a task force to study family leave insurance. Plans are underway to reintroduce such a proposal during the 1999 legislative session.

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

Joanne Saltzberg
Maryland Commission on Women
(410) 767-7137

Massachusetts

Spearheaded by the Women's Statewide Legislative Network, a diverse and active Family Leave Coalition is rallying support for bills that were recently filed to extend unemployment benefits to employees taking family leave and to create a *family and employment security trust fund.*

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

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

Minnesota

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

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

New Jersey

A bipartisan bill introduced in the 1998 legislative session proposed to extend New Jersey's statewide TDI system to cover family leave. The bill would also have established a task force to study the impact of family leave benefits on workers, their families, employers, and the general public. Advocates plan to reintroduce similar legislation in the 1999 legislative session.

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

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

New York

A bill introduced during the 1998 legislative session sought to amend New York's TDI law to cover family leave. A coalition of major New York labor unions and women's groups has made

passage of a similar bill a priority for the 1999 legislative session.

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

Deborah King
Executive Director
1199/Employment Training and Job Security Program
(212) 494-0524

Vermont

A bill was introduced in 1998 to authorize unemployment benefits for employees who take family leave, and similar legislation is expected in the 1999 legislative session.

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

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

Washington

Activists are developing a bill that would set up a research task force on the feasibility of family leave insurance.

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

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

For more information on family and medical leave, please refer to the National Partnership for Women & Families* website, www.nationalpartnership.org, or contact the National Partnership

directly at 1875 Connecticut Avenue, NW, Suite 710, Washington, D.C. 20009, (202) 986-2600.

Agenda

Paid Parental Leave and UI

April 28, 1999

I. Opening Remarks (OMB, DOL)

II. Background

- Early Administration positions on FMLA and recent budget discussions (DPC)
- Current status of the state UI proposals (DOL)

III. Issues for Discussion

- Administration position on paid parental leave
- Alternatives to finance paid parental leave
 - Employer mandated through FMLA
 - New Federal program administered through UI
 - UI funded and administered

IV. Next Steps (OMB)

THE WHITE HOUSE
WASHINGTON

OFFICE OF THE FIRST LADY

TO Larry Matlack, OMB
FROM Nicole Rabner, DPC
FAX # 5-1596 / 5-7752
PHONE # 5-3262
OF PAGES (including cover) 3

COMMENTS My comments to the CJ on the
FARA/paid research fund
follow.

The Department of Labor shares the views of the Administration in the use of information technology (IT) to improve the efficiency of the Federal government and make the government more accessible to the American people. Specifically, with the resources provided in this requested increase, the Department will use Internet technologies as a primary IT resource in achieving its strategic goals and accomplishing the objectives for an electronic and virtual government set out by the National Partnership for Reinventing Government and the Government Information Technology Services Board. The Department envisions a clear alignment of its strategic goals and the application of Internet technologies.

Base:FTE: 130Estimate: \$20,975,000**Program Increase:**FTE: +11Estimate: +\$2,250,000

Proposal: To provide \$10,000,000 for research on the impact of the Family and Medical Leave Act on the American family and on how to make leave accessible to and affordable for more of America's working families.

Rationale: The President believes that no one should have to choose between their job and their family. While the enactment of the Family and Medical Leave Act in 1993 (FMLA) was a great step forward for working families, more must be done. Good, reliable, up-to-date information is needed to determine what working families need to help them balance the demands of work and family.

In 1996, the bi-partisan Commission on Family and Medical Leave published a study entitled "A Workable Balance: Report to Congress on Family and Medical Leave Policies" that evaluated the effects of the FMLA since its 1993 passage. The report included the results of two surveys conducted by the Commission that provided comprehensive, national data on employees' need for and use of FMLA leave. These data need to be updated to reflect what has happened since the date of the surveys, particularly in light of increased awareness of and experience with the law since then.

delek
The number of people who are covered and eligible and took leave under the Family and Medical Leave Act cannot be estimated from data which is currently available. The data that are available are not consistent nor reliable enough to draw conclusions about a trend in usage, availability or affordability of leave. ?

It is known from the Commission data and from anecdotal information that there are families who need but cannot take FMLA leave because they cannot afford to be without a paycheck. There is a serious lack of data, however, on how extensive this problem is and on how, if at all, families and their employers are addressing this

problem. For example, while it is known that some employers and States have broader family and medical leave policies or laws and that some provide wage replacement during leave, current data on the availability, usage and impact of such policies are very limited. It is also known that there are proposals to provide wage replacement as a matter of public policy at the Federal and State level, but there is little or no information on the feasibility or long-term effects of such proposals or the development of alternatives. ✓

Program Effects: Both areas identified in the proposal above will be addressed, as outlined below.

-- Impact of the Family and Medical Leave Act on the American Family - Follow-up surveys will be completed to the Commission's employer and employee surveys on the FMLA impact. Once these surveys are completed, work will focus on project management, compiling and analyzing the data, particularly making comparisons to the early data, and publishing the analysis. In addition, new sources of existing data would be explored to see if they might yield useful information on work patterns and access to benefits.

-- How to make leave accessible and affordable to more of America's working families - The remaining research funds would be used for projects for the following purposes --

(a) provide data on what barriers are faced by workers who are unable to use family and medical leave when they need it;

(b) highlight what can be done to break down these barriers, with an emphasis on how companies and states have successfully addressed these problems;

~~(c) determine what is the best role for employers and State, local and Federal governments in breaking down these barriers;~~ - delete (c)

~~(d) present an analysis of the costs and benefits to employers and employees of unpaid versus paid family and medical leave;~~

(e) assist State and sub-State governmental entities that wish to undertake studies or research in connection with developing paid leave plans for their citizens; and ✓

(f) conduct other research related to the need for and feasibility of wage replacement for employees taking leave for family or medical leave reasons.

Base:

FTE: 130

Estimate: \$20,975,000

Program Increase:

FTE: -0-

Estimate: +\$10,000,000

strategies to make leave more affordable for their citizens

develop methodologies and provide data on the costs and benefits of strategies to make leave more affordable.

replace current (d)

U.N. Surveys Paid Leave For Mothers

U.S. Among Nations Without a Policy

By ELIZABETH OLSON

GENEVA, Feb. 15 — A United Nations survey of 152 countries has found that the United States is one of only six that does not have a national policy requiring paid maternity leave.

Such disparate countries as the Sudan, Cameroon, and Nepal, for example, mandate that a woman receive her salary while she is caring for her newborn. The majority of countries surveyed provide benefits through social welfare systems, some require the employer to pay, and still others combine both financing sources.

Only the United States, Australia, New Zealand, Lesotho, Swaziland and Papua New Guinea do not require paid leave, according to the review of International Labor Organization member countries.

The 114-page study, "Maternity Protection at Work," is being issued on Monday. It was undertaken, its authors said, because of the importance of women's salary for family survival.

The study found that women contribute half or more of family income in about 30 percent of households in the nations studied. In the United States, the figure is 55 percent, and in Europe, 59 percent.

The agency estimated that by 2010, the figure for women who work during their childbearing years in industrialized countries would rise to about 81 percent, from the current 73 percent. In less developed regions, the study indicated, the figure would rise to 68 percent, from 63 percent.

While rights are written into law in many countries, all is not rosy for women worldwide, said one of the study's authors, Ann Herbert. "There is a huge gap between law and practice," she said, adding that widespread discrimination was found to exist on the job against women who become pregnant.

The study found that only 29 countries, most of them in Africa and Asia, absolutely bar dismissal of a worker during her maternity leave. There is even less protection against dismissal after the mother's return to work. About two dozen countries

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division**FAX COVER SHEET****WAGE AND HOUR DIVISION****FAX NUMBER (202) 219-5122**TO: Nicole R DATE: 12/4FAX NUMBER: _____ PAGES: 5
(Include cover sheet)

LOCATION: _____

FROM: _____

If you do not receive all of the pages please call:

NAME: Kathy C

NUMBER: _____

COMMENT/INSTRUCTIONS:Sorry for weird formatting

_____*Working to Improve the Lives of America's Workers*

Staff draft 12/4/98 3:30 pm

Federal Support for State Paid Parental Leave Initiatives

The Family Medical Leave Act, signed into law by President Clinton on February 5, 1993, signaled our nation's recognition that American workers face enormous obstacles in their struggle to balance work and family, and that the federal government can, and should, play a role in helping to achieve that balance. The FMLA enables millions of working Americans to care for a child after birth or adoption, by providing up to 12 weeks a year of unpaid, job-protected leave. But many of those workers are unable to take the full amount of time they need and are entitled to, because they simply cannot afford to go that long without a paycheck. Other workers who are not protected by FMLA but have access to unpaid leave can face the same dilemma.

Several state governments are exploring strategies to provide wage replacement for parents who have access to and want to take leave to care for a newborn or newly adopted infant but cannot afford to do so. The Administration could assist states in this effort, and encourage more states to consider their own paid leave initiatives, through a federally funded grant program. The funds could be used by states to support research and development activities; to underwrite the administrative and implementation costs of starting up a state-funded benefit program; and to evaluate the success of state initiatives. Supporting these initiatives would not only benefit the working citizens of the individual states, but would also allow us to explore, through the "laboratory of the states," which approaches to paid parental leave work best and possible promising models for a nation-wide paid leave plan.¹

States could be invited to submit proposals, and grants could be awarded competitively, with the size and number of awards dependent upon the amount of funding available. In addition to new funds for the grants, we would need to have legislative authority for the grant program. It is possible that legislative authority for current DOL programs could be used although new legislation would likely be necessary to authorize a more flexible and complete grant program.

¹ A caveat: any proposal to encourage paid leave should be considered in the context of proposals to raise the minimum wage and to expand FMLA (by lowering the coverage threshold to 25 and/or giving covered employees 24 hours/year for routine medical care for children/elderly parent or to attend school conferences). Also, we should be aware of, and avoid, the possibility that any policy decisions or funding decisions could create negative incentives for employers who currently, or might otherwise, provide paid leave for their employees.

PROPOSAL: Develop competitive federal grant program for increasing availability of paid parental leave. Funding would be available to states and appropriate sub-state entities for some combination of the following activities:

1. Subsidy of benefits in a demonstration, or pilot program, to provide paid leave to care for newly born infants and adopted children.
2. Funding administrative and startup costs for promising models of state paid parental leave.
3. Researching existing and new paid leave activities.

FY 2001 Budgetary Implication:

Total: \$50m

1 & 2. Subsidize benefits and/or administrative costs in a pilot or demonstration project

- Benefit subsidy (modeled after \$200 a week federally paid leave proposal): cost is based on a \$200 benefit a week per person; benefit cost varies from \$9m-\$38m per state, assuming between 4 and 12 weeks of paid leave to *women* with infants. Benefit costs could be reduced if assume a subsidy of less than \$200 a week. Sub
state?
- Administrative costs: Start-up of new state (or local level) programs ranging from \$250,000 to \$2,500,000 per state (estimate based upon using UI system for delivery) -- assume first year operating costs of approximately \$3m to \$4m per state.
- Cost per state total for first year, for full (\$200) benefit subsidy and administrative costs: \$13m- \$44m.

3. Research and evaluation grants and follow-up on FMLA commission leave study.

- Minimum funding for a single state commission including administration, travel and survey/review, assuming meets 6 times in one year: travel \$50,000; administration (2 staff persons) \$125,000; survey/review paper (1) \$50,000. This assumes no payment to commissioners other than per diem and travel cost reimbursements. For a paid executive director assume an additional \$125,000 for salary and benefits. National
NAS
study?
- Cost per review-type paper estimated at \$50,000. Additional funds would be necessary for an optional conference.
- Cost for follow-up to national FMLA Commission leave study is \$1.5m.

Preliminary Grant Elements:

Careful and targeted design of the grant program would be crucial, and should include the following factors:

- . Specific policy goals to be served in addition to increasing workers' ability to take new parent leave, if any;
- . Multi-activity proposals would be considered (i.e., combining benefit subsidy and/or administrative costs and/or research);
- . Benefit subsidy/administrative costs proposals must include outcome measurement/evaluation, perhaps with third party participation (such as universities) to assist in evaluation activities.;
- . Defined duration of pilot;
- . Demonstrate sustainability of program -- likelihood of continuation without federal funding after demonstration/pilot period, if successful;
- . Benefit recipient eligibility tied to need/income level;
- . Benefit receipt eligibility includes workforce attachment requirement.

In addition, the following questions needed to be answered or criteria need to be developed while designing the grant program:

- . How to limit the number of pilot benefit proposals;
- . What are the specific criteria for selecting proposals, including:
 - size of population to be served
 - issues to be addressed in research proposal
 - areas for evaluation/measured in benefit subsidy/admin. cost proposal, e.g.:
 - at what benefit level/benefit duration are workers with various incomes more likely to take leave?
 - what impact does paid leave have on new parents' return to the workforce?
 - what impact does paid leave have on employer incentives to provide paid leave? unpaid leave (if not FMLA-covered)?
 - length or amount of benefit
 - percentage of federal subsidy to state dollars, and could it vary by proposal

Pros:

- . minimum federal cost leveraging state funds;
- . option could be coordinated with Rep. Woolsey's plans;
- . expansion of programs such as TDI may have broader benefits than just parental leave (may also be con if it dilutes message too much);
- . experience could help with development/passage of federal legislation or lead to more states

- and private employers providing paid leave;
- provides some real benefits to real people in need;
- research and experimental program would be helpful in laying groundwork for widespread provision of paid leave;
- data would allow assessment for the need for new programs and targeting of programs to people who most need the help.

Cons:

- unclear if proposal is sufficient to get interest of states' and third parties (NGA, AFL-CIO) particularly given large cost of funding benefits;
- questionable newsworthiness;
- possible political and legal obstacles, including likely need for authorizing legislation; delivery systems and benefits would vary across states;
- possible conflicting signals with welfare to work (e.g., do we want low-income parents at home with kids or in workplace?)
- DOL position on use of UI dollars to provide paid leave may be a vulnerability benefit subsidy (vs. just using federal funds to cover administration) may not be appropriate for a one-time intervention -- would states be willing to pay for funding program (i.e. benefit) costs in the out years?

Proposal must be accompanied by/reflect:

- FMLA expansion
- Serious consideration of/resolution of authorization problem
- Commitment to thoughtful program design to channel federal dollars to programs that are most promising; consistent with articulated policy objectives; and conducive to outcome measurement
- Input from states and third parties on whether states likely to make use of such grants.

Greater Boston Legal Services

197 Friend Street • Boston, Massachusetts 02114 • Telephone (617) 371-1234 • TDD 371-1228 • Fax 371-1222

March 16, 1999

Ms. Kitty Higgins
Deputy Secretary of Labor
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210

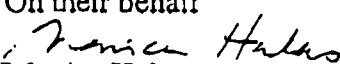
Re: The Massachusetts Unemployment Insurance/Family Leave Recall Bill

Dear Deputy Secretary Higgins:

I am writing to bring to your attention our response to the issues raised by Grace Kilbane after our meeting in your office. After thorough research, we are pleased to report that the Massachusetts legislation falls within the states' prerogative to determine unemployment eligibility including amending "availability" under specific circumstances as presented in our proposed legislation. This conclusion is supported after a careful review of federal law, legislative history, and state precedents which have received prior DOL approval.

In addition to a growing coalition in Massachusetts, several other partners in this initiative, including the offices of Senator Kennedy and Senator Dodds, the AFL-CIO, the National Partnership for Women and Families and others look forward to your response. As indicated in our letter to Ms. Kilbane, we are hopeful that a meeting can be quickly arranged to resolve any outstanding issues.

I have enclosed our letter to Ms. Kilbane and the memorandum setting forth our research and our conclusions. Thank you again for your interest in and assistance with this matter which is so critical to working families.

Sincerely,
The Family Leave Coalition
On their behalf

Monica Halas
Senior Attorney

enc(?)

Greater Boston Legal Services

197 Friend Street • Boston, Massachusetts 02114 • Telephone (617) 371-1234 • TDD 371-1228 • Fax 371-1222

March 15, 1999

Grace A. Kilbane
Director, Unemployment Insurance Service
Employment and Training Administration
Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Grace:

I am writing once again on behalf of my colleagues Ann Bookman, Maurice Emsellem and Linda Johnson, to continue our correspondence concerning the proposed Massachusetts law which provides time-limited partial wage replacement through the unemployment system to individuals who must temporarily leave employment for family or medical reasons. As we indicated in our prior letter, we appreciate your thoughtful response to the issues we had discussed and your invitation to engage in further dialogue about how best to proceed.

Although we are late in reply, and we apologize for this, we felt your letter deserved the most careful review and a response based on thorough research of all materials relevant to the issues you addressed. We appreciate your understanding that the ability to enact this or similar legislation is so critical for working families. We took most seriously the charge to essentially look afresh at unemployment law and make sure that our approach is consistent with federal law.

To address the issues you raised, we reviewed the original Social Security Act, its legislative history, including statements of the drafters, opinions of the Department's chiefs of the former Bureau of Employment Security, and the opinions of legal experts including a comprehensive published work on the availability for work requirement. We also searched for examples where current state law waives availability as an eligibility criteria. In addition to our combined over 35 years of experience with unemployment law, we consulted other legal experts in this field. This in-depth research has resulted in some new conclusions that can be made about whether the concept of availability is a creature of federal or state law.

As the enclosed memorandum details, all of these sources definitively document the conclusion that the availability test is one that is determined by state law rather than federal law. None of the original or secondary sources controverts this conclusion in any way. In addition, over the years there have been numerous examples where states have waived availability as a factor in determining eligibility, and in each instance, DOL has not found an inconsistency with its directives. This is very good news for us all, as it permits the unemployment laws to continue to

operate on the local level, responding to the needs of the states' particular economic condition and, in that context, their ability to best address the needs of its unemployed workers.

However, we recognize that on an issue of such importance to the underlying policies of unemployment insurance, the Department's role in guiding the states is vitally important. As you are aware, the Massachusetts statute is just one approach to this issue and at least Vermont, Maryland, and Washington have also filed legislation which suggests that other approaches are possible.

We look forward to your response to our memorandum and, more importantly, to your suggestions as we continue our work on this type of legislation. We believe that another face-to-face meeting would facilitate coming to agreement on the parameters of state legislation. Thank you.

Sincerely,

Ann Bookman (MA)

Professor Ann Bookman
Holy Cross College

Maurice Emsellem (MH)

Maurice Emsellem
National Employment Law Project

Monica Halas

Monica Halas
Greater Boston Legal Services

Linda Johnson (MH)

Linda Johnson
Women's Statewide Legislative Network

enc (1)

cc: Cathy Curran, Wage & Hour Division
Suzanne Day, Office of Senator Chris Dodd
Cheryl Dorsey, Women's Bureau
Robert J. Haynes, President, Massachusetts AFL-CIO
Jonathan Hiatt, AFL-CIO General Counsel
✓ Donna Lenhoff, National Partnership for Women and Families
Senator Stephen Lynch, Massachusetts Joint Committee on Commerce and Labor
Representative Anne Paulsen, Massachusetts House of Representatives
Stephanie Robinson, Democratic General Counsel
Bill Samuel, Associate Deputy Secretary

March 15, 1999

**MEMORANDUM IN SUPPORT OF MASSACHUSETTS BILL
AMENDING ITS UNEMPLOYMENT COMPENSATION LAW
TO INCLUDE ELIGIBILITY FOR FAMILY AND MEDICAL LEAVE**

**Prepared by
Greater Boston Legal Services
National Employment Law Project¹**

Executive Summary

The Massachusetts Legislature has introduced a bill that would provide unemployment insurance (UI) for no longer than 12 weeks to workers who are separated from their jobs for reasons that qualify for protection under family and medical leave laws. Similar legislation has been introduced in Maryland, Vermont and Washington, raising the issue of whether federal UI law imposes any obligations on the states that would interfere with their broad discretion to enact this UI legislation.

This memorandum seeks to advance the on-going dialogue with DOL that has been extremely valuable to the development and improvement of the proposed state laws. As a result of these communications, the legal issues also have been significantly clarified. The question now boils down to whether the DOL has the authority to impose limitations on a state's eligibility requirements -- in particular a state's determination whether an individual must always be "available" for work at the time she applies for benefits. Based on the research described below, we conclude that the Massachusetts bill is consistent in all respects with the intent of the federal law (allowing states' broad authority to expand UI eligibility) and with past precedents in state UI laws.

We also believe that the state family leave bills are consistent with DOL's interpretation of the federal UI law. The proposed laws retain a genuine test of availability, as required by DOL, but allow for exceptions in particular circumstances just as the states have routinely done in other areas of UI eligibility. We therefore look forward to a continuation of the dialogue, informed by this most recent research, to address DOL's remaining concerns and to modify the Massachusetts proposal if necessary.

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- **The legislative history of the Social Security Act does not require states to adopt any particular definition of availability for work and grants broad discretion to states to develop their eligibility requirements.**

Neither the plain language of the Social Security Act nor its legislative history provides any basis for a federal restriction on states' prerogatives to determine availability requirements. Ralph Altman, a senior official of the Bureau of Employment Security in 1950, provides the most comprehensive published survey of the availability for work requirement and concludes that "determination of availability for work under American unemployment compensation laws is *exclusively a state function*." This conclusion is supported by numerous statements from the initial drafters and enforcers of the federal unemployment laws, including the President, legislators, the Committee on Economic Security, and the Social Security Board itself. *Additionally, legislation which would have injected a federal availability requirement into the unemployment laws was rejected by Congress.*

- **The states' adoption of numerous exceptions to their availability requirements with prior DOL approval demonstrates that states have the authority to enact these exceptions.**

There is ample precedent for states' authority, with DOL approval, to carve exceptions to their availability requirements. Even before federal law was amended to speak to the issue, 22 states exempted trainees from the availability requirement. Numerous states have at one time or another exempted workers who become disabled while unemployed from disqualification due to unavailability. Most importantly, employees on temporary lay-off need not be available for other jobs while on recall status. The proposed bill varies from these precedents in some ways, but none of the differences distinguishes their validity under federal law. The leave bill maintains the state's availability requirement and preserves the unemployment system's focus on involuntary unemployment, applying a genuine test of availability. DOL's approval of this bill would thus be entirely consistent with past practice.

- **We have addressed the concerns that DOL has raised in connection to the scope of the bill and its relation to existing recall statutes and have provided analogous examples under numerous state precedents.**

DOL has raised concerns about the scope of the bill and seeks to explore several distinctions between the Massachusetts bill and other recall statutes. We conclude that these concerns and distinctions, where they exist, do not vitiate the legality of the Massachusetts bill under the federal/state statutory scheme, as they do not affect the fundamental availability requirement nor Massachusetts' ability to create exceptions to that requirement. For example, DOL questions the distinction between an employer initiated layoff as opposed to a family leave taken by the employee. However, federal law does not limit unemployment compensation to only those cases where an employer initiates the layoff. Over one-third of all states, including Massachusetts, cover compelling, personal circumstances as nondisqualifying reasons for leaving work, and these reasons also constitute "good cause" for the refusal of otherwise suitable work.

These state laws demonstrate that it is well-established that leaving for family and medical reasons --- the same reasons that qualify employees under the proposed Massachusetts law for family and medical leave --- render the leaving "involuntary" or are not truly "initiated" by the employee. Consequently, the fundamental availability requirements remain intact.

- **Compelling policy considerations support deference to the right of states to expand UI eligibility under their availability rules without federal restraints.**

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

I. Introduction

The Massachusetts Legislature has introduced a bill that would provide unemployment insurance (UI) for no longer than 12 weeks to workers who are separated from their jobs for reasons that qualify for protection under family and medical leave laws. Similar legislation has been introduced in Maryland, Washington and Vermont, raising the issue of whether federal UI law imposes any obligations on the states that would interfere with their broad discretion to enact this UI legislation.

This memorandum seeks to advance the on-going dialogue with DOL that has been extremely valuable to the development and improvement of the proposed state laws. As a result of these communications, the legal issues have also been significantly clarified. The question now boils down to whether DOL has the authority to impose limitations on a state's eligibility requirements — in particular a state's determination whether an individual must always be "available" for work at the time she applies for benefits. Based on the research described below, we conclude that the Massachusetts bill is consistent in all respects with the intent of the federal law (allowing states' broad authority to expand UI eligibility) and with past precedents in state UI laws.

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II. Federal Law Grants States the Authority To Define Availability in Seeking to Expand UI Eligibility.

A. The Plain Wording Of The Applicable Federal Statutes Does Not Require States To Adopt Any Particular Availability Requirement.

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

B. The Early History Of The Unemployment Laws Demonstrates That Availability Requirements Were Intended To Be Defined Solely By The States.

Despite the absence of statutory language authorizing federal control over state laws, DOI suggests that a federal availability requirement can be implied from the overall structure of the statutes and their legislative history. However, a review of the legislative history of FUTA and the SSA and contemporaneous commentary by those responsible for enforcing the newly-enacted laws demonstrates that states were intended to possess complete discretion in defining their eligibility and disqualification requirements. Federal law was envisioned as providing only a floor on the coverage and amount of unemployment benefits a state could grant; it was never intended to create a ceiling limiting a state's ability to provide for its citizens under its unemployment laws.

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

"The Social Security Act and the federal unemployment tax provisions of the Internal Revenue Code, which prompted almost all the state unemployment compensation laws, make no provision for payment of benefits to claimants. Neither do they establish any eligibility requirements which claimants must satisfy. . . . [T]he only [provisions] that affect state laws and administration on availability problems are those which protect labor standards . . . and those which provide that all compensation must be paid through public employment offices or such other agencies as the Labor Department may approve. *The practical result is that determination of availability for work under American unemployment compensation laws is exclusively a state function.*" Ralph Altman, *Availability for Work* 74-5 (1950) (emphasis added).

1. Congress Expressly Rejected On Numerous Occasions The Imposition Of Specific Federal Definitions And Standards On State Eligibility And Disqualification Rules.

Notably, legislation imposing specific federal requirements on state unemployment laws was proposed and rejected on numerous occasions during the formative years of the unemployment scheme. Senator Woodrum proposed in 1939 a number of specific requirements in connection with new unemployment legislation that would constrain states and the federal government in their ability to grant unemployment benefits, including a requirement that an eligible worker must be available for and seeking work. See H.R.J. Res. 151, 76th Cong. (1939) (printed in 84 Cong. Rec. 1160 (1939)). Senator Murray proposed a bill in 1940 which would have amended the Social Security Act to require states to follow specific guidelines in making

determinations of whether work is suitable. See S. 3365, 76th Cong. (1940). Other proposals would have imposed varying specific requirements on state unemployment laws. See S. 2203, 76th Cong. (1939) (Byrne amendments); H. R. 7762, 76th Cong. (1940) (McCormack bill).

All of these proposals were rejected in favor of maintaining a system of minimal federal control over state eligibility standards. See Edwin E. Witte, *Development of Unemployment Compensation*, 55 Yale L.J. 21, 46-7 (1945). While the Woodrum proposal arose in the context of a Works Progress Administration appropriation, it is notable that a comparable availability requirement never made its way into the general federal unemployment laws. Since Congress expressly declined at the outset to limit states' discretion over the details of their unemployment laws, including the specific area of availability for work, it would be inappropriate for a federal agency to adopt a contrary view sixty years later. See *Johnson v. Mississippi*, 421 U.S. 213, 228 (1975) ("[t]he absence of any evidence or legislative history indicating that Congress intended to accomplish . . . what it has failed or refused to do directly through amendment . . . necessitates our considered rejection of the [asserted claim] in this case.").²

2. The Initial Drafters And Enforcers Of The Unemployment Laws Believed That States Alone Should Define Eligibility And Disqualification Requirements, Including Availability For Work.

The Social Security Board recognized early on that in constructing the federal-state unemployment scheme, Congress required only a limited number of specific standards to be satisfied for state unemployment laws to be approved, and that all of those standards ensured only that states provide adequate compensation. In its first annual report, the Board explained that "[t]he amount of assistance and practically all the conditions under which assistance is granted are determined by the States. In unemployment compensation the primary role of the Federal Government is to remove obstacles to State action." United States Social Security Board, *Annual Report* 8 (1936) (emphasis added). In a 1936 circular, the Board outlined the main features of the federal-state relationship in administering unemployment laws. Notably, in a section entitled "Essential Features of Unemployment Compensation," the Board never even hints at a federal requirement that states define availability to work in a particular manner. To the contrary, the Board goes on to conclude that "It is desirable that a State law should be at least as broad in its coverage as the Federal act. . . . The State may, of course, go further and adopt a

² There were also sound practical reasons why Congress would choose to leave the issue of availability for the states to decide. Although the Department's objection in the current controversy centers on a specific piece of proposed legislation, its interpretation necessarily entails a dramatic expansion in federal jurisdiction over state unemployment disputes. DOL argues that federal law imposes a requirement that individuals seeking unemployment compensation must be available for work in order to receive benefits. If valid, this rule applies not only to proposed legislative enactments but also to individual benefits determinations. The consequence is that a federal question potentially arises in any state unemployment dispute where availability for work is at issue. A federal question definitely arises in a case where a worker is erroneously deemed available for work, giving the U.S. Supreme Court jurisdiction over appeals from decisions of the Massachusetts Supreme Judicial Court on these issues. Absent an express statutory mandate, a federal agency should not adopt an interpretation of federal law which would inject federal courts into the review of state benefits determinations.

wider coverage . . . *This is a matter of policy for the State to decide.*" United States Social Security Board, *The Federal-State Program for Unemployment Compensation* 5, 9 (1936) (emphasis added).

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

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

The U.S. Supreme Court acknowledged the broad discretion enjoyed by states in enacting unemployment laws in one of its decisions upholding the constitutionality of the federal-state unemployment system. In *Steward Machinery Co. v. Davis*, 301 U.S. 548, 593 (1937), the Court found that "[a] wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books." Though the Court conceded that states may not "depart from those standards which in the judgment of Congress are to be ranked as fundamental," *id.* at 594, the standards deemed "fundamental" in this case were those explicitly codified by Congress.

State courts adopt the same position. In *Teledyne Columbia-Summerill Carnegie v. Unemployment Compensation Board of Review*, 634 A.2d 665 (Pa. Commw. Ct. 1993), the court upheld an order by the state unemployment compensation board of review determining that amounts received by employees in liquidation of pension benefits when a plant closed were not to be offset against unemployment benefits. In reaching this result, the court held that absent explicit federal definitions, states are free to define FUTA requirements as they see fit: "Beyond meeting these minimum standards, a state is free to design its unemployment compensation law and establish its own eligibility requirements. . . . [Federal statutes do not define] 'pension,' 'retirement pension,' or 'annuity,' and Employer does not cite any authority for the proposition that a state may not define these terms or that the Board's regulation is in direct conflict with

Section 3304(a)(15)." *Id.* at 669.

III. State Precedents Supporting the Massachusetts Bill Have Broadly Defined Availability For Work to Expand UI Eligibility.

Numerous states have enacted UI laws broadly defining their availability requirements, thus establishing ample precedent for the state family leave recall proposals. These state laws have been left undisturbed by DOL even where states enacted provisions eliminating their availability requirement in particular circumstances.

A. Recall.

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

B. Training.

States have also dramatically altered their availability requirements to extend benefits to individuals in approved training programs. Prior to 1976, FUTA did not contain its current provision prohibiting states from disqualifying otherwise eligible workers from unemployment eligibility on the basis of their participation in a vocational training program. *See id.* at 549-50. Nevertheless, by 1966, twenty-two states had enacted provisions exempting unemployed workers in training or retraining programs from availability requirements if otherwise eligible. *See*

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

⁴ *See* Ark. Stat. Ann. sec. 11-10-507 (3)(E); 19 Del. C. sec. 3314(3)(1997); MSA sec. 17.531 (1998), sec. 23(1)(a); R.S. Mo. sec. 288.040.1(2)(1997); N.M. Stat. Ann. sec. 51-1-5-A. (1993); ORC Ann. 4141.29 (1996); ARSD 47:06:04:11.

William Haber & Merrill G. Murray, *Unemployment Insurance in the American Economy* 114 (1966). These states chose this policy based on their view of "unemployment insurance as part of a comprehensive labor market program." *Id.*

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

C. Disability.

States are currently allowed to exempt disabled workers from availability requirements if the disability or illness arises after the worker applies for benefits.⁵ The only difference between these laws and the proposed Massachusetts legislation is that the proposed bill would exempt workers from the availability requirement at the time they apply for benefits. However, it is not clear why this difference should determine the legality of the state scheme under federal law. If states' abilities to define availability for work are constrained by federal law, then that constraint should presumably apply at any time the worker is receiving benefits. Under federal law, a state cannot provide benefits to a healthy worker who has become fully employed after applying for benefits; the law does not change merely because the worker has already applied for benefits. Similarly, if states may make disability and illness exceptions applicable after a worker applies for benefits, as DOL concedes they may, there is no appropriate basis for imposing a different standard at the benefits application stage.

D. Inverse Seniority Layoff.

Another relevant precedent in state law supporting the validity of the Massachusetts bill is the exemption that applies to workers who "choose" a layoff as authorized by a collective bargaining agreement. These laws, which exist in at least three states (Pennsylvania, Ohio and Michigan), typically apply where a collective bargaining agreement gives senior employees the option to choose a layoff and permits less senior employees to continue to work. Normally,

⁵ Notably, according to a study of utilization of leave under the federal Family and Medical Leave Act (FMLA) by the Commission on Family and Medical Leave, the major reason for leave-takers was the individual's own illness (59%) followed by 13.3% of all leave-takers where the individual left due to childbirth, adoption or placement of a foster child. These numbers were closely mirrored in non-covered worksites where 56.1% of all individuals left due to their own illness, and 14.7% left due to childbirth, adoption or foster child placement. See Commission on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 93 - 96 (1996).

these are used in temporary layoff situations, and they give workers input into which specific employees are going to be laid off in a particular layoff situation. The employer "initiates" the layoff and determines the overall number of employees laid off, but the employees' seniority system and individual choice determines which employees are laid off. The state statutes (and case law in selected states) exempt those workers who "choose" to be laid off in these situations from the "voluntary" quit disqualification. While not addressing the "availability" requirement per se, these state statutes make clear that not all layoffs can be neatly characterized as either employer or employee "initiated". As discussed below, the same is true in the case of workers taking family and medical leave.⁶

IV. Responses to DOL Questions Raised In Prior Correspondence

A number of concerns were raised in the letter from Grace Kilbane, Director of UIS, dated January 15, 1999, regarding the scope of the proposed bill and its relation to existing recall statutes. We will address each of these considerations in turn.

A. Query: For the purposes of a state's availability requirement, is there a relevant distinction between an employer initiated layoff as opposed to a family leave taken by the employee?⁷

⁶ There are several other relevant precedents worth noting. First, there is the deduction for retirement pay from UI that is required by federal law in specific circumstances. Although receipt of retirement pay while unemployed would appear to raise a question whether the individual is available for work, Congress focused instead on other objections. "Under these amendments, Congress appeared less interested in the retirement payment as a test of availability than with preventing duplicate payments attributable to the same employer." Gerald Hildebrand, *Federal Law Requirements for the Federal-State Unemployment Compensation System: Interpretation and Application*, 29 U.Mich.J.L. Ref. 527, 557 (1996). Second, DOL has authorized unemployed seasonal workers to refuse work that would interfere with their ability to return to their seasonal jobs. Department of Labor Manual of Precedent Decisions, AA 450.45© ("A seasonal worker who regularly works for one employer in one industry and who has definite prospects of recall to work may restrict the employment acceptable to him during the off-season to work which will permit him to return to his regular employment when the season begins."). Other examples that exist in Massachusetts and elsewhere include exemptions for acceptance of suitable work for workers receiving UI in work-sharing situations, the provisions allowing workers to recover UI on jury duty and refuse an offer of suitable work, and the part-time worker availability rules allowing workers to limit their availability to part-time rather than full-time work. For example, the Massachusetts statutory law provides that "[a]n otherwise eligible affected individual shall not be denied worksharing benefits for any week by reason of application of provisions relating to availability for work, active search for work or applying for or accepting suitable work with other than the worksharing employer. (Emphasis added). Massachusetts General Laws ch. 151A, §29D(h)(1). Under Massachusetts policy, the statutory provision which requires availability for work is deemed satisfied when an otherwise eligible claimant is summoned for jury duty during a period of unemployment. See Massachusetts Division of Employment Security, *Service Representative Handbook*, section 1039, Jury Duty (Rev. 10/96). Under recently promulgated Massachusetts regulations, various provisions are set forth as "conditions for limiting availability" to part-time employment which include a history of part-time work for "good cause" encompassing family and medical reasons. 430 Code of Massachusetts Regulations 4.42 - 4.45 (4/5/96).

⁷ This statement paraphrases DOL's letter, dated January 15, 1999, which specifically states: "[W]e would like your views on the distinctions between employees on temporary lay-off, where the employer initiates the

(continued...)

First, it is well established that federal law does not limit unemployment compensation only to cases where an employer terminates its relationship with an employee. There are countless examples of state laws deeming an employee's initiation of his separation from work involuntary under certain circumstances, expanding unemployment coverage beyond the category of workers laid off through no fault of their own. Over one-third of the states cover compelling personal circumstances requiring an individual to leave his or her job, and such circumstances are not limited to those directly connected with the employment. See Advisory Council on Unemployment Compensation, *Unemployment Insurance in the United States: Benefits, Financing, Coverage* 110-2 (1995). These laws, conceded to be valid, cover claimants who leave their jobs due to compelling family circumstances. Another twenty-three states have special provisions for employees who quit work due to an illness or disability not necessarily connected with the individual's employment. See United States Department of Labor, *Comparison of State Unemployment Insurance Laws* Table 401.1 (1996). Thus, an employee-initiated temporary leave should not automatically be invalid under federal law when employees in so many other circumstances are allowed to collect benefits despite their employers playing no role in their separation from work.

Furthermore, the distinction between layoffs initiated by an employer and those initiated by an employee is ambiguous at best. For example, as described above, several states have laws that specifically allow workers to choose to take a lay-off and still qualify for unemployment benefits, as occurs with many layoff schemes authorized by collective bargaining agreements. The cases on this issue also make the point that states have vast discretion to fashion different solutions to the same problem. Compare *Ford Motor Co. v. Ohio Bureau of Employment Services*, 571 N.E.2d 727, 729 (Ohio 1991) (holding that an employee who elects voluntary termination under a plan or policy adopted by the employer to reduce the number of employees due to a lack of work in the employer's overall work force is entitled to unemployment compensation) with *Goewert v. Anheuser Busch, Inc.*, 919 P.2d 106, 111 (Wash. 1996) (holding that early retirement, even after a 10 percent reduction-in-force announcement, constitutes a voluntary quit without cause). The *Ford* case illustrates that a quit is sometimes considered involuntary even where the employee accepts, and even formally initiates, the separation. This demonstrates further that whether an employer or employee initiates a layoff is not the *sine qua non* of an employee's eligibility under federal law for unemployment benefits.

Lastly, it is inappropriate to characterize family and medical leave as always being "initiated" by an employee. In fact, it is unfortunately quite common for employers to coerce workers into taking family leave. For example, this often occurs when pregnant women seek an accommodation to stay on their jobs during the course of their pregnancy rather than go on unpaid family leave. The employer then denies the accommodation and the worker is forced to

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unemployment and the employee must return to work upon recall or have his or her UC terminated, and those on family leave, where the individual initiates the unemployment and is unavailable to return to work until the leave ends."

take unpaid family leave or else lose her job. See, e.g., *Harvender v. Norton Co.*, 4 Wage & Hour Cas.2d (BNA) 560 (N.D.N.Y. 1997) (holding that there is no right under FMLA to bring an action against an employer for placing an eligible employee on leave in a case where the employer denied a pregnant worker an accommodation to avoid being exposed to chemicals during her pregnancy and instead placed her on 12 weeks unpaid FMLA leave which ended four months before her due date). Employees take family and medical leave in many, if not most, cases due to circumstances beyond their control. Allowing employees to receive unemployment compensation during such leaves is thus fully consistent with the goals of compensating involuntary unemployment.

B. Query: Under what circumstances is an employee on temporary lay-off with no available work and a definite recall date required to return to work pursuant to federal UI law, and are the employee's obligations under federal UI law any different when the leave is based on the FMLA?⁸

Here, it is necessary to distinguish between what states are permitted to do under federal UI law and what current state laws require under their recall statutes. As described above, many states provide that employees are exempt from work-search requirements if they are on temporary layoff and will be recalled within a certain period of time. In certain circumstances, the recall statutes also allow for the availability requirements to be waived. The rationale for such an exception parallels that justifying the proposed recall bill. See Olga S. Halsey, *Claimants Awaiting Recall - Their Special Problems of Availability and Suitability for Work*, Social Security Bulletin, Oct. 1946, at 13 (evaluating state unemployment laws deeming employees on recall to be unavailable for work and finding that "[t]he practical result for the claimant is a denial of benefits which places economic pressure on him to sever an employment relationship, perhaps of years' standing, which has proved satisfactory to both the worker and his employer."). Such employees clearly need not seek work from other employers during this period or accept an offer of work, even of a vastly better paying job, from another employer.

Despite these very broad state statutory limitations on the availability rules, the question is whether federal law still requires that the workers be available during their layoff to return to work with their existing employer. This question appears to presume that an obligation exists under federal law to require availability in all circumstances. We, of course, take issue with this premise, as described in Section II. Nonetheless, there are indeed precedents in state law allowing workers who refuse suitable work to continue receiving UI benefits. For example, while not specific to the recall situation, the state training laws described above exempted workers in approved training from having to accept an offer of suitable work. See, e.g., *Alaska Department of Labor v. Boucher*, 581 P.2d 660 (Alaska, 1978) (quoting Alaska's 1974 training

⁸ Specifically, the DOL letter dated January 15, 1999, states: "In the case of employer initiated lay-offs, it has always been the Department's position that the individual must be available to return to work with the employer, particularly if the lay-off ends earlier than assumed. We are not aware of any State which does not require this of the individual. There is no similar requirement in the family leave recall proposals, and in fact, the employer is prohibited from recalling the employee for a minimum period."

provision as exempting "workers attending a training or retraining course with the approval of the employment security division or because, while attending the course, he is not available for work or *refuses an offer of work.*" (Emphasis added). The Massachusetts bill, like the state training statutes, simply makes adjustments to its suitable work requirements as permitted by federal law.

The case of *U.S. Steel v. Unemployment. Compensation Bd. of Review*, 389 A.2d 249, 250 (Pa. Cmwlth. 1978), involved a collective bargaining agreement which also allowed the workers to turn down certain offers of suitable work while on recall. In *U.S. Steel*, the court found that a collective bargaining agreement which restricted the employer's ability to recall workers during their vacation period while on an indefinite recall did not disqualify the workers from receiving benefits. The court noted that although the employees were to be deemed available unless they turned down an offer of suitable work, the collective bargaining agreement precluded any offer of suitable work during their vacation period. In holding that the employer's argument that the claimants were "unavailable for suitable work" was not dispositive of the claimants' eligibility for benefits while receiving vacation pay, the Court relied on the "social purposes" of the state's unemployment law. The social purposes behind providing unemployment outweigh the fact that during the vacation period the employees are, in fact, available. 389 A. 2d at 252. Similarly, under the family leave provisions, the goal of partial wage replacement (for a limited set reasons and limited period of time) satisfies the availability criteria.

C. Query: For the purposes of determining availability, is there a relevant distinction between a leave required by law and a leave authorized by the employer?⁹

As the purpose of the Massachusetts legislation is to provide partial wage replacement for reasons that satisfy the criteria of the Family and Medical Leave Act, we believe that it is unnecessary to distinguish between statutorily required leave and employer-provided leave as the defining issue in both is the *reason* for the leave. This is certainly consistent with current Massachusetts unemployment law. Both statutory and case law provide that an individual does not leave employment for disqualifying reasons where the *reason* for leaving is for an "urgent, compelling, and necessitous nature." See Massachusetts General Laws, chapter 151A, § 25(e). It is well-established that this provision includes child care and family responsibilities. *Manias v. Director of Div. of Employment Sec.*, 445 N.E.2d 75 (Mass. 1983).

⁹ The DOL letter states: "We would also appreciate your thoughts on the distinctions between leaves required under family leave laws and leaves merely authorized by employers. Is it your assumption that the fact that the leave is granted under a leave law creates a statutory presumption of availability? If so, how does this carry over into cases where an employer authorizes leave without a statutory requirement to do so?"

D. Query: Does the proposed exemption for workers on family and medical leave effectively eliminate a genuine test of availability under Massachusetts UI law?¹⁰

Massachusetts currently applies a genuine test of availability, and the proposed bill does not interfere with such a test. Federal law permits states to make generalized determinations concerning eligibility disqualifications in the interests of efficiency and administration so long as the unemployment laws target involuntary unemployment. The training and disability precedents in the various states demonstrate that such determinations are acceptable. Massachusetts as well has exercised a great deal of latitude in this area, including adjustments to availability covering training, illness, temporary lay-offs, jury duty, and other selected circumstances.¹¹ Furthermore, the proposed legislation contains such an individualized test. Though the bill itself creates a statutory presumption of availability, this presumption only arises if a variety of individual factors specified in the relevant leave legislation is satisfied (i.e., a worker must qualify for reasons acceptable under the FMLA leave first, which entails an individualized determination of the worker's circumstances).

Finally, it is important to emphasize that the proposed leave bill does not eliminate the state's general availability for work requirement. It leaves the existing structure in place, adjusting it to allow benefits to be granted in particular situations and simply creating time-limited exceptions based on illness or disability and family circumstances.

E. Query: What does federal UI law say specifically about compensation for individuals who are "involuntarily unemployed", defined by DOL to include a "suitable work" requirement?¹²

We have explained and illustrated previously in this memorandum that states are free to define what constitutes "involuntary" unemployment and have adopted broad definitions in a variety of circumstances. The suggestion that federal law requires a suitable work standard in *all circumstances* is not supported by either an explicit statutory mandate or legislative history.

¹⁰ In response to a memorandum written in support of the proposed Vermont law, DOL wrote a letter dated July 17, 1997. The letter restates the memorandum's conclusion ("States have latitude to determine what constitutes availability for work") and continues as follows: "Although this is true, States must still have a genuine test of availability. The Vermont proposal eliminates any test for workers on family leave by substituting a conclusive statutory presumption of availability even where facts demonstrate the individual is unavailable. No examination of the individual's circumstances is made."

¹¹ See Massachusetts General Laws, chapter 151A, §§ 24(c), 30 waiving availability requirements for participation in an approved training program or due to illness; and note 4, *infra*.

¹² In its letter dated January 15, 1999, DOL stated: "Lastly, Federal UC law limits withdrawals from a State's unemployment fund to 'compensation' for 'unemployment.' (Sections 3304(a)(4) and 3306(h) of the Federal Unemployment Tax Act and Section 303(a)(5) of the Social Security Act). We believe the legislative history of the original Social Security Act is clear that only involuntary unemployment, that is, where no suitable employment is available, is to be compensated."

As required by the basic rules of statutory construction, it is necessary to rely primarily on the plain language of the statute to determine its legislative intent. The main provisions of the federal law relied on by DOL are Section 3304(a)(4) of FUTA, which states that "all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation," and Section 3306(h) defining "compensation" to mean "cash benefits payable to individuals with respect to unemployment." These limited statutory references to "unemployment" certainly do not rise to the level of a federal mandate preventing the states from waiving their suitable work requirements in selected circumstances. If anything, we believe these references to "unemployment" in the federal law support our position since it is conceded by DOL that states have the authority to define "unemployment" under state law.

Furthermore, it is notable that FUTA alludes to suitable work only once, in Section 3304(a)(5). Consistent with other aspects of federal UI law, Section 3304(a)(5) works to *prevent* states from denying compensation where no suitable work is available, again establishing a floor rather than a ceiling on state benefits. In addition, as discussed earlier, the Murray bill would have imposed specific standards for suitable work upon the states, but this bill was rejected, indicating congressional reluctance to dictate state policy in this field. Relying then on legislative history, DOL quotes from the draft state laws prepared by the Committee on Economic Security. However, as the Committee itself concluded, these provisions were absolutely never intended to constrain the states.¹³

Even if the federal law could be interpreted to impose a suitable work requirement on the states despite this limited statutory authority, nowhere has the case been made that the states must also require all workers to accept suitable work in all circumstances. To be clear, the Massachusetts bill should not be interpreted by DOL to eliminate the state's "suitable work" requirement. Therefore, we believe it is entirely consistent with DOL's interpretation of the federal law. In this sense, the Massachusetts bill is no different from the many other examples

¹³ In its letter to Senator Patrick Leahy, dated July 17, 1997, DOL references provisions of the Committee on Economic Security's original draft of a state unemployment statute as if they were substantive limitations on state legislative discretion. This draft was never enacted. Moreover, even if the draft had been enacted, as the Committee itself points out, these provisions were never intended to constrain the states:

"This draft is merely suggestive and is intended to present some of the various alternatives that may be considered in the drafting of the State unemployment compensation acts. Therefore, it cannot properly be termed a 'model' bill or even a 'recommended' bill. This is in keeping with the policy of the Social Security Board of recognizing that it is the final responsibility and the right of each state to determine for itself just what type of legislation it desires and how it shall be drafted." United States Social Security Board, *Draft Bills for State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types 1* (1937) (quoted in Rubin at 23-4).

Although most states enacted the provisions of the draft bill, they did not do so because they thought the draft was binding. Rather, the enactment of the federal unemployment legislation was such that states had to move extremely quickly and had no alternative but to adopt the federal government's suggestions to assure compliance within the required time. See Raymond C. Atkinson, *The Federal Role in Unemployment Compensation Administration* 30 (1941).

of state legislation that define the contours of what is "involuntary unemployment" and whether an individual must accept all suitable work.

In fact, in Massachusetts as in many other states, the concept of suitability already covers most FMLA situations. For example, Massachusetts law allows a worker to refuse an offer of work for "good cause", which is defined to cover appropriate family circumstances.¹⁴ And the Massachusetts law permits workers to refuse an offer of work that does not meet the State's high standards of "health, safety and morals," which is entirely consistent with the concept of partial wage replacement for individuals on family and medical leave.¹⁵

As described above, there are also selected state laws that allow workers to refuse *any* offer of suitable work. For example, in some states, a worker on temporary lay-off with a definite date of recall has the right to reject any offer of work from another employer, even the most generous offer of employment. The state training exemptions in effect before the 1976 Amendments also allowed workers in approved training to refuse all suitable work. Here too, the Massachusetts bill would still retain its general requirement that UI claimants accept suitable work. In choosing where to draw the line to expand eligibility for a select group of workers, the Massachusetts Legislature would thus be exercising its clear authority under the federal-state UI scheme.

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

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

State discretion over availability standards is appropriate because states have different economic structures, budget surpluses or deficits, and job markets, and they should thus be allowed latitude to design unemployment laws which best serve their individual needs. A state with an unemployment funds surplus and many workers left uncovered when taking leave should be able to decide what scope of unemployment compensation coverage is appropriate. Thus, while DOL should continue to vigilantly guard against new state interpretations of availability

¹⁴ *Conlon v. Director of Div of Employment Sec.*, 413 N.E.2d 727 (Mass. 1980) (holding that good cause for the refusal of "suitable work" under Massachusetts law includes the refusal of work to the day shift in order to permit a claimant to fulfill her responsibilities to her children.)

¹⁵ See Massachusetts General Laws chapter 151A, §25(c); see also: *Carney Hospital v. Director of the Div of Employment Sec.*, 414 N.E. 2d 1007 (Mass. 1981) (holding as sufficient to overturn a disqualification of benefits that an employee had a reasonable belief that a severe skin infection was caused by the work environment; the claimant did not have to prove that this was in fact the case.)

laws that lower the floor,¹⁶ expansions of UI eligibility should be encouraged as recognized by the Social Security Board. United States Social Security Board, *The Federal-State Program for Unemployment Compensation* 5, 9 (1936) ("It is desirable that a State law should be at least as broad in its coverage as the Federal act . . . The State may, of course, go further and adopt a wider coverage.")¹⁷

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

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

Massachusetts unemployment compensation law, which has as its statutory purpose "to lighten the burden on the worker and his family," exemplifies the beneficial result of permitting state experimentation in order to best serve the needs of unemployed workers. Massachusetts General Laws, chapter 151A, §74. Not only does Massachusetts law provide for the longest duration of benefits (30 weeks) and one of the most generous amounts (currently \$402 a week, plus a potential addition of \$200 in dependency allowance), it has long provided benefits for

¹⁶ See, e.g., Letter from Larry Heasty, Regional Director, U.S. Department of Labor, Employment Services and Unemployment Service to Videna Crosley, Director, State of Oregon, Employment Department, dated September 25, 1998 (correspondence discussing the legality of restrictions on UI under the state's JOBS Plus program); Unemployment Insurance Program Letter 41-98, dated August 17, 1998 (describing the minimum federal standards under which a claimant shall be denied UI for refusing to accept new work under Section 304(a)(5)(B)).

¹⁷ The Social Security Board held this view during the formative years of unemployment legislation. In its first annual report, the Board noted that "[t]he several State laws reflect the needs of a particular State, the manner of administering other labor laws within a State, the character of State government, and the demands of local public opinion." United States Social Security Board, *Annual Report* 44 (1936). That same year, the Board also explained that "[t]he State may enact the type of law which it judges best designed for the local conditions within the State." United States Social Security Board, *Functions and Progress of the Social Security Board* 36 (1936).

leaving for non-work connected reasons, including domestic responsibilities. Individuals are not only exempt from availability requirements while participating in approved training, but up to an additional eighteen times the weekly benefit amount are available for continued participation in training. Massachusetts General Laws, chapter 151A, § 30(c).

Although many states have closed offices for intake of claims, recently enacted state law requires that regional offices remain open and that multilingual orientations and forms are provided to facilitate access to newcomers. Massachusetts General Laws, c. 151A, §62A. In addition, interpreters are provided at no cost to claimants for all unemployment hearings concerning eligibility for benefits. Eligibility and higher benefits for low-wage workers is assured by both requiring a movable base period, and by including the most recent earnings in the calculation of the weekly benefit amount if the result is a 10% or greater amount. See Massachusetts General Laws, chapter 151A, §§ 1(a), 24(b), 25(e), 30. Benefits are provided to workers who reduce hours to preserve jobs through worksharing¹⁸ and benefits are also provided to workers who reduce their hours because of new or worsening disabilities. Massachusetts General Laws, chapter 151A, §29D; 430 Code of Massachusetts Regulations 4.45 (4/5/96).

Massachusetts is also the only state to provide health insurance benefits for unemployed workers and their families through a modest tax on employers. Massachusetts General Laws, chapter 151A, § 14G(j). Although the medical security plan is paid for out of a separate trust fund, it is administered by the Massachusetts Division of Employment Security as a needs based program of COBRA continuation benefits or direct coverage available to those families with an unemployed worker whose income is 400% or less of the federal poverty guidelines. And most recently, a portion of the employer tax was diverted to provide incumbent worker training targeted to low-wage, low-skilled workers. Massachusetts General Laws chapter 29, § 2RR; 430 CMR § 8.01 *et seq.* These numerous provisions, like the proposed benefits for family and medical leave further the purpose of the Massachusetts law to benefit "the worker and his family."

Experimental programmatic additions to the Massachusetts unemployment scheme are possible due to the solvency of the Massachusetts unemployment trust fund. Currently, the Massachusetts Trust Fund has a balance of \$1.694 billion. According to John King, Deputy Director of the Massachusetts Division of Employment and Training, this balance "represents far and away the largest balance the Fund has ever attained. Reserves are now large enough, even after excluding all anticipated 1999 contribution income, to pay benefits for twenty-nine months at current levels of unemployment and for more than one year at a severe recessionary level."¹⁹ This is precisely the time for the state to expand its efforts to help workers during times of difficulty. The trust fund is solvent, yet at the same time, there are sobering statistics that the

¹⁸ The administration is currently proposing providing lump sum unemployment benefits to individuals seeking self-employment. See Massachusetts House Bill No. 590 (filed 12/2/98).

¹⁹ Letter to Monica Halas, Greater Boston Legal Services, from John A. King, Deputy Director of Massachusetts Division of Employment and Training dated February 17, 1999.

Massachusetts boom economy has not reached all its citizens, particularly low wage workers. Added to this fact is the impact of the state's two-year time limit on welfare which means that many working poor heads of households will no longer be able to rely on public assistance when they are forced to take an unpaid leave. All of these factors, unique to the state, are best resolved at the state level where the needs of workers can be evaluated in the context of the particular state's economic condition.

The case for experimentation is particularly strong as applied to the proposed recall bill. The FMLA is a fairly recent federal enactment, and even more recent are findings that the FMLA's benefits are not enjoyed by a substantial number of the citizens the Act targets.²⁰ The proposed Massachusetts bill is an ideal opportunity to test a creative and innovative means for implementing the letter and spirit of the federal mandate. Just as Massachusetts was on the cutting edge as the first state to consider unemployment legislation in 1916, its willingness to consider such a bold modification constitutes exactly the type of experimentation that the federal-state scheme is designed to encourage.

B. The Proposed Legislation Furthers Important Federal Policies And Promotes The Exercise Of Federal Rights.

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

²⁰ Other states are also attempting to pick up where the FMLA left off. For example, under proposed legislation introduced in Vermont, individuals who are eligible for leave under Vermont state law, as well as individuals who work for smaller employers who are not required to give leave who intend to return to employment within the timeframe of the leave are eligible for unemployment benefits. See Vermont Senate Bill 179. The statement of purpose which addresses the critical need to provide unemployment benefits for family and medical leave provides:

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

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

and less hardship on those separated from work when necessary to care for themselves or their families.

Furthermore, any doubts as to whether the proposed recall bill complies with federal law should be resolved in favor of the legislation's validity since the bill facilitates the exercise of federally-created rights. The bill is premised on findings that most workers are unable to take advantage of leave available under FMLA since it is currently unpaid and since it applies only to companies of 50 employees or more (a concern which the administration has most recently highlighted). The bill does not create an impediment to any federal right; to the contrary, it removes an obstacle to its exercise, by providing limited compensation to allow medium and low income workers to be able to enjoy family and medical leave as much as higher-income workers. Congress apparently contemplated such state legislation when it included a non-preemption provision in the FMLA. See 29 U.S.C. § 2651 (expressly permitting states to provide more protective family and medical leave guarantees, but not less, than that provided by FMLA).

A bipartisan congressional commission reached the same conclusion. According to the Commission on Family and Medical Leave, established by Congress to study the impact of the FMLA, the major reason why employees in FMLA-covered businesses do not take FMLA leave is that they cannot afford to do so. To make it possible for such workers to take needed leave, the Commission recommended that consideration be given to a uniform system of wage replacement. Specifically, the Commission suggested that states extend unemployment compensation qualifications to employees on family and medical leave. See Commission on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 199 (1996).²¹

Finally, the approach to availability that we suggest is not without precedent, as other states have carved out similar exceptions based on identical policy considerations. For example, in *Missouri Division of Employment Security v. Jones*, 679 S.W.2d 413, 415 (Mo. App. Ct. 1984), the claimant conceded that she was unable to work for a week due to the sickness and death of her mother. However, the court nonetheless awarded benefits, explaining that "[t]he meaning of 'available for work' varies, depending on the circumstances of each case," and holding that the availability requirement "do[es] not apply when a claimant is not available for work due to an unfortunate family emergency beyond her control. Any other result would be inconsistent with the policy of the Missouri Employment Security Law . . ." *Id.*

²¹ Specifically, the Commission recommended that "States should consider voluntarily extending unemployment compensation qualifications to employees on family and medical leave . . ." Commission on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 199 (1996). In its letter to Senator Leahy, dated July 17, 1997, DOL narrowly interprets the Commission's statement to cover only those situations in which a worker takes family and medical leave but remains available to accept work and where the individual quits work for family or medical circumstances (i.e., the situation where an individual is most likely separated from the job and is no longer eligible for FMLA leave).

VI. Conclusion

Based on the research described above, we conclude that the Massachusetts bill is consistent in all respects with the broad discretion to fashion state laws guaranteed under federal UI law and with past precedents in state UI laws. We also believe that the state family leave bills are consistent with DOL's interpretation of the federal UI law. The proposed laws retain a genuine test of availability, as required by DOL, but allow for exceptions in particular circumstances just as the states have routinely done in other areas of UI eligibility. We therefore look forward to a continuation of the dialogue, informed by this most recent research, to address DOL's remaining concerns and to modify the Massachusetts proposal if necessary.

July 8, 1999

Dear Friend of Family and Medical Leave:

We are writing to invite you to participate in the National Partnership's Campaign for Family leave Income, our exciting new initiative to make family and medical leave more affordable and accessible for America's working families. As you know, during the six and a half years since the Family and Medical Leave Act was enacted, job-protected family and medical leave has helped millions of Americans fulfill their work and family responsibilities. Yet too many families still cannot take advantage of family and medical leave because they cannot afford to take unpaid leave. In fact, as you may be aware, the bipartisan Family Leave Commission found that nearly two-thirds of employees who needed but did not take leave in 1994-95 cited lost wages as the reason why they did not. When employees did take FMLA leave, the lack of wage replacement often resulted in significant financial hardship, forcing nine percent of all leave-takers, and 12 percent of women leave-takers, onto public assistance.

To address this serious problem, the National Partnership for Women & Families recently launched the **Campaign for Family Leave Income** -- the first-ever national campaign to provide income during family and medical leave. This Campaign will build upon creative solutions to the problem of unpaid leave that have already begun to emerge in many states across the nation, including California, Iowa, Maryland, Massachusetts, Minnesota, New Jersey, New York, Vermont, and Washington. For instance, advocates and policymakers in several of these states have proposed *family leave insurance* -- expanding unemployment compensation or disability insurance to provide partial wages during periods of family and medical leave. This approach has the support of an overwhelming majority of American women and men. Other innovative approaches might include covering family leave under private disability insurance programs, creating subsidies for new parents who take time off, or offering tax credits to make family leave more affordable.

The goal of our Campaign is to facilitate and catalyze family leave income efforts both in the states and at the federal level. We laid the foundation for the Campaign when we convened an invitational meeting of state legislators, advocates, and researchers last December to brainstorm about strategies for promoting family leave insurance during the 1999 state legislative sessions. Building on the success of that meeting, our Campaign is designed to:

- link state and national networks of advocates, policymakers, and researchers;
- coordinate multidisciplinary research on how to provide income during family leave and the social and economic impacts of doing so;
- disseminate information about the need for family-leave income and possible solutions to that need; and
- advocate for supportive policies at all levels of government.



CAMPAIGN FOR FAMILY LEAVE INCOME

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

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

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

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

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

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

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

AMERICANS SUPPORT FAMILY LEAVE INSURANCE

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

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

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

Findings: Large and consistent majorities FAVOR family leave insurance, including:

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

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

National Partnership for Women & Families

FAMILY LEAVE INCOME CAMPAIGN ADVISORY COMMITTEE

(in formation)

Affiliations listed for purposes of identification only.

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Vermont Senate

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Ann Mosle

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Hon. Patty Murray

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Child Care Action Campaign

Hon. Lynn Woolsey

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*Department of Psychology,
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Nancy Zirkin

*American Association of University
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6/24/99

URGENT CALL TO ACTION

On May 23, 1999, President Clinton announced that he was directing the U.S. Labor Department to issue regulations clarifying that states could offer unemployment benefits to employees taking leave to care for newborn or newly adopted children. The President's directive has revitalized existing family leave income efforts and is generating new interest in family leave income legislation. At the same time, however, opponents have been very vocal in criticizing this use of unemployment insurance. **Now it's up to us to make our voices heard in support of the President's directive.**

Here's what you can do to make the Administration aware of your support: Write letters of support to President Clinton and Labor Department Secretary Alexis Herman, and urge your members, supporters, friends, and family to send letters of support as well. Please feel free to use the sample letters we've included with our "Call to Action," or refer to our web site at **www.nationalpartnership.org** and click on "Support the President's call for family leave to be more affordable."

Your support is essential in encouraging the Administration to continue helping states to provide family leave income.

For more information, please contact the National Partnership for Women & Families, 1875 Connecticut Avenue, NW, Suite 710, Washington, DC 20009, (202) 986-2600, or refer to the National Partnership's web site at www.nationalpartnership.org.

Show your support for the President's recent directive to the Secretary of Labor on family leave by sending the following two letters to the President and Secretary Herman:

1. Thank You Letter to President Clinton
e-mail address: president@whitehouse.gov

President William Jefferson Clinton
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear President Clinton:

I write to praise your recent directive to the Secretary of Labor to issue a rule to enable states to offer unemployment insurance to employees who are taking family leave. This is a forward-thinking initiative that supports innovative approaches to the problem of people being unable to afford to take family leave even when their families need them most.

A large majority of Americans –79% –support this approach. And, several states are already considering using unemployment insurance to cover family leave.

Providing family leave income through state unemployment insurance systems makes good common sense. By spreading the risk across the entire workforce, employers would pay only a fraction of the cost of paid leave: in Massachusetts, a mere \$1.25 per employee per week. In fact, most states have surpluses in their unemployment funds; in Massachusetts, for example, the surplus is anticipated to be enough to cover the entire cost of adding family and medical leave, with no additional cost to employers at all. And because state unemployment systems are already in place, administrative costs would be negligible. Businesses already comply with both unemployment laws and the Family and Medical Leave Act (FMLA), and research shows that meeting FMLA requirements has cost little or nothing for the overwhelming majority of employers.

Too many Americans simply cannot afford to take time off when their families need them most. According to the bipartisan Family Leave Commission, nearly one in ten employees who takes family or medical leave is forced onto public assistance while on leave. As a society, we must find ways to help people care for their families and keep their jobs. Compared to higher welfare, health care, and nursing home costs, not to mention lower productivity and higher turnover for employers, it is a small price to pay.

Thank you for showing your commitment to women and families through this important initiative.

Sincerely,

[YOUR NAME] [CITY, STATE]



National Partnership for Women & Families

Kathleen Duffus
Boston, MA

**FAMILY LEAVE
-- FATHER WITH A SERIOUS HEALTH CONDITION**

According to Kathleen Duffus:

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

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

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

Although Ms. Duffus is grateful that her vacation time allowed her to care for her father, and also that her company gave her some flexibility, she feels that if paid family and medical leave had been available to her, it would have allowed her to take better care of both herself and her father.

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

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

Withdrawal/Redaction Marker

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

Clinton Presidential Records
Domestic Policy Council
Ann O'Leary
OA/Box Number: 19580

FOLDER TITLE:

Paid Parental Leave [Folder 1] [2]

2013-0436-S

rc1306

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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

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

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

Clinton Presidential Records
Domestic Policy Council
Ann O'Leary
QA/Box Number: 19580

FOLDER TITLE:

Paid Parental Leave [Folder 1] [2]

2013-0436-S

rc1306

RESTRICTION CODES

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

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STATE FAMILY LEAVE INCOME INITIATIVES: *Making Family Leave More Affordable*

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

- ◆ Most Americans – fully 82% of women and 75% of men – support such “family leave insurance” proposals.*

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

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

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

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

* National Partnership for Women & Families, *Family Matters: A National Survey of Women and Men*, 1998.

** Commission on Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies*, 1996.

MINNESOTA

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

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

NEW JERSEY

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

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

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

NEW YORK

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

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

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

VERMONT

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

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

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

- more -

CAMPAIGN FOR FAMILY LEAVE INCOME

National Partnership for Women & Families

1875 Connecticut Avenue, NW, Suite 710

Washington, DC 20009

202/986-2600 (phone)

202/986-2539 (fax)

I am interested in supporting the Campaign for Family Leave Income.

Please check all that apply:

- Please add me to your mailing list for updates on the Campaign. I understand that I will generally receive updates by e-mail if I list my e-mail address below.
- I would like you to put me in contact with other people in my state who are working on family leave income initiatives.
- I would like to start a family leave income initiative in my state.
- I have needed paid leave, or know someone who did or does, and would like someone from the National Partnership to contact me.

Organization:

Name:

Address:

Phone:

E-mail:

Fax:

Notification of key stakeholders on UI-FMLA announcement

I. Advance Notification by White House

Senator Edward Kennedy -- Massachusetts is one of 4 states with pending legislation. The Senator has written to the Secretary on the issue and staff (Michael Myers) has followed this issue aggressively.

Senator Chris Dodd -- Served on Family and Medical Leave Commission which recommended use of UI for paid leave; co-signed Kennedy letter to Secretary Herman.

Senator Patrick Leahy -- Has supported VT legislation in past two legislative sessions; has written to Secretaries Reich and Herman; previous DOL letter raised conformity issues and suggested that the State use the separate fund method.

Senator Patty Murray -- Has also written on this subject.

Leadership -- courtesy calls to Senator Daschle and Rep. Gephardt are also recommended.

Labor -- Gerry Shea of the AFL-CIO

Women's groups -- Judith Lichtman of the National Partnership for Women and Families.

NOTE: The likely reaction from Senator Kennedy and other advocates will be twofold:

- 1) Policy does not go as far as they would have liked (States could not adopt pending legislation and must await DOL regulations, which would also limit the scope of the experiment.)
- 2) They had expected to be consulted on the range of options prior to a policy announcement.

II. Advance Notification by DOL

Rep. Nancy Johnson -- Secretary Herman has an appointment with the Ways & Means Human Resources Subcommittee Chair next week on the issue of the proposed Welfare-to-Work reauthorization, and significant good will could be lost if a heads-up to staff is not provided. Ways & Means staffer Ron Haskins, who has advocated *strengthening the work requirements in UI* will likely oppose this policy, especially given the opposition of employer groups.

Rep. Ben Cardin -- Staff call also recommended. Not only is he the subcommittee ranking minority member, but Maryland is one of the states where legislation has been filed and reaction from parties on both sides of the issue is likely to be swift. We do not know if he has taken a position on the state legislation.

III. Monday Follow-up by DOL

Remaining authorizers; key members: Senators Roth and Moynihan; Reps Levin and English (sponsors of Administration UI Reform bill)

State groups -- Interstate Conference of Employment Security Agencies (ICESA) and National Governors Association (NGA) should be called; new policy will shift the pressure to the States.

Business/Employer Organizations -- UWC has been spearheading a letter-writing campaign against a change in policy. Significant co-signers have been: US Chamber of Commerce, NFIB and NAM.

Prepared 5/21/99

Paid Leave Options

A working group developed the following options in for Kitty Higgins in March 1998, and recommended that the Department explore the first three options:

1. Support state funding for R&D projects to develop innovative paid leave policies.
2. Paid Parental Leave Commission to conduct research necessary to assess existing paid leave proposals and develop additional options if appropriate.

Convene White House "best practices" conference to highlight existing paid leave strategies.

3. Ask ERISA Advisory Council working group to study utilization of benefits practices -- for example, disability insurance plans, savings plans and/or cafeteria plans -- to provide wage replacement without jeopardizing retirement savings.
4. Use state unemployment compensation programs to provide partial wage replacement to parental leave-takers. ("Vermont proposal")
5. Create state wage replacement system for new parents, administered by UI systems but funded from general revenue or new payroll tax.
6. Encourage expansion of state Temporary Disability Insurance (TDI) programs as models for paid leave. (Currently used by 5 states -- CA, HI, NJ, NY, RI -- and PR.). Fund state demonstration project.
7. Create federal wage replacement system for "new parent" leave, funded from federal general revenue. (This is the idea being explored by the DPC.)
8. Work with Treasury to develop tax code changes to assist working parents who take leave to care for children.

DRAFT 11/4/98

Impact of Tying Paid Leave Eligibility to UI Eligibility Requirements

- **UI Eligibility.** UI eligibility requirements vary from state to state, but in general the applicant must have a minimum amount of earnings (which also varies from state to state) in the first four of the previous five quarters (the base period), and have earnings of a specific amount in one of those quarters (the high quarter).

So, for example, in AZ an applicant would have to have earned \$1000 in the high quarter and \$1500 in the base period. Since s/he already has \$1000 from the high quarter, s/he actually needs only another \$500 from the remaining quarters in the base period. Depending on State law, that \$500 must come from one quarter or could be distributed among the three remaining quarters. (Thus, the applicant must have worked in the base period, but could have had earnings – that is, worked – in only two quarters.)

- **Weak workforce attachment.** Thus under UI workers need only a very minimal connection to the workforce to qualify for benefits – and the same would be true for paid leave benefits if we track the UI eligibility requirements. This is inconsistent with the concept that the paid leave proposal is intended to be a wage replacement benefit for workers with a demonstrated connection to the workforce.
- **Expanded eligibility pool.** Using UI eligibility to determine paid leave eligibility, instead of requiring a 52-week workforce attachment, would increase the number of eligible applicants as compared to the current proposal, thus raising the cost of the program.
- **Certain workers excluded.** If we track UI eligibility exactly, then workers currently outside the UI system would also be excluded from receiving a paid leave benefit: for example, self-employed workers, independent contractors, farm workers. (Adjusting eligibility to include non-UI covered worker would greatly increase administrative costs.)
- **Administrative Cost.** Note that even if we track UI eligibility requirements there will still be a very significant administrative cost involved in asking UI to implement a paid leave program. Given that the cost would likely vary by state, the estimates given are almost certainly too low.

P. 02

09:22

NOV-05-1998

DRAFT				
FMLA PAID LEAVE OPTION: COST ESTIMATES	(1)	(2)	(3)	(4)
	all take 4 wks	all take 6 wks	all take 8 wks	all take 12 wks
No. of women w/ youngest child < 1 year old (1997 CPS)	3,170,000	3,170,000	3,170,000	3,170,000
Est. of the no. of these women in the labor force* (57.9% LFPR of all women w/youngest child less 1 year old)	1,835,430	1,835,430	1,835,430	1,835,430
Workforce attachment requirement **				
a. 35% ineligible	1,193,030	1,193,030	1,193,030	1,193,030
b. 10% ineligible	1,651,887	1,651,887	1,651,887	1,651,887
Assume 11 percent would not take time off ***				
a. 35% ineligible	1,061,796	1,061,796	1,061,796	1,061,796
b. 10% ineligible	1,470,179	1,470,179	1,470,179	1,470,179
Income requirement:	Cost = \$200 x (# of weeks) x 1/2 (# of persons taking leave)			
Est. cost of serving families below the median****				
a. 35% ineligible	\$424,718,502	\$637,077,753	\$849,437,004	\$1,274,155,506
b. 10% ineligible	\$588,071,772	\$882,107,658	\$1,176,143,544	\$1,764,215,316
ADD'L ADMINISTRATIVE COSTS*****				
1st year (start-up + change in base yr)	\$113 million	\$113 million	\$113 million	\$113 million
annual operating costs	\$162-193 million	\$162-193 million	\$162-193 million	\$162-193 million
Each scenario assumes all leave takers take full amount of paid leave				
Includes job seekers as well as employed				
*Based on 2/98 CPS tenure data for women 16 to 44 years of age	35%	were on the job for 1 year or less		
and a guesstimate of the percent of women who would fail the UI eligibility rules				
** Data from FMLA Commission: total leave takers for care of newborn/adopted/foster as percent of leave takers + leave needers				
Maybe too high of an estimate given the availability of paid leave.				
*** 1996 median income of primary families with children less than age 3 was \$36,626				
**** Cost would be determined by States and could be considerably higher				

Name	Dept	Phone	Fax
Chuck Marr	NEC	65364	62223
BERT HUANG	CEA	55618	56853
Debra Bond	OMB	395-3262	395-1596
LARRY MATLACK	OMB	395-3262	" "
~~Carol Rott~~	OMB	395-3262	" "
Gus Fancher	Treasury	622-0714	622-1294
Jennifer Friedman	OMB	395-7763	395-8851
Lisa Stuart	DOL	219-5108	219-4902
Kathy Curran	DOL/WH	693-0743	~~219-4~~
Barbara Bingham	DOL/OASD	219-6036	219-9214
John R. Fraser	USDOL/WH	693-0051	219-4753
CORDELIA REIMERS	CEA	395-6982	395-6853
Jennifer Klein	DPC	456-2597	6-2828
Emil Parker	HHS/ACF	401-6947	401-5770

Recommendations:
TO COME

___ INSTRUCT DOL TO ISSUE REVISED PROGRAM GUIDANCE

___ INSTRUCT DOL TO PROMULGATE REGULATIONS

___ INSTRUCT DOL TO DEVELOP MODEL LEGISLATION FOR STATES

___ LET'S DISCUSS

DRAFT OPTIONS MEMORANDUM

May 20, 1999

The purpose of this memorandum is to outline non-legislative options for action to enable States on a voluntary basis to use their Unemployment Insurance systems to provide benefits to workers on FMLA-covered leave. This year, four States with surpluses in their UI trust funds – Massachusetts, Vermont, Maryland, and Washington – had bills introduced in their State legislatures to use Unemployment Insurance (UI) to pay individuals on some form of FMLA-covered leave. Three of the four States, anticipating conformity problems, have asked for comment from the Department of Labor (DOL). While many question the prospects of State legislative efforts, DOL has been pressured from Senators Kennedy, Dodd, Leahy, and Murray, the AFL-CIO, and women's groups to allow States this flexibility; business groups have weighed in against opening up UI for this purpose.

The DPC has led a policy process to explore what responsible action the Administration could take to promote this approach, while also protecting the integrity of the UI system and preserving DOL's authority to guard against ill-advised changes that States might propose (such as restricting benefits).

Background

States have flexibility in designing and running their own UI systems. With some variation in implementation, the States determine UI eligibility with three general tests: (1) involuntary separation from work; (2) ongoing work search; and (3) availability for suitable work. Because DOL does not interpret federal law as setting specific requirements for the first two tests, States are free to carve exceptions as they see fit (*e.g.*, claimants who are going to be recalled to their old employer need not seek work; claimants may quit work if they have good personal cause such as illness; temporary ill claimants need not seek work). However, DOL has long interpreted federal law as mandating a specific "availability" requirement, *i.e.* workers have to be able and available for work to claim benefits. DOL has used this interpretation of the same Federal law provisions to wall off regressive proposals by States to limit benefits. DOL could revise its policy to address FMLA by constructing a rationale that asserts that the UI availability requirement is met during FMLA-covered leave. States would then have the option of providing UI benefits to this new category of claimants, through some change to State law. This is, however, not a simple and straightforward exercise.

Taking a non-legislative step to advance paid FMLA-protected leave for American workers would be a bold way to enable workers to spend more time with their families in important times – to care for a newborn or adopted child, to attend to their own serious health needs, or to care for a seriously ill parent, child or spouse. The 1996 FMLA Study, *A Workable Balance*, found that 40 percent of leave-takers report that they cut their leave short due to lost wages, and 64 percent of respondents who did not take leave when needed (3.4 percent of respondents) cite cost as a barrier. Furthermore, the study found that lower-skilled, poorer workers are far less likely to have any wage replacement for FMLA leave; for instance, hourly employees, who are more likely to have lower incomes and lower levels of education, are four times as likely as salaried

leave-takers to report receiving no pay during their leaves. And, most of the wage replacement that workers do report for their FMLA leave is in the form of sick, personal, or vacation pay.

Proper design of a State system to provide these new benefits would be critical. For instance, how FMLA leave-takers would be accounted for in the count of initial claims (a leading economic indicator) is an issue that must be considered. Also, while currently most UI tax collection is “experience rated” (meaning that employers whose workers claim UI benefits pay into the system proportionately), it would be important that the cost of this new policy is borne as broadly as possible to guard against unintended labor force repercussions on women of child-bearing age. Other program design issues would need to address the substitution effect, whereby workers or employers might try to shift from currently paid leave to the new UI-FMLA program. In addition, there would be important implications for the UI program, such as: the potential for opening up UI to other people “not available for work” (e.g., those on sick leave or sabbaticals), moves to means test the program, and generally reducing the control we have over the program.

On the policy and budget front, some might see this as an attempt to circumvent the legislative process in order to expand FMLA coverage, and it could result in bill riders (arguably a good fight to have). The budget costs are uncertain, but potentially are large in the near term, if States took this option (fully implemented in all States, costs could range from \$2 to \$9 billion annually, compared to about \$23 billion nationwide in UI annually). Several estimates of the effect of the Massachusetts proposal put it in the \$200 million range. However, over the longer term, State UI taxes would be adjusted upwards to respond to the increased benefits so the program would be deficit neutral. These non-legislative approaches will also be subject to congressional review under the Small Business Regulatory Enforcement Fairness Act prior to going into effect.

Options for non-legislative action

OPTION ONE: Instruct DOL to Issue New Program Guidance. DOL would issue a program letter that revises DOL’s position on the UI availability requirement by deeming the requirement met for FMLA-covered leave. The guidance would cabin as closely as possible the future ability of States to make other policy modifications to the availability requirement.

PROS:

- Represents the fastest way to allow States the option of providing UI benefits to FMLA-covered leave takers.
- Carefully crafted guidance could interpret narrowly the DOL policy shift and could assert DOL’s authority to reject future applications for policy modifications.

CONS:

- Administration recommendations for the design of the State program, *i.e.* in data collection and cost-sharing, would not be binding.

- May undercut DOL's future ability to stave off States attempts to carve objectionable exceptions to the availability requirement.
- Could provoke considerable congressional opposition and legislative riders.

OPTION TWO: Instruct DOL to Issue New Regulations. DOL would promulgate regulations that set parameters for providing UI benefits to FMLA-covered leave takers. The rule would allow States to deem the UI availability requirement met during FMLA-covered leave and would set specific program design requirements.

PROS:

- Empowers DOL to design program parameters and data collection requirements.
- Provides DOL with greater leverage to guard against future objectionable State efforts.
- Provides opportunity for public comment, more involvement of other federal agencies, and time for fine tuning the many program issues.

CONS:

- Could also provoke strong congressional opposition and legislative riders.
- Would be a time-intensive process, taking at least a year to finalize and requiring States to wait for regulations to take action.
- Also subject to SBREFA process of congressional review.

OPTION THREE: Instruct DOL to Produce Model State Legislation for Separate UI-FMLA Fund. DOL would encourage States to divert a portion of UI taxes to fund special benefits for workers on FMLA leave and develop voluntary model State legislation for such a tax-neutral approach, which would be separate from but administered by the State UI authority, to provide wage replacement benefits for FMLA-covered leave.

PROS:

- Provides DOL with the greatest ability to minimize risks to the solvency and integrity of the UI system.
- Model legislation would be based on successful State efforts to create separate funds for training and reemployment assistance.
- No administrative or regulatory actions are needed.

CONS:

- Could be ineffective in promoting State action, as States may be concerned about the appearance of creating a new tax structure to cover FMLA benefits.
- Groups supporting DOL policy change will view this option as weak (they may prefer that the Administration do nothing than advance this approach).

MEMORANDUM FOR THE DIRECTOR

FROM: Barbara Chow

SUBJECT: UI and Paid Family and Medical Leave

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

Background on Paid Parental Leave and State UI Proposals.

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

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

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

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

Policy Questions

What is the size of the problem that we are trying to address with this policy? The data on the

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

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

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

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

Operational Questions.

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

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

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

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

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

Budgetary and Regulatory Questions.

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

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

that over time States would increase taxes, so over the years the program would be deficit neutral.

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

DPC Options.

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

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

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

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

2. Instruct DOL to Issue New Regulations.

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

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

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

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

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

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

PAID PARENTAL LEAVE OPTIONS

There are a variety of options of proposal to advance in support of paid parental leave.

I. Create a Commission/Working Group:

- (1) A Paid Parental Leave Commission could conduct research necessary to assess existing paid leave proposals and develop additional options if appropriate.
- (2) The ERISA Advisory Council could be asked to study utilization of benefit practices -- e.g. disability insurance plans, savings plans and/or cafeteria plans -- to provide wage replacement without jeopardizing retirement savings.

II. Create a Research and Development Fund to support States to develop innovative paid parental leave policies. Approaches that States could adopt include:

- (1) Expansion of State Temporary Disability Insurance (TDI) programs as models for paid leave. TDI programs currently exist in 5 States (CA, HI, NJ, NY, RI) and Puerto Rico; these programs provide partial wage replacement for workers out of the workforce due to pregnancy complications. One or two States are looking at building on this benefit.
- (2) Creation of State wage replacement system for new parents, administered by U.I. systems but funded from general revenue or new payroll tax.
- (3) Use of State unemployment compensation programs to provide partial wage replacement for parental leave-takers. Vermont has asked DOL for authority to pursue this approach, and has been thwarted.

III. Create a Federally-Funded, State Administered Paid Parental Leave Proposal Administered by the U.I. System. Eligibility criteria would include:

- Income Eligibility. Tied to income (below median income) to assist the families that are most likely to face a financial barrier to leave-taking. Non-FMLA covered workers (likely benefit recipients) would be eligible.
- Workforce Attachment. Eligible new parents must be authorized to work in the U.S. and have been in the workforce -- full or part time -- for 1 year prior to birth or adoption. Linking eligibility to the workplace reinforces the purpose of the plan as a wage replacement plan, and one-year requirement demonstrates pre-pregnancy workforce participation. Workers could receive the benefit regardless of whether they intend to return to their job, or whether they in fact return.
- Benefit Duration, Timing, and Amount. Benefit would be available for a set time only immediately following birth or adoption. A worker with access to employer-paid leave