

Full Paid Leave

Short Term Paid Leave: A New Approach to Social Insurance and Employee Benefits.

75 Calif. L. Rev. 465 (1987)

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In this Article I propose an entirely new approach to income maintenance for employees who are off work for temporary periods, ranging from one day up to six months, for whatever reason, including disability (from illness or injury), leisure (vacation and public holidays) and unemployment. In lieu of the variety of existing arrangements for temporary income replacement, I advocate a new mandatory employee benefit that I call "Short Term Paid Leave."

Part I describes the Short Term Paid Leave plan and argues that it would be a substantial improvement upon existing arrangements for several reasons. Part II compares the Short Term Paid Leave plan with the present arrangements, using hypothetical employees to demonstrate why the overwhelming majority of employees would be significantly better off under my proposal.

I. OVERVIEW OF SHORT TERM PAID LEAVE

This Part first briefly describes the key features of the Short Term Paid Leave plan. I then present three broad objections to existing arrangements and explain how my plan would respond to them. Following that I address who would pay for Short Term Paid Leave. Finally, I discuss why it is appropriate for government to adopt programs that assure people reasonable levels of income protection during periods when they temporarily are not working.

A. The Plan

Through a simple and uniform regime, employers would be required by law to make certain advance arrangements for their employees' needs for income when temporarily not working. Specifically, every employee would earn one day of paid leave for every five days worked. Hence, someone who works 220 days during a year (amounting to forty-four five-day weeks), would earn forty-four days (nearly nine five-day weeks) of paid leave. n1 These paid-leave days would be accumulated in a "paid leave account" and available for employee use on a relatively unrestricted basis. A suitable present-day analogy is the typical employee's earned vacation leave, which accrues as one works and can be drawn upon largely when and as the employee wishes.

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n1 People who work part time would accumulate earned paid leave in the same way: for example, one hour for every five hours worked or one half-day for every five half-days worked.

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There would be one major limit on a worker's access to his or her paid-leave account. A portion of the account would be designated the "reserve." An employee would be required to put some of each year's earned leave days into the reserve until he or she had saved six months worth of leave days. This reserve, whatever its balance, would become available only after an employee had been off work for two weeks owing to disability or unemployment.

A worker drawing on his or her paid-leave account would normally remain in full-pay status since, during the course of any year, earned paid-leave days would simply accrue on an employer's books. Substantial end-of-year accrued but unused balances, however, (including additions to one's "reserve") would be fully funded through employer payments into employee-controlled accounts held at designated, participating financial institutions. n2

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n2 It might be helpful to think of these restricted accounts as analogous to individual retirement accounts (IRA) which are held in employees' names but are set aside until retirement.

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Short Term Paid Leave would replace benefits such as paid public holidays, paid vacations, paid sick leave, temporary disability insurance, unemployment compensation, and workers' compensation (at least for the first six months of benefits under those programs). n3 Hence, employees would have to draw upon income from their paid-leave accounts whenever they temporarily were not working and wanted to be "paid." Existing long-term benefit plans, like social security and the permanent disability portion of worker's compensation, would continue to provide for needs lasting more than six months. Short Term Paid Leave, a radically simplified benefit that all employees nationwide could enjoy, would replace the current grab bag of schemes designed to satisfy employee's short-term income needs.

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n3 Workers' compensation benefits providing for other than income replacement would continue -- for example, medical treatment and rehabilitation costs.

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B. Three Reasons Why the Plan Is Needed

The Short Term Paid Leave plan is my solution to three different problems with the existing arrangements for temporary income replacement.

1. Absence of a Cohesive System

My first concern stems from the present absence of a cohesive income maintenance system, resulting in unevenness, uncertainty, and waste. Today's short-term benefits are the product of ad hoc decisions made over time, rather than a comprehensive approach to the temporary income replacement problem. Together, today's benefits resemble a crazy quilt that is filled with holes and jagged borders and with overlapping, and often clashing, patches. Here in brief are the main features of the current regime.

Workers' compensation, which is largely a legislatively mandated, private insurance scheme, was adopted on a state-by-state basis early in this century in response to tort law's failure to deal adequately with the mayhem of the new industrial age. Although workers' compensation covers long-term injuries as well, my plan would only replace its provision of income -- often two-thirds of prior wages up to a modest ceiling -- to those suffering from job-related, temporary disabilities.

Unemployment compensation was imposed on the states in 1935 by the federal government as a reaction to economic suffering caused by the Great Depression. Although there are government-run unemployment compensation programs in all states, as with workers' compensation, they vary significantly. In general, unemployment compensation provides up to fifty percent of prior wages, subject to a modest ceiling, for a period of up to six months, to involuntarily unemployed people who have had recent, substantial attachment to the workforce.

Generous vacation, public holiday, and sick leave benefits, where they are found, are largely the result of post-World War II, private sector responses to employee needs and demands. These nonmandatory benefits are a critical feature of modern employment for many workers, often providing one day per month of fully paid sick leave, eight to twelve paid public holidays, and two to four weeks of paid annual vacation.

Finally, in recent years, many large employers have developed various highly complicated personnel policies designed to wrap a network of generous, private supplementary benefits around the publicly mandated ones. n4 At the same time, many workers must make do with only the legally required

programs.

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n4 For example, some employers provide severance pay or supplemental unemployment benefits on top of required unemployment compensation, and some employers provide more generous wage replacement benefits than are required by workers' compensation.

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One consequence of these incremental developments, as already suggested, is that benefits vary enormously depending upon where and for whom one works. Moreover, most employees probably do not well understand their eligibility for many of their benefits and cannot value the overall package of benefits that comes with any particular job they hold or might be considering. These inconsistencies and uncertainties should be dramatically reduced under the Short Term Paid Leave plan because benefits would be uniform and more easily calculated.

In order to manage the various existing programs, separate and costly bureaucracies and accounting systems, both public and private, must be maintained. Furthermore, a great deal of attention is given to eligibility determination since in many situations it is not clear which program, if any, should compensate the worker. Claimants with dubious eligibility now exert unwelcome pressure to qualify when the alternative is lesser benefits or none at all. Disparate public and private management of today's programs also results in inconsistent enforcement and policing of eligibility restrictions. Seemingly equivalent violations of eligibility requirements do not carry the same meaning or risk of discovery. By comparison, under the Short Term Paid Leave plan many bureaucracies would be eliminated, most of the currently difficult program eligibility decisions would no longer have to be made, and employers would virtually never need to police employees.

While each of the current benefits seems to be aimed at a separate employee need, if one steps back it becomes clear that at a broader level all of these benefits deal with a single problem -- how to maintain an employee's income during short-term periods when he or she is not working (including transitional periods during which an employee is moving out of the work force for a longer time or altogether). Short Term Paid Leave offers a simple and comprehensive approach to this broader problem, thereby promising increased coherence, uniformity, clarity, and administrative savings.

2. Inadequacy

My second objection to existing arrangements concerns their inadequacy. As noted above, although many employees are, in one way or another, now reasonably well protected against income loss when they are temporarily not working, many others are not. For example, a significant proportion of workers who become disabled have neither paid sick leave (for the occasional few days of illness) nor paid temporary disability leave (for an illness or off-the-job injury lasting for a few weeks to a few months). n5 Holiday and vacation pay is also often provided on miserly terms, and some workers must do entirely without it. n6 Certainly as compared both with their better-off counterparts (including most public employees) and with employees throughout Western Europe, those many American workers who must depend for temporary income replacement largely upon the required social insurance benefits (unemployment and worker's compensation plans) are very poorly served indeed. n7 Inadequacy, thus, is a very substantial weakness of the existing regime. A key objective of mine, therefore, has been to develop a plan that would assure that nearly all employees have what are considered good benefits.

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n5 Social Security Programs in the United States, 49 SOC. SECURITY BULL., Jan. 1986, at 5, 37-41; Price, Cash Benefits for Short-Term Sickness: Thirty-five Years of Data, 1948-83, 49 SOC. SECURITY BULL., May 1986, at 5.

n6 Full-time jobs without any paid vacation or paid holidays are now apparently largely restricted to the

retail trade, personal services, and small employers. For example, a M & M Community Personnel Practices Survey dated 1984 (on file with author) identified 7.4% of employees in "retail and services to individuals" as having no paid holidays. Of the medium and large firms regularly surveyed by the Bureau of Labor Statistics, virtually all provide some paid holidays and paid vacation. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYEE BENEFITS IN MEDIUM AND LARGE FIRMS, 1985 (1986). About a quarter of all employees, however, enjoyed only eight days or less of paid holidays in 1985 as contrasted with the 40% who enjoyed more than 10 paid holidays. Id. at Table 6. Perhaps even more striking, this survey found that at one year of service, 30% of employees were entitled to only one week of paid vacation. Even at five years of service, 45% of employees were entitled to only two weeks of paid vacation. Id. at Table 8. On the history of paid vacations, see generally D. ALLEN, FRINGE BENEFITS: Wages or Social Obligation? (1964).

n7 For a description of the good benefits provided to its nonfaculty employees by the University of California, see *infra* text accompanying note 21. From personal experience and informal conversations with colleagues in Western Europe, it has become clear to me that in many countries at least four weeks of annual paid vacation is guaranteed to employees by law. For an international overview of social insurance benefits, see INTERNATIONAL LABOUR OFFICE, INTRODUCTION TO SOCIAL SECURITY (1984).

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Similarly disadvantaged under the present arrangement are those many workers who, when they change employment, forfeit built-up rights at their old job (typically sick leave and longer annual holidays). Therefore, I have also sought to assure the "portability" of benefits in my plan.

On the other side of the adequacy coin, some employees exploit (albeit legally) existing program designs. For example, certain construction workers and other reasonably well-paid and regularly seasonally employed people routinely receive unemployment compensation that many consider inappropriate. n8 The Short Term Paid Leave plan would also curb these sorts of excesses.

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n8 For further discussion of this problem, see *infra* text accompanying note 45. It is worth noting here that Congress has singled out professional athletes and school employees as seasonal workers who are undeserving of unemployment compensation benefits in their off season. For a discussion and criticism of these special provisions, see NATIONAL COMM'N ON UNEMPLOYMENT COMPENSATION, UNEMPLOYMENT COMPENSATION: FINAL REPORT 28-34 (1980).

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In sum, my plan would ensure more adequate benefits than are provided by the current schemes. Steady workers would have a benefit package that is comparable to or better than that which jobs with good benefits now provide; and erratic workers would have decent and apt protection.

3. Lack of a Satisfactory Underlying Conception

Third, and perhaps most importantly, my plan adopts an entirely different underlying conception of how to deal with short-term income replacement needs. Short Term Paid Leave substitutes the forced-savings principle (through individual employee "paid leave accounts") for the existing categorical basis of eligibility for benefits. In other words, unlike some of the existing arrangements which depend upon purported or real insurance, my plan relies upon compelled self-insurance.

Employees face various contingencies which temporarily prevent them from working, such as illness, injury and economic recession and instability. Traditional thinking considers these different contingencies as risks to continued wages and salaries which should be protected by separate insurance-like means. By contrast, like the typical approach to vacation pay today, under my plan paid time off is earned and accumulated as one works. The savings or self-insurance idea (together with a

borrowing feature I will later discuss) n9 is not only appropriately applicable to and sufficient to deal with all of the short-term income protection problems that workers face, but it also avoids several undesirable features of the current arrangements.

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n9 See infra text accompanying note 48.

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To be eligible for benefits under the existing categorical approach it is insufficient that the employee is merely not working. The worker must satisfy one of the socially-approved, or employer-approved, categories. This approach inevitably requires the programs to make controversial decisions about who is deserving -- that is, what risks are covered. For example, should an employee who leaves employment to move with his or her spouse to the spouse's new place of work receive unemployment compensation? Should one be eligible for paid leave when home sick but not when home caring for a sick child? Under the Short Term Paid Leave plan it would now be up to the employee to decide when to use the funds put aside for his or her use, thereby substantially decreasing the feelings of unfairness that today's linedrawing creates.

Today's category-based programs also work both to restrict worker liberty and to invade worker privacy. For example, where sick-leave rules are enforced, workers must demonstrate that they are entitled to a paid sick day based on their employer's definition of the conditions that justify an absence. As a consequence, employees who do not feel up to work because of some physical or emotional distress that does not fall into their employer's definition of sickness, feel strongly pressured to work anyway. Similarly, under current law workers who quit their jobs often cannot get unemployment benefits even if they leave work for what to them are quite valid reasons. n10 In order to qualify for benefits, they must justify being out of work by external standards that may not include their personal justifications. As a result, many employees are strongly pressured to remain in jobs that they would rather leave. Moreover, even when the employee clearly qualifies for sick leave or unemployment compensation, having to explain and defend his or her "excuse" to a third party often imposes upon the worker's dignity.

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n10 This is apart from those who quit for "good" reasons, the legal definition of which is destined to be continually in dispute.

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By contrast, under the Short Term Paid Leave plan, an employee's short-term income replacement benefit would be a single pool of credits that he or she has earned. Therefore, an employee would decide individually whether to draw on the fund when temporarily off work.

Since the current arrangements conceive of unemployment compensation as insurance that is paid for by employers, in order to prevent undeserved entitlements benefits are restricted to those people who are unemployed for reasons that do not reflect employee fault. After all, it would be an example of the classic moral hazard about which insurers worry if workers were allowed freely to trigger the unemployment compensation benefit by their own deliberate (and possibly pleasurable) choices. Under the Short Term Paid Leave plan, by contrast, employees would, in effect, save up for their own possible unemployment. Consequently, workers could collect benefits without needing to justify their departure from work in terms of categories established by others. Moreover, there would no longer be grounds for imposing coerced work searches on the unemployed (although job-finding services would still be available to those who found them useful). Thus, Short Term Paid Leave would free workers from unwanted regulation of their lives.

Yet another important cost of today's categorical approach is the abuse that it generates. For example, some employees secretly work for cash while drawing unemployment compensation. n11 Some claim to

be home ill when they are not (especially on Monday or Friday) in order to have a paid day off without using up a vacation day. n12 Some malingers after an injury or illness, thereby continuing to draw benefits, when they could easily return to work. n13 Some calculatingly change their conduct in order to qualify for benefits (for example, instead of quitting, they cause themselves to be fired so as to come within an approved category for unemployment compensation). n14 These abuses not only anger supervisors and colleagues as well as the government and taxpayers, but they also demean the cheating employees themselves. The Short Term Paid Leave plan would largely do away with these abuses, since the incentives to cheat are radically diminished when employees are claiming their own earned paid leave.

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n11 For some studies of this problem, see Black & Carr, *An Analysis of Income Misreporting*, and Porterfield, St. Louis, Burgess & Kingston, *Selecting Claimants for Audits of Unreported Earnings*, in 2 NATIONAL COMM'N ON UNEMPLOYMENT COMPENSATION, UNEMPLOYMENT COMPENSATION: STUDIES AND RESEARCH 543, 561 (1980).

n12 Although occurrence of this sort of abuse can be confirmed through conversation with any experienced benefits manager, I have found no empirical studies directed specifically at the abuse problem. For one interesting study of sick leave, see Winkler, *The Effects of Sick Leave Policy on Teacher Absenteeism*, 33 *INDUS. & LAB. REL. REV.* 232 (1980).

n13 For a discussion of the impact of benefits levels on malingering under current plans from the perspective of benefit managers, see Doudna, *An Overview of Group Disability Income Insurance*, in THE HANDBOOK OF EMPLOYEE BENEFITS 216-17 (J. Rosenbloom ed. 1984).

n14 For a discussion of this problem and the "provoked discharge" doctrine that sometimes serves to block the employee's access to benefits, see Voluntary Leaving, 1B *Unempl. Ins. Rep.* (CCH) PP1975, 1975.14 (Jan. 6, 1986).

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In sum, Short Term Paid Leave responds to all three of the objections I have raised to the current arrangements. Employees generally would gain freedom, privacy, benefit portability, and a clearer understanding of what their benefits are. Many workers would have substantially improved benefits, and employers and government would benefit from reductions in both administrative costs and abuses. To be sure, some employees would be worse off under my proposals than at present. This would be a positive improvement in regards to abusers of the present programs and undeserving recipients. Other losers under my plan, such as workers who negligently allow themselves to become ill, injured, or unemployed on a recurrent basis, are also unlikely to win much sympathy.

Nevertheless, I admit that a small proportion of clearly deserving workers, those employees who now have good benefits and who are recurrently ill, injured, or unemployed for reasons outside their control, would be worse off under my plan. For them, the shift from the insurance concept to the forced savings principle would take with it the social advantages of insurance from which they now benefit. But even these workers would not generally suffer income losses under my plan. Rather, they would, in effect, be treated as being on vacation during these periods of inactivity and would use up the paid vacation time that they had saved. I find this burden on a small class of workers a small price to pay for the very large gains promised by the Short Term Leave Plan.

In sum, I happily concede that the insurance principle is needed to care for workers with long-term needs like permanent disabilities; these are rather rare and can be financially devastating. But, on the other hand, just about everyone who has a substantial attachment to the work force can reasonably take care of his or her own short-term income needs through a forced savings arrangement instead.

C. Who Pays

By this glowing description of its many benefits and limited shortcomings, I do not mean to suggest that the Short Term Paid Leave plan could be implemented without additional costs to anyone.

Nonetheless, for those employees who now have good benefits, the Short Term Paid Leave plan would not cost substantially more, if at all, than the benefits it would replace, especially when the reduction in abuse and costs of administration are taken into account. Consequently, most employees with good benefits today would be even better off at essentially the same cost to their employer. It is very difficult to say whether the value of those increased benefits would ultimately accrue to workers, or would go to employers (because wages or other employee benefits would then go up more slowly than otherwise), or would be shared between them. For now it is enough to make the point that there is room in this reform for gains for both employees and employers.

It is more difficult to determine who would pay for the increased benefits that workers with poor benefits today would receive under the Short Term Paid Leave plan. One view is that under the plan these employees would gain a great deal for which their employers would pay. This model imagines that wages and benefits are separately determined and that newly required benefits would mean lower profits for enterprises. This view is often endorsed by employer groups and politicians who focus primarily on the formal assignment of costs. Such people often carefully distinguish between employer and employee contributions to health insurance plans, social security, and the like.

A different and probably more realistic view, however, is that employees would pay for their own improved benefits through lower wages in the long run. This model, usually favored by economists, argues that employees are able to command a total price for their services, which includes both cash and noncash labor costs. Other things being equal, therefore, whatever employees get in benefits they do not get in wages. I would argue that if workers under my plan would gain benefits at the expense of current cash, on the whole they would favor this sort of trade. Moreover, if this creates serious concerns about employee needs for cash flow, my plan would permit workers in some circumstances to convert their Short Term Paid Leave credits back into current cash. n15

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n15 For workers earning the minimum wage, who cannot trade lower wages for better benefits, my plan may be equivalent to an increase in the minimum wage. I leave the consideration of the desirability of this impact to a future, more specific discussion of the implementation of my plan.

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It is exceedingly difficult, if not impossible, to determine the extent to which each of these two perspectives on "who pays" best describes the current situation or to predict which would prevail under my plan. In response to this ambiguity, at least to the extent practical, I have tailored my proposal so as to maintain the current balance of fiscal responsibility between employees and employers. Thus, to avoid importantly altering the burden on whomever it is that pays at present, as a formal matter, employers would fund Short Term Paid Leave benefits out of current enterprise revenues. Since the employers who would formally have to pay more under my plan are those who currently underprovide decent benefits, many people would find this a just result whatever the ultimate incidence of such costs.

D. Why Require Any Benefits

At stake here is the need for income maintenance during those days, weeks, and months when people, once having gone into the labor market, temporarily do not work. n16 Expenditures continue during these periods, and, unless a sharp decline in living standards is to be experienced, some provision must be made for continued income. n17 It is imaginable, of course, that many, or even most, workers could personally provide for those periods through rational planning -- voluntary savings combined with private borrowing, deferral of consumption, or private insurance. Moreover, households in need because they have no member currently at work and inadequate savings have traditionally been assisted by voluntary, private income transfers that arise out of bonds of affection, felt social obligations, and altruism generally. Furthermore, there is a collectively funded safety net of "public assistance" that has

emerged over the course of this century to assume a critical backup role in assuring subsistence income to those who have immediate needs for cash because of the unavailability of other sources.

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n16 I exclude from consideration here income maintenance for those young persons who have yet to become regularly attached to the labor force. Hence, I will not discuss parental support rules and other existing mechanisms for funding living costs during periods of education and training of young people.

n17 Many couples depend on the income of only one spouse. In such cases it is only when the breadwinner is not working, assuming the other spouse does not take over that role, that the family's need for regular income provision arises. In two-earner families, although a period of nonwork by one spouse is less likely to plunge the household into poverty, it still threatens to lower dramatically that household's ordinary standard of living.

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While self-sufficiency, charity, and welfare might in principle take care of the problem, in practice they would not. The major fly in the ointment is that, if left entirely to their own devices, too many people find themselves in need because they do not manage their money wisely. Although they might be poor enough to obtain welfare or charity in terms of need, these people are not really the targets of this aid because they could be self-sufficient, if they only planned properly. Short Term Paid Leave, thus, is perhaps best seen as a mechanism for helping people to plan by automatically and conveniently setting aside earnings that a great consensus of workers, if properly informed, would favor.

This general point can be seen if one considers, for example, annual paid vacations under today's regime. Imagine an alternative system by which people would get higher weekly pay packets, but then would have to finance on their own a two- or three-week unpaid vacation to which they were entitled each year. Most people would probably prefer the current arrangements under which they are, in effect, helped (or forced) to save up for those vacations. Otherwise, many people, filled with self-regret, would find that they had spent the extra pay and could not afford to take a vacation. Even those who would take the trouble of carefully planning for a holiday period without pay probably prefer, at least in most cases, not having to make the special effort to do so. Indeed, this notion of employee preference -- self-paternalism, it might be called -- helps to explain why we have paid vacations. n18

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n18 There are other explanations for paid vacations as well; for example, employers want people to take time off in enjoyable circumstances or unions want to show workers they have obtained something besides higher wages.

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Short Term Paid Leave simply expands upon the amount saved -- substantially beyond that needed for ordinary vacations and public holidays. At the same time it restricts the use of some of these savings, through the device of the "reserve," to periods of more serious need (more than two weeks of disability or unemployment). That, too, is the sort of self-paternalism that most employees, if well informed, would probably favor.

More broadly, I wish to make clear that I do not simply advocate overturning existing employee benefit and social insurance arrangements aimed at workers' short-term needs for income. These collective and mutual arrangements (both public and private) play a key role in keeping people from hardship, charity, and welfare. They represent, in my view, one of the major triumphs of the modern welfare state. In short, I do not object to either government intervention or employment-based, noncash benefit arrangements, but rather to their current form.

Since I am claiming that employees generally would prefer their benefits in the form that I am

proposing, it may be fairly asked why the market has not generated the scheme that I advocate. One reason is that the legal requirements of unemployment compensation and workers' compensation do not currently permit it. More broadly, the category-based way of thinking that lies behind those two plans has made it difficult for benefit planners even to imagine it.

Recently, however, this has begun to change a bit. Where employers and employees have room to maneuver, some employee benefit plans, such as at high technology companies like Hewlett-Packard and Bechtel, are combining sick leave and vacation pay into a single, earned paid time-off benefit -- a kind of mini-precursor to my Short Term Paid Leave proposal. ⁿ¹⁹ Indeed, Stanford University Hospital in California has had several years of successful experience with an earned time off plan that combines the former benefits of vacations, sick leave, and public holidays. ⁿ²⁰ Legal restrictions and lack of imagination stand in the way of further experimentation. Although I cannot do anything directly about the legal constraints, the hope of this Article is to stimulate a new way of thinking about short-term income replacement so as to make possible in the near future at least substantial experimentation with Short Term Paid Leave.

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ⁿ¹⁹ See INTRODUCING FLEXIBLE TIME OFF AT HEWLETT-PACKARD (on file with author). Information about Bechtel's plan was kindly provided in a telephone interview by Susan Grisso, Manager of Corporate Policy.

ⁿ²⁰ Information about Stanford University Hospital's plan was kindly provided by Carol Ann Bergman, Manager of Human Resources (on file with author).

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II. COMPARING SHORT TERM PAID LEAVE WITH EXISTING ARRANGEMENTS

For purposes of this Article, I have chosen to provide neither a systematic evaluation of the existing employee benefit arrangements nor a highly detailed description of my plan. Rather, I have elected to make some informal comparisons in hopes of generating broad interest in the proposal.

This Part first describes a package of short-term income replacement benefits of the sort that employees with what I call "good benefits" have today. I then compare that package with what Short Term Paid Leave would provide to hypothetical employees under varying circumstances. That comparison allows me both to flesh out additional important details of my proposal in their appropriate contexts and to demonstrate why even employees with good benefits today would, by and large, be better off under my plan. At the same time, this analysis demonstrates the advantages of my plan to those who do not have good benefits now.

A. Good Benefits Today

Employees with good benefits generally find that their income (or at least a reasonably large share of it) continues during most short-term periods when they are not at their jobs. For these employees the combination of governmentally mandated and employer provided protection fairly well sees them through the whole range of circumstances that keep them temporarily away from work -- such as periods of unemployment and disability (including pregnancy), absences on account of personal and public duties (for example, family illness, funerals, and jury service), and time off intended for leisure (public holidays and vacations).

I will now describe in some detail typical good benefits, using as an example the benefit package enjoyed by staff -- that is, nonfaculty -- employees of the University of California. ⁿ²¹ New full-time University of California staff employees typically earn ten hours per month or 120 hours (three weeks) per year of paid annual leave, commonly thought of as paid vacation. After ten, fifteen, and twenty years of service, respectively, paid vacation leave is increased in steps from this initial three weeks to a maximum of four weeks and four days (twenty-four days) per year. There are twelve paid holidays per

year at the University of California. Employees are also eligible for paid leave, as needed, for a few other unusual and specially identified circumstances such as jury duty.

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n21 This information was kindly provided in a telephone interview by Betty-Lou Harmon, Manager, Compensation and Policy on the Berkeley Campus. See generally SUMMARY OF YOUR BENEFITS AT THE UNIVERSITY OF CALIFORNIA (1985) (on file with author).

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Paid sick leave is earned at the rate of one day per month or twelve days per year. Unused sick leave accumulates and can be used in subsequent years, but is forfeited if one leaves University employment. n22 Unused vacation leave is paid out like a severance bonus when one quits or is laid off. Employees injured at work are eligible for workers' compensation benefits, which are integrated with sick leave so that, in the typical case, an injured worker uses up sick leave first, thereby initially remaining in full-pay status. After that, he or she goes over to the workers' compensation plan, which at the University of California is a combination of the state's normally required workers' compensation minimum plus a University supplement. Together they replace 80% of an employee's wages for up to six months.

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n22 If an employee retires from the University with unused sick leave, this adds to the employee's service credit for purposes of calculating his or her retirement pension.

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Those who become disabled off the job and who use up their sick leave go onto the University's equivalent of California's mandated nonoccupational disability plan for the private sector; this plan provides up to six months of only moderate wage replacement (55% of past wages up to a modest monthly ceiling). n23 University employees may, however, purchase additional nonoccupational, temporary disability insurance that permits them to have coverage for a higher proportion of their wages -- the maximum being 70% of wages, subject to a ceiling that is rarely reached given staff salaries. Childbearing leave, typically lasting about eight weeks, is covered by these plans.

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n23 The University's traditional 26-week maximum duration for benefits is less generous than the current maximum of the state plan which is 52 weeks. Compare CAL. UNEMP. INS. CODE §§ 2653, 2655 (West 1986) with Your Prudential Disability Insurance Program, University of California 1986 at 3-17 (on file with author) (describing the University's nonindustrial disability insurance program).

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Employees who are dismissed are entitled to unemployment compensation only to the extent provided by law. For those with a reasonably substantial attachment to the work force in the year prior to losing their jobs, California's unemployment compensation scheme provides up to six months of benefits equal to 50% or less of past wages, and only up to a modest ceiling. n24 Like other employees in California, those who quit their jobs at the University are generally ineligible for unemployment compensation, and there is no University supplement. However, as noted above, n25 departing workers are paid for any unused vacation days, and some departing employees elect to withdraw their vested funds from the University's retirement program, thereby sacrificing their pension rights, but giving themselves a financial cushion that can be used to tide them over for a while.

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n24 See CAL. UNEMP. INS. CODE §§ 1280-1281 (West 1986). The maximum weekly benefit is

currently \$166 per week for earnings of \$5533 or more in the highest quarter of the claimant's base year (which is about \$425 per week).

n25 See supra text accompanying note 22.

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So long as one remains in employment at the University, the short-term income replacement benefits are quite good by American standards. On the other hand, before one leaves employment at the University, it is wise to have another means of support already lined up, because the income-support benefits that are available after quitting are considerably poorer.

Based upon data released by the University, I estimate that the direct cost of the various benefits just described is approximately 15.85% of payroll as shown in Table I. n26

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n26 I am confident that all the administrative costs associated with the University's short-term employee benefit system are not included in this figure.

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TABLE I

COST OF SELECTED STAFF BENEFITS AT THE UNIVERSITY OF CALIFORNIA n27

Percentage of Payroll

Annual (vacation) leave 6.27

Paid holidays 4.60

Sick leave 3.49

Workers' compensation n(1) .34

Nonoccupational disability insurance n(2) .76

Unemployment compensation .19

Other .20

Total 15.85

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n(1) Temporary income replacement portion only

n(2) Assuming University were to provide maximum supplement now paid for by employees

n27 This table is based upon information kindly provided by Robert S. Kraus from the University of

California, who provided his COST OF STAFF FRINGE BENEFITS (Effective August 1, 1985) (updated) (on file with author). Where readily available University data is insufficiently detailed for my needs, I have made my own estimates. As these figures are mainly illustrative, I am confident that they are sufficient for my purposes here.

-----End Footnotes-----

Given the nature of the higher education industry, the pattern of employee benefit costs is somewhat different at the University than in other industries. For example, many other industries will have relatively higher costs for unemployment and/or workers' compensation, but will spend less on sick leave and/or paid holidays. Overall, I have concluded that the aggregate costs of short-term income replacement benefits at the University are roughly comparable to those incurred by other "progressive employers" with good benefits. n28

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n28 See generally CHAMBER OF COMMERCE OF THE U.S., EMPLOYEE BENEFITS: 1983 (1984); BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, *supra* note 6.

-----End Footnotes-----

B. Comparing Short Term Paid Leave

It should facilitate both the making of comparisons and the selling of my proposal if it can be demonstrated that for enterprises which presently provide good benefits costs would be approximately equal under current arrangements and my plan. With respect to the University's program at least, that goal seems to have been satisfied. Since the rule of one day of earned leave for every five days worked means that one of every six days is a paid leave day, this would amount to a payroll cost of 16.7% of wages. Taking into account the reduced administrative burden that the University would face under my plan, its immediate financial costs would be more or less the same as current arrangements. n29 These calculations, moreover, say nothing about the intangible gains that the University would achieve or the advantages most University employees would attain through Short Term Paid Leave, to which I now turn.

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n29 Because of the uncertainty of the actual amount of administrative costs that would be saved, it is pointless now to make more finely tuned comparisons, including, for example, adjusting for the fact that some of the 15.85% shown as University benefit costs today are "inside" payroll costs and others are "outside" or on top of payroll costs. Moreover, cost-lowering adjustments to my proposal could always be made by providing, say, one earned paid-leave day for every five and one-half days, or even six days, worked -- although all of my analysis here uses the one-for-five basis.

-----End Footnotes-----

In making the comparisons, I consider the situations of various hypothetical employees, starting with a reasonably simple employment situation, then introducing various complications. Along the way, as appropriate, I explain additional details of my proposal as well. n30

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n30 One detail that I will not discuss here is the extent to which certain types of employees should be exempted from the plan on the ground that one can count on the market, as revealed by existing practices, to provide them with suitable short-term paid-leave arrangements. Indeed, given the special nature of their teaching duties as well as their peculiar nine-month schedule, faculty at the University of California, for example, probably should be fully outside the Short Term Paid Leave plan.

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1. The Simple Case

I will first discuss a new employee of the University of California who, during his or her first year of employment, takes under the Short Term Paid Leave Plan the same twelve paid holidays as he or she now gets, the same three weeks of vacation now available, and a total of four further days of paid leave when the employee is not feeling well enough to come to work or for whatever other reason. Although there would no longer be separate categories of paid leave under my plan, for comparison purposes I nonetheless identify reasons for the employee's days off. I have used four sick days so far in my illustration because evidence suggests that the great majority of workers take four or fewer sickness days per year.ⁿ³¹ In this example, then, our hypothetical worker would have taken thirty-one paid days off and, in turn, would have worked 229-230 days during the year. Under my proposal, the one-for-five rule means that those 230 days worked would earn this employee forty-six paid-leave days; thirty-one of those, as noted already, would have been used up, leaving fifteen unused.

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ⁿ³¹ Unfortunately, the University of California does not have good data readily available from which a frequency distribution of sick leave taking can be constructed. Nonetheless, a California State Personnel Board's 1982-83 report, cited in Kraus, *supra* note 27, suggests that state employees take an annual mean of about nine sick days, and that figure was assumed for University employees in constructing the table at note 27, *supra*. This estimate may well be high. In 1986, for example, the Social Security Administration estimated that state and local government employees lost an average of only seven days per year because of nonoccupational illness and accidents. See Price, *supra* note 5, at 6.

According to Kraus in a telephone interview with the author, there is a traditional rule of thumb in this field that 20% of the employees take 80% of the sick leave. Applying this rule of thumb to the higher figure of an average of nine days of sick leave, it would appear that 80% of the workers would average only 2.25 sick leave days per year. That in turn suggests that nearly 80% of the employees probably take four or fewer sick leave days in any one year. A report from Hewlett-Packard presents a broadly similar finding. See INTRODUCING FLEXIBLE TIME OFF AT HEWLETT-PACKARD, *supra* note 19.

-----End Footnotes-----

I now consider the "reserve" feature of the Short Term Paid Leave plan. This restricted savings feature of my proposal is designed to create a pool of funds for workers to draw against for either of two types of longer, but still temporary, needs for paid time off -- that is, more than two weeks off because of either unemployment or disability (including pregnancy).ⁿ³² A full reserve contains six months, more precisely twenty-four weeks (120 days), of paid leave. Someone with a full reserve would be able to cover six months out of work at full pay, subject to the two-week waiting period.

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ⁿ³² These conditions on access to the reserve admittedly reintroduce categorical features to my plan. But these conditions are far less intrusive into the employee's privacy than are existing conditions on benefit eligibility. The two-week unemployment condition requires only that the worker has severed an employment relationship and is indifferent to the reason why the worker became unemployed. As for the disability requirement, presumably virtually everyone off work for at least two weeks owing to illness or injury will have seen a doctor whose certification will provide the worker access to his or her reserve funds under my plan. The point of these conditions is to make clear that access to the reserve is not to occur simply because the worker has been on holiday for two weeks.

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Since the proposal must balance the twin goals of providing substantial unrestricted leave and generating a substantial reserve, something also must be said about the rate at which employees would be required

to build up their reserve. Assume, therefore, the following rule: Fifteen days per year would have to be added when one's account has fewer than sixty days in it, ten days per year when one's account has fewer than 100 days in it, and five days per year after that and until it is complete. This rule has two important implications. First, it would take twelve years of regular work to have a full reserve, assuming that the employee does not draw against it in the meantime. n33 Second, given the build-up rate, regular workers would obtain an extra week of unrestricted earned leave after the fourth, eighth, and twelfth years of work, respectively.

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n33 Numerically this means 60 days would be built up after four years at 15 days per year. At 10 days per year for the next four years, 100 days would be built up after the eighth year. And, at five days per year for the next four years, 120 days would be built up after the 12th year.

-----End Footnotes-----

In this example, therefore, the new University employee (assuming he or she came into this employment with an empty reserve) would have to put fifteen days into his or her reserve account during the first year -- which equals the amount of the employee's unused earned days in this hypothetical. At the end of the year, therefore, the University would pay over to a qualifying financial institution designated by the employee a sum equal to fifteen days of pay, which would go into the employee's "reserve" portion of his or her paid-leave account. n34

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n34 When the employee draws from his or her paid-leave account (either from the reserve or from any unrestricted portion he or she has built up), he or she could do so at a rate up to the amount of his or her then current daily wage. Although the employer would pay into this account at the employee's wage rate at the end of the year when the day was earned, the fund would be earning interest. In this way the employee ought ordinarily to be able to fund an increase he or she has won in wages between the time of earning and use of the funds.

Mentioning yet one further detail, my plan would provide, like the treatment of vacation days today, that employees would recognize taxable income only when they actually receive the cash on a paid day off and not when they first become eligible for the funds.

-----End Footnotes-----

The reason for requiring the payment of funds over to a financial institution is to minimize the risk that employees would lose their benefits owing to the possible insolvency of their employer. On the other hand, for the administrative convenience of both employer and employee, my plan provides that at year's end employees would keep up to two weeks of unused, unrestricted earned paid leave as a credit on their employer's books. n35

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n35 This is only a rather small sum to have at risk in case of an employer's insolvency -- like lost accrued vacation pay in similar situations today. This risk is outweighed by the convenience created by the two-week accrual which allows employees to remain in full-pay status at the beginning of any calendar year when they wish to use up some unrestricted earned paid leave days from the prior year. The two-week accrual rule also helps more closely match employers' cash flow obligations under my plan with current arrangements.

Moreover, the two-week accrual rule would not give either employer or employee a financial advantage. When an employee takes a day off with pay from his or her account on the employer's books, he or she would be paid, as today, at his or her wage rate at the time he or she is off work, and not at the wage when he or she earned the day off. That is, he or she simply remains in full-pay status. An employer's

current use of this money while it remains a credit on the employer's books would offset any usual increment that might occur between the time of earning and the use of the paid day off.

-----End Footnotes-----

The hypothetical employee so far is largely in the same position under my plan as under the existing University arrangements -- at least in the sense that in both cases he or she will have taken the same number of paid days off during the first year of employment. Under the existing rules the employee would have accrued eight days of unused sick leave as well as his or her contingent rights to the various other benefits. By contrast, under my plan the employee would now have fifteen paid days in his or her reserve. Moreover, the employee would not have to give any official reason for taking those four days off that I have, for comparison purposes, termed "sick" days. And whereas the employee today may be quite uncertain where he or she stands in terms of accrued benefits, it ought to be an easy matter for an employee to receive regular notice, perhaps even with each pay stub and with each quarterly statement from his or her financial institution, of the current status of the various elements of his or her paid-leave account. n36

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n36 If the hypothetical employee continues this same pattern for three more years, he or she would have 60 days in his or her reserve under my plan. By contrast, under the existing University plan this worker would, after four years, have 32 days of unused sick leave built up, as well as his or her continuing contingent rights under the other benefit programs.

-----End Footnotes-----

2. Vacation Leave

Under my plan, vacation benefits for the long-term steady worker would surpass those available under the current University arrangements starting in the fifth year of employment. In the fifth year, only ten days would have to go into the employee's reserve. As a result, the hypothetical employee could work 225 days, thereby earning forty-five days of leave, and take thirty-five paid days off -- twelve as holidays, four as "sick" days, and nineteen as vacation. This compares with fifteen days of vacation under existing policy.

The advantage of the Short Term Paid Leave plan would continue to grow in subsequent years, since additional increments of paid vacation would become available after the eighth and twelfth years of employment. By contrast, the employee under the existing arrangements must wait for his or her tenth, fifteenth, and twentieth completed years before vacation benefits are enhanced. After twelve years under my plan the hypothetical steady employee would have a full reserve of 120 paid-leave days (twenty-four weeks), and could thereafter settle into a work pattern of 216.5 work days and 43.5 paid time-off days per year -- twelve public holidays, four "sick" days, and 27.5 vacation days. This contrasts with eighteen vacation days at that point under the current rules, with the promise of twenty-one and twenty-four days to come in the future. n37

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n37 At the beginning of the 13th year, the hypothetical employee would have put aside 120 days of earned paid leave under my plan. Under existing arrangements, by contrast, he or she has 96 accumulated and unused sick days plus other contingent benefits (with even more sick days to accumulate in the future at the rate of eight per year under my assumptions so far).

As for the actual frequency distribution of vacation benefit entitlements among University of California staff, Kraus, *supra* note 27, reports that as of August 1, 1985, 34,245 University staff employees had under 10 years of service, 5978 had 10-15 years of service, 4176 had 15-20 years of service, and 2373 had over 20 years of service.

-----End Footnotes-----

If this hypothetical employee were to remain in University employment until retirement age, never drawing on his or her reserve, then he or she could elect either to take off the last six months prior to retirement at full pay (and use up the paid-leave account), or to receive his or her paid-leave account as a cash payment to be used as he or she wished during retirement years. By contrast, under the existing arrangements, an employee who retires healthy loses those accumulated sick leave days -- although the University now provides that they are counted as additional service credit in determining the employee's retirement pension. On balance, therefore, because of the extra vacation benefits, the long-term steady worker with an average amount of "sick" days is decidedly better off under my plan than under the existing arrangements.

The hypothetical employee may not wish to use all of his or her vacation time as it becomes available but rather may want to save it up for a long break sometime in the future. Although some employers currently allow this, many do not. Even the University, with its tradition of faculty sabbaticals, allows staff employees to accumulate only as much vacation as they earn in two years; after that no further annual leave is accrued, thus serving as a strong incentive for the worker to take accumulated time off.

Longer accumulations would be permitted to everyone under the Short Term Paid Leave plan. All workers who save up a large block of days could, with reasonable notice, take lengthy breaks from work while maintaining the right to return to their jobs. n38 Functionally, an employee would simply take less than all of his or her available earned paid-leave days each year. The money for those unused earned days off would, beyond the ten days' worth held by the employer for convenience reasons, be paid over to the employee's financial institution and put in his or her paid-leave account on an unrestricted basis. Note, too, that for every two weeks that an employee works rather than taking available paid leave, he or she accumulates not only the ten days of unused leave but also two additional days of leave that are earned by working those two extra weeks. This feature provides a faster accumulation of unused time off than occurs under existing arrangements.

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n38 On the other hand, my plan would permit employers to require that their workers actually take at least some, although not all, of their available "vacation" each year. That is, on the ground that the enterprise benefits if its employees have some breaks in the work routine, an employer would be able to require its employees annually to take off a certain number of weeks of their earned paid leave. Moreover, as today, employers could, of course, close for public holidays and have annual shut-downs of all or parts of their operations -- such as two weeks in the summer for production changes or a number of days during the Christmas to New Year period in order to save heating expenses. Employees wanting to remain in full-pay status during those periods would have to use up available earned paid leave.

Although employees would have substantial discretion as to when they use their earned paid leave, they would nonetheless have an obligation to take their employer's interests into account by giving notice when feasible, reasonably coordinating time off with the plans of fellow workers, and accommodating special employer needs at particular times of year. I do not envision an intrusive policing system to enforce this obligation. However, just as employees today are not normally thought to have complete freedom as to when to take their annual vacation, so too in the extreme cases, under my plan, employers would be free to discharge employees who abuse their paid-leave rights. Disputes over these matters would, presumably, be resolved by existing procedures set by standing company practice or provisions of union contracts.

-----End Footnotes-----

3. Employment Changes

Since many workers do not have career patterns like that of the hypothetical employee I have been discussing, I next consider a number of variations on this situation. One possibility is that the worker would leave employment at the University of California, immediately take up work with an employer

who today offers equivalent benefits, and then possibly change to yet a third and similar employer. Today the employee would lose seniority-based paid vacation rights and sick leave status at each job change. Accumulated, unused sick leave with the University would disappear, as is the common practice with employers today. By contrast, under my plan the worker's paid-leave benefits would be fully portable. n39

-----Footnotes-----

n39 Under my plan he or she would receive a payout into his or her designated financial institution of any balance of unused earned leave held on the employer's books at the time of leaving employment.

-----End Footnotes-----

As a result, this employee's vacation pay and reserve days for sickness or unemployment would increase throughout his or her career, unaffected by job changes. This portability feature is plainly a gain for such employees, not only in terms of actual benefits enjoyed, but also in removing inhibitions to changing jobs. Under my plan, when the employee shifts to a new job, that position would continue to provide the same good Short Term Paid Leave benefits. By contrast, many who leave University service today shift over to employment that provides benefits inferior to those available at the University. n40

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n40 Under my plan people who come into a new job with a substantial reserve will, in effect, have more vacation than many others at the new place of employment. I do not think that this will discourage employers from hiring those with built-up reserves. To the contrary, a full reserve would indicate a record of dependable work attendance.

-----End Footnotes-----

4. Unemployment

I have so far considered long term steady workers, whether or not they remain with one employer. Now let me turn to employees who experience gaps in their careers, thereby comparing the protection provided by Short Term Paid Leave with that now afforded by unemployment compensation.

Suppose first that a worker has a six-month bout of unemployment after twelve years of steady work, another six months off after a second twelve-year period of steady work, and so on. These might occur, for example, because the person was undergoing retraining for a new type of work, or because he or she was searching for a new job, or because a family crisis or other personal reason caused the employee temporarily to leave the work force. Regardless of the reason for the unemployment, the employee under the Short Term Paid Leave Plan would have a full reserve at the time of each break in service, so he or she could take the entire six-month period of unemployment on a fully paid basis, after the two-week waiting period. n41

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n41 An employee using his or her reserve for such bouts of unemployment would, of course, have fewer days available for vacation on return to work than he or she had before taking time out of the workforce. This parallels today's typical arrangements in which, as already noted, a new employee usually starts again at the bottom of a firm's vacation program regardless of how many years of service he or she had with a previous employer.

-----End Footnotes-----

By contrast, under today's regular unemployment compensation programs the unemployed person typically at best gets only half pay (and usually less) for up to six months (subject also to a waiting period, often one week). Moreover, unless the period of unemployment is triggered by a layoff or

qualifying personal reasons, typically no unemployment compensation benefits are available at all. n42 Benefits are also generally denied under today's arrangements if the former employee is unavailable for work because, for example, he or she is back at school training for a new job or is taking care of some family need. When an employment break occurs because of the worker's choice, my plan, by contrast, maintains the person's living standard for a reasonable time, rather than throwing the worker into potentially precarious financial straits. This additional financial security should make employees far more able both to change career patterns and to attend to other important personal needs, thereby enhancing their lives significantly.

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n42 It should be noted, however, that retraining programs occasionally carry modest stipends, and some workers permanently laid off today receive a supplemental (often lump sum) payment on severance.

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While these comparisons are quite favorable to Short Term Paid Leave, many people obviously are temporarily out of the work force more often than every twelve years. Yet my plan would adequately cover these workers' needs as well. Since an employee's reserve would be initially built up at the rate of fifteen days (three weeks) per year, he or she would be entitled to twelve weeks of fully paid breaks between jobs after every four years of work. And, since an employee could elect to draw down on his or her reserve at less than the maximum allowable rate, twelve weeks of fully paid leave could be stretched to twenty-four weeks of half paid leave -- which is essentially equivalent to what laid off workers could, at best, expect today. In short, I am satisfied that most people whose unemployment bouts come no more frequently than every four years would be much better treated during that period of unemployment under Short Term Paid Leave as compared with current arrangements.

Even if a person is between jobs, or laid off a more-or-less regular job, for eight weeks every two years, he or she will still be well treated under the Short Term Paid Leave plan. After the two week waiting period, which could be covered by currently accrued earned leave days, the employee could turn to his or her reserve and there find six weeks of full pay available. This is a significant advantage for that substantial proportion of the insured unemployed who are out of work for eight weeks or less. n43 For them, the theoretical advantage of twenty-six weeks of benefits under the current unemployment compensation system is not important.

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n43 According to a study by the Congressional Budget Office, for example, the mean duration of unemployment benefits varied between 12.3 and 15.9 weeks during the years 1970-1982. CONGRESSIONAL BUDGET OFFICE, UNEMPLOYMENT INSURANCE: FINANCIAL CONDITION AND OPTIONS FOR CHANGE 22 (1983).

-----End Footnotes-----

Let us consider next those people whose jobs carry with them, for example, annual four-week shut downs, during which periods they currently turn to unemployment compensation to maintain a regular flow of income. Although these funds may not be sufficient because unemployment compensation imposes a waiting period and only pays partial compensation, presumably such workers save for this time off. Short Term Paid Leave treats these annual periods for what they really are -- paid vacation time that is required at the convenience of the employer. Regular income would flow to workers during such mandatory time off -- the first two weeks out of current paid-leave accumulations, the remainder out of their reserves.

Other employees are out of the work force for very lengthy periods, for example, a year or more. The Short Term Paid Leave plan, like existing regular unemployment compensation arrangements, is not designed to handle the needs of these people. Rather, other long-term programs are needed. n44

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n44 Under present arrangements workers sometimes obtain modest durational additions to unemployment compensation that carry them for nine months or a year. Typically these are triggered by unusually high rates of unemployment either within a state or nationally. For a description of the extended benefit programs, see Duration of Benefits, 1B Unempl. Ins. Rep. (CCH) P1935 (Mar. 11, 1986). Those programs could, of course, continue under the Short Term Paid Leave plan. But even they do not deal with the truly long-term unemployed, whose needs are now very poorly addressed in the United States -- primarily through means-tested programs like food stamps. This problem requires reform of our long-term income maintenance programs, which, however, is not the subject of this Article.

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There are still other categories of the temporarily unemployed to consider. Some workers, because of the nature of their jobs, can expect to be regularly off work for rather more than the annual four week period considered above. There are, for example, certain seasonal workers who work six months in the canning industry and then have no work for the rest of the year. Others, such as certain construction workers, know that because of the climate or the long-term work situation in their area, they are usually going to work a short year. Even though these bouts of unemployment are hardly unexpected, these seasonal employees now draw heavily on the compensation system, in many cases year after year. n45 Some states have sought to restrict the access of seasonal employees to their systems. These states have had only limited success, in part because of the difficulty under the current arrangements of distinguishing by statute these claimants from those whose long layoffs are truly unanticipated.

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n45 For studies of and policy responses to this problem, see generally Maruizi, Unemployment Insurance and Seasonal Industries, in 2 NATIONAL COMM'N ON UNEMPLOYMENT COMPENSATION, UNEMPLOYMENT COMPENSATION: STUDIES AND RESEARCH (1980) and M. MURRAY, THE TREATMENT OF SEASONAL UNEMPLOYMENT UNDER UNEMPLOYMENT INSURANCE (1972).

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Workers in these sorts of industries, in my view, are often able to take inappropriate, though perfectly legal, advantage of the current system. n46 After all, many of these jobs are reasonably well paying; and many holders of part-year jobs are not primary family breadwinners. Yet these jobs are being subsidized by the economy as a whole. That subsidy either gives the worker a windfall in the sense that his or her unemployment is hardly the result of the "risk" the system was centrally designed to protect against; or, alternatively, and perhaps even more likely, that subsidy permits employers to pay such workers less than their otherwise market wage because the available unemployment benefits are worth more than the benefits for which the enterprise pays. Under my plan, while these short-year workers would, of course, be entitled to the Short Term Paid Leave benefits they earn while working, they would have to make other arrangements to cover longer gaps without regular paychecks. n47

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n46 At present, the financing of unemployment compensation is done on the basis of a payroll tax, which is partially "experience" rated; that is, employers pay a higher tax rate the more benefits their employees receive. State maxima and minima bound the operation of experience rating, however, with the result that even if seasonal employers pay into the system at the maximum rate, their employees often draw out sums in excess of the amounts that their employers paid into the system. These employers are often termed "red ink" employers.

n47 Employers of such workers might well have to increase their hourly compensation or else reorganize their workforces in a more efficient way. More seasonal workers who are primary family breadwinners

might find supplementary off-season work. States could choose to enact special supplemental compensation programs deliberately aimed at these classes of workers.

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A yet different category of the unemployed is illustrated by the person who will wind up with a reasonably stable attachment to the work force over the long haul, but who has an unstable or unlucky start, experiencing a disproportionate share of early unemployment. On a career-long basis this sort of worker could well self-insure his or her unemployment experience through the reserve feature of my plan. The problem, however, is not having cash -- a sufficient reserve -- at the outset. In order to deal with this sort of situation (and other similar ones), I have added a "borrowing" feature to the Short Term Paid Leave plan. The basic idea is that an employee may, under appropriate circumstances, take his or her own reserve account into the red, by borrowing from the employee's designated financial institution. So as to assure that the funds would be forthcoming, I would have the government be a guarantor of these loans.

I propose that the maximum loan be equal to what would be that worker's full reserve -- that is, twenty-four weeks of full pay. So far as repayment goes, I would require a worker whose paid-leave reserve account is in the red to bring it back into the black at a rate of twenty days of earned days per year -- that is, somewhat faster than the initial, fifteen days per year, reserve build-up rate. This would, in effect, mean that the worker who had borrowed would obtain one week less vacation a year until his or her reserve was into the black. n48

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n48 A worker's loan from his or her reserve might be ultimately secured by that worker's social security retirement account, which could be charged were the reserve still in the red when the worker wanted to retire. Perhaps this would mean delaying the worker's ability to retire on social security.

Harder issues raised by this feature are whether there would be restrictions on when a worker could borrow from his or her reserve and what interest rate, if any, this loan would carry. It is beyond the scope of this Article to discuss these details. My instinct at present is to provide public support of the Short Term Paid Leave plan by having the government pay the interest due to the financial institution that loans the money. I also lean toward a rule that in cases of long-term, involuntarily unemployed people, the government itself would repay the loan, perhaps on the basis of a month's repayment for every six the person remains unemployed after the first six.

Although these subsidies might create demands to regulate who would be eligible to borrow, I would oppose such individual restrictions as contrary to the principles of the Short Term Paid Leave plan. On the other hand, it might be appropriate for a person under age 25, for example, to be barred from borrowing from his or her reserve account unless he or she has logged at least, for example, two years of substantial employment during the prior three years. The general idea here is to discourage the use of the loan feature by those who are more likely to be immature borrowers if they have not had a significant recent history of regular work.

A further question would be to what extent a person could borrow if he or she had something in his or her reserve account at the start of the bout of unemployment in question. Plainly, I would allow someone with 10 weeks in his or her reserve to borrow 14 more weeks, if necessary, once those 10 had been used up. The issue rather is whether that employee with a full reserve could go 24 weeks in the red, thereby extending his or her paid unemployment period to a maximum of 48 weeks. Although there are arguments on both sides, I would allow such a worker to borrow up to the full 24 weeks.

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Although this borrowing feature would take care of workers whose needs are timed such that they occur in advance of an adequate opportunity to save up, it is not intended to take care of the needs of all of the temporarily unemployed. Some workers who have sufficiently erratic employment will still be without

benefits under the Short Term Paid Leave plan for periods of varying length. Many of these people, of course, are also without benefits under the current regime. For example, their unemployment is regularly considered to be their fault (for example, they are regularly fired for misconduct, refuse suitable work, or voluntarily quit their jobs). In those situations, of course, any failure of Short Term Paid Leave to provide protection is not a loss as compared with the present system.

There are some people now who recurrently lose their jobs because of bad luck (for example, their employer or industry suffers a downturn) or incompetence that does not amount to misconduct (or is not so argued by an employer), both of which are an employer's responsibility under the current arrangements. Some people in this group currently obtain unemployment compensation benefits that may be better than what they could expect to get under the Short Term Paid Leave plan. Others, however, do rather poorly under the present regime because they do not have enough so-called base period employment to qualify for benefits. Of those erratic employees who are served reasonably well by the current system, some may be abusers of the system (such as those who arrange to be fired for the purpose of collecting unemployment compensation or who secretly work for cash while drawing unemployment). The moral claim of these sorts of people to unemployment benefits is rarely stronger than that of those who have never worked but now say they would like to, and for whom the current system provides nothing.

Yet, in the end, I concede that there must be some victims of recurrent bad luck, even if relatively few in number, whose replacement income needs, though satisfied by today's unemployment benefits, could not be well met by the Short Term Paid Leave plan. Unless I badly underestimate the number of people in this situation, however, I conclude that the benefit of my proposal would be worth the cost of harsher treatment to these innocent victims. Moreover, so as to minimize the effects of this loss, I would favor giving such people first priority in obtaining help from the employment service. If they truly are willing workers who have had a run of bad luck, they should be relatively easy to place.

Besides, the great bulk of those employees who now have jobs with good benefits will rarely find themselves claiming unemployment compensation at all. At the University of California, for example, most employees leave their jobs by quitting voluntarily. n49 Finally, even if Short Term Paid Leave would provide less unemployment compensation protection for some deserving people than does today's scheme, the shift to my plan might improve their benefits in other areas. On that basis, even these hard luck workers may well be considerably better served by the Short Term Paid Leave plan than by the current system.

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n49 Telephone interview with Betty-Lou Harmon, supra note 21.

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By this point I hope it has become reasonably clear that concerns about (1) work disincentives created by today's unemployment compensation system, (2) whether people today are secretly working while drawing unemployment compensation benefits, and (3) whether unemployed claimants are today engaging in bona fide work searches, would largely disappear under my plan. The Short Term Paid Leave plan would provide considerable incentives for people to try to get back to work since they would be using up their own resources while out of work. At the same time, since claimants would have earned the money they draw from the plan, the public would feel quite differently about the claimants' right to draw upon it as they please.

5. Disability

Employees who are out of work for a few days each year because of sickness would, under my plan, remain in full-pay status by using up earned paid-leave days. Although this would be a gain for those many workers who do not now have sick leave benefits, others, such as those who work for the University, currently remain in full-pay status so long as they have sick leave available. Under my plan, unlike the current University plan, using up a day of earned paid leave when ill reduces available

vacation days. Still, people with an average number of sick days would nonetheless have generous vacation leave under my plan, even as compared with the University's relatively liberal vacation benefits.

Moreover, the merger of vacation and sickness leave means that employees who stay healthy are rewarded with more vacation. n50 By itself, this is a desirable incentive and one which a number of employers are already embracing, albeit often in a diminished way, such as allowing workers to trade two unused sick leave days for one extra vacation day. n51

-----Footnotes-----

n50 My plan also rewards with extra later vacation those employees who are temporarily disabled but who make special efforts to recover promptly. Current programs, by contrast, try to discourage malingering by both medical oversight of the employee's condition and less than full replacement of wages.

n51 Similarly, some companies provide a core package of benefits that is supplemented by earned "flexible credits" which employees discretionarily apportion among health-insurance plans, disability income, life insurance, vacations, and so forth. See, e.g., CONFERENCE BOARD, REP. NO. 831, FLEXIBLE EMPLOYEE BENEFIT PLANS: COMPANIES' EXPERIENCE (1983). As noted above, a few employers have already merged sick leave and vacation leave, treating them as a single paid time-off benefit. See supra text accompanying notes 19-20.

-----End Footnotes-----

To the extent that there are sick-leave abusers in an enterprise today, those employees would have a new clear choice under my plan. They could either take those days off as before, probably on an ad hoc one-by-one basis, or take them on a planned basis, probably in a block, but not both. This choice may well lead to less ad hoc absenteeism with workers preferring to have their available holidays in longer periods. Also, workers might be more inclined to give advance notice of intended days off, rather than just calling in sick that morning. Both of these changes would provide important scheduling and morale benefits to employers. To be sure, there is some chance under my plan that some employees would choose to come in to work when they are not feeling up to par. Given the overall generosity of the plan, however, this seems fairly unlikely.

Of course, most people do not have a stable pattern of three or four days of illness per year. Yet, if they average three or four days per year over their work career, the Short Term Paid Leave plan allows them, in effect, to self-insure with ease. On top of that, the reserve portion of the Short Term Paid Leave account is deliberately designed for the occasional longish bout of disability that many people suffer. Moreover, as in my discussion of the unemployed, someone who unluckily has a longish bout of disability near the start of his or her career (including, for example, those novices who are injured at work when they first begin their jobs) would be able to deal with that timing problem through the borrowing feature of my plan. In these respects, my plan broadly parallels the University's current package of protection for work and non-work disabilities (assuming that the employee carries the nonindustrial disability supplement) when combined with the University's policy of permitting sick leave accumulation.

To be sure, my plan is not intended to deal with other than the temporary needs of the long-term disabled any more than it provides for the needs of the long-term unemployed. n52 On the other hand, as discussed above, n53 even employees with several longish bouts of temporary disability would fare well under my plan. And, again based on my previous discussion of the unemployed, it should be evident, for example, that with a very modest amount of planning and saving, women could easily arrange to have eight weeks of fully paid pregnancy leave every few years and still have good vacation leaves in between. n54

-----Footnotes-----

n52 I nonetheless envision (as I did with the long-term unemployed) that the government would slowly repay one's loan from his or her Short Term Paid Leave account when a worker is out with an extended disability. See supra note 48.

n53 See supra text accompanying note 41.

n54 See supra text accompanying note 43.

-----End Footnotes-----

My main concern about how Short Term Paid Leave would treat the disabled parallels the concern I raised about an innocent employee who is recurrently unemployed. n55 Here, one should think about the person who regularly has to take time off work because of a chronic health problem. As before, I am not especially troubled by what would happen to those people in this group who are continually off work because of health problems caused by their own fault. n56 Those who are chronically ill or recurrently injured because of bad luck present a more troubling case, of course. Nonetheless, my concerns are at least diminished since the general outcome for these people too would not be a loss of income. Rather, they would have to use up their paid leave while sick and not have earned paid-leave days left for genuine holidays. Moreover, the many people in this state of health who hold jobs today that carry with them no temporary disability protection for causes unrelated to work would be considerably better off under my plan. Finally, assuming chronically sick people are not likely to have accumulated sick leave, even at a place with good benefits like the University, anyone who regularly has to be out of work more than a day a month for health reasons already must dip into vacation leave in order to remain in full-pay status.

-----Footnotes-----

n55 See supra text following note 48.

n56 Id.

-----End Footnotes-----

6. Combinations

On the bright side, by pooling a number of risks as my plan does, many people will be able, over their work careers, to self-insure their income replacement needs, whereas they could not do so if separate funds were earmarked for each specific contingency. For example, someone with an unusual disability experience would be better off having access to funding that would otherwise be allocated to unemployment protection that this person does not need.

On the darker side, however, those few people who unluckily combine unusual amounts of both unemployment and disability would be least able to maintain a continuous flow of income under my plan. Yet again it must not be forgotten that many of the people in these circumstances, probably a large portion of them, do not have career-long good benefit arrangements today either, thus once more minimizing the potential social costs of my plan.

CONCLUSION

The extended discussion presented in Part II of hypothetical workers and their various non-work experiences illustrates how the Short Term Paid Leave plan would function and why it ought to be a very attractive benefit scheme for nearly all employees regardless of their current benefit packages.

How should employers react to my proposal? Assuming employees are happier with my plan as compared to current arrangements, resulting improvements in job performance could well be the biggest gain for employers. Additional employer benefits would include administrative savings, a reduced need to police workers and to pry into their private lives, less conflict with employees over whether they

qualify for certain benefits, enhanced workforce morale as employee perception of abuse by fellow workers declines, and incentives for employees to plan and announce proposed periods off work. And while the portability of the plan's benefits would make it easier for employees to leave their jobs, it would at the same time be easier to attract employees from other jobs.

Employers would, of course, be concerned about costs -- especially those employers who do not provide good benefits now. Nonetheless, an appropriate phasing-in of my plan, combined with more research on who really pays for employee benefits, ought to reduce considerably fears and objections on this ground.

To be sure, in some employment sectors, my plan might lead to lowered pay (or slower raises) and more time off for some workers and, at the same time, to new jobs for other workers. Retail clerks and textile workers with poor benefits at present are possible candidates here. More precisely, by providing existing employees with more paid time off the introduction of Short Term Paid Leave ought to force employers to expand their work force in order to maintain their current level of productive labor input. At the same time, because they would be providing better benefits, these employers ought to be able to pay lower base hourly wages. Although the plan might initially burden some employers, it could achieve a real gain in these times of continued high unemployment. n57

-----Footnotes-----

n57 There are, in addition, some broad questions my plan raises about potential macroeconomic impacts on private savings and productivity. If enough people would become sufficiently interested in my plan for those matters to be investigated seriously by economists, I would be very pleased. But so far, I do not see serious problems lurking there.

-----End Footnotes-----

Assuming the Short Term Paid Leave plan is a promising idea, how might it be implemented? The best strategy is probably to push for some substantial experimentation. In order to try out all of the features I propose, it would certainly help to have special exceptions from the federal government, probably Congress, with respect to existing unemployment compensation system rules. Armed with such exceptions, any state could, I believe, authorize or impose experimentation by or on some portion of its working population. n58 Even without federal action, states could probably authorize employers to try out the Short Term Paid Leave plan so long as there were provisos to the effect that those who fully use up its benefits are held harmless with respect to existing unemployment compensation benefits. Even individual employers might try to experiment with my plan through contractual arrangements with workers to the effect that the workers agree not to claim either workers' compensation or unemployment compensation benefits so long as they have funds in their earned paid-leave accounts.

-----Footnotes-----

n58 There is a possibly troubling question here about whether ERISA preempts state experimentation, something I do not believe ERISA drafters ever intended despite ambiguous language in the statute. See Kilberg & Inman, Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514, 62 *TEX. L. REV.* 1313 (1984); Galante, State Benefits Law Not Pre-Empted by ERISA, *Nat'l Law J.*, Sept. 23, 1985, at 5, col. 1 (regarding the impact of ERISA on state laws regulating vacation rights). I have chosen to ignore that question here.

-----End Footnotes-----

But it is probably too early to focus on implementation issues. What is needed first is wider discussion of the Short Term Paid Leave proposal. Were the basic idea of Short Term Paid Leave to catch on, I have little doubt that we could identify promising experiments to try.

Professor of Law, University of California, Berkeley. B.S. 1964, J.D. 1967, Northwestern University.

This proposal was in a way inspired by an article by Swedish Professor Gosta Rehn, titled Towards A Society of Free Choice, which appeared in COMPARING PUBLIC POLICIES (Wiatr & Rose eds. 1977). Rehn discussed his work with me in Berkeley some years ago after the publication of my book EDUCATION BY CHOICE (1978) (co-authored by Professor John E. Coons). That conversation showed me that the particular mixture of liberty and equality that Professor Coons and I advocated for the education system might have a counterpart in the social insurance/employee benefit system.

New file: UI reform

FAX TRANSMISSION

AFL-CIO

815 16th Street, N.W., Room 7057
Washington, D.C. 20006
(202) 637-5178
Fax: (202) 508-6967

To: Ann O'Leary **Date:** February 11, 2000
Fax #: 456-2878 **Pages:** , including this cover sheet.
From: Christine L. Owens

Subject: ALF-CIO comments on UI/paid leave initiative

COMMENTS: Please feel free to call if you want to discuss these comments or to talk further about broader unemployment insurance reform. Thanks.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS



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February 2, 2000

Ms. Grace A. Kilbane, Director
Unemployment Insurance Service
Employment and Training Administration
U.S. Department of Labor
Room 2-4231
200 Constitution Ave., NW
Washington, DC 20210

Dear Ms. Kilbane:

Enclosed please find the American Federation of Labor and Congress of Industrial Organizations' comments in support of the Department of Labor's proposed regulations to allow the States to provide unemployment compensation for birth and adoption leave. We appreciate the opportunity to comment on the Department's proposal and urge DOL to promulgate final regulations as soon as possible.

Thank you for your consideration.

Sincerely,

Jonathan P. Hiant
General Counsel

DG:ls
Enclosure

**COMMENTS OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF
INDUSTRIAL ORGANIZATIONS IN SUPPORT OF REGULATIONS PROPOSED BY
THE DEPARTMENT OF LABOR, EMPLOYMENT AND TRAINING
ADMINISTRATION, FOR BIRTH AND ADOPTION UNEMPLOYMENT
COMPENSATION**

Introduction

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) submits these comments in response to the Notice of Proposed Rulemaking by the Department of Labor (DOL) "to create, by regulation, an opportunity for State agencies that administer the Unemployment Compensation (UC) program to pay, under a voluntary experimental program, UC to parents who take time off from employment after the birth or placement for adoption of a child." 64 Fed. Reg. 67972 (to be codified at 20 C.F.R. pt. 604) (Dec. 3, 1999).¹ DOL's proposal follows President Clinton's May 23, 1999 directive to the Secretary of Labor, in recognition of the importance of building strong family support systems, to promulgate regulations allowing the "States to develop innovative ways" to use the unemployment compensation system to provide partial wage replacement to new parents. *Id.* For the reasons set out below, we support the proposed regulations but suggest several modifications to add clarity to the program and protect the integrity of the unemployment trust funds.

We stress, however, that while the modest program authorized by these regulations responds to real needs of a discrete group of workers, it is no substitute for long-overdue comprehensive and meaningful reform of the UC system. As discussed below, the UC system is in crisis and no longer serves the needs of the nation's working families. The solution to this

¹ The Department refers to this as Birth and Adoption Unemployment Compensation, or BAA-UC. See 64 Fed. Reg. at 67973. We use that term throughout these comments.

crisis is *not* incremental, *ad hoc* reform that secures limited benefits for relatively few workers. Rather, the answer is careful and comprehensive reform that will expand eligibility, increase benefits and shore up the UC program generally. Just as the AFL-CIO and its affiliates remain committed to strengthening income support for parents who perform the critical work of taking care of children, we also remain firmly committed to comprehensive reforms and call on the Department and Congress to move quickly and aggressively to put into place the changes necessary to mend the frayed unemployment safety net and restore essential protections for working families.

I. **Comprehensive UC Reform Is Necessary to Meet the Needs of Today's Workforce and Restore the UC Safety Net for Working Families**

The unemployment compensation system is in crisis. Since the 1980s, benefit reciprocity rates have dropped dramatically. Low reciprocity rates are *not* because state UC programs are in trouble. To the contrary, state trust funds are flush and, as such, invite program reforms boosting coverage and benefits. Yet the response has been the opposite: a steady drumbeat for lowering tax rates and rolling back protections even further. In the face of declining coverage and threats to the Employment Service program generally, only comprehensive reform -- at both the federal and state levels -- can restore the capacity of the UC program to meet the needs of America's working families.

A. **The Unemployment Compensation System Has Not Kept Pace with Trends in Employment.**

Six and a half decades after its creation as part of the Social Security Act of 1935, 49 Stat. 620 *et seq.*, the UC system is failing in its mission to provide economic protection to unemployed workers. In fact, only about one third of unemployed workers actually receive unemployment

benefits. Advisory Commission on Unemployment Compensation, *Unemployment Insurance in the United States: Benefits, Financing, Coverage (Unemployment Insurance)* 218 (1995).² The system's shortcomings in coverage fall disproportionately on certain segments of the workforce, including low wage, contingent, part-time, and temporary workers, many of whom are women.

In 1991, compelled by the dramatic decrease in the receipt of UC benefits during the 1980s, Congress created the Advisory Commission on Unemployment Compensation (ACUC) to evaluate the effectiveness of the UC system. The findings of the ACUC confirm the critical need for reform. They also demonstrate that the current crisis in the UC system is in large part attributable to the program's failure to keep pace with economic changes and changes in the demographics of the workforce. Without real and substantial reform aimed at bringing the system in line with current economic and workforce realities, the crisis will continue unabated.

Today's workforce differs vastly from its 1935 counterpart. While the workforce in the earlier era consisted primarily of married men who were the sole sources of income in their family units, women make up 47% of today's workforce and more than 60% of women work for pay. U.S. Department of Labor, *The Employment Situation: December 1999*, Table A-1 (January 7, 2000). Between one-fourth and one-third of workers are in jobs that are part-time, temporary or contract labor. *No Shortage of "Nonstandard" Jobs* (Economic Policy Institute, Washington,

² The proportion of unemployed workers receiving UC benefits has dropped from a national average of 49% during the 1950's, and over 75% during the recession of 1974-75, to 35% in the 1990's. *Expanding Unemployment Insurance for Workers on Family & Medical Leave* (National Employment Law Project, New York, N.Y.), July 22, 1999, at 1-2.

D.C.), 1999, at 3 and Table 1. Traditional eligibility criteria exclude these growing segments of the workforce from UC coverage.³

In addition to excluding members of the new workforce, since the 1980s the UC system has increasingly excluded workers who were traditionally eligible for unemployment compensation. This phenomenon primarily results from the tightening of State eligibility requirements. ACUC, *Report and Recommendations* 39 (1994). At the encouragement of the Federal government, many States greatly restricted their eligibility requirements during the 1980s in an effort to improve trust fund solvency. *Id.* However, despite a booming economy and unprecedented surpluses in UC trust funds, unemployment compensation reciprocity remains at a record low at the same time that employers benefit from massive tax cuts.

Several key changes – reforms we support and have advocated strongly for – are necessary to bring the UC system out of the current crisis-state. These reforms will force the UC scheme to be more responsive to today's workforce and economy by increasing both the scope of UC coverage and the level of benefits. It is important to recognize that due to the structure of the UC system, reform will occur in large part on the State level. Nonetheless, in addition to addressing issues appropriate for national reform, the Federal government must also work aggressively to encourage reform amongst the States. This is exactly what the ACUC urged and we strongly support their recommendation. See ACUC, *Defining Federal and State Roles in Unemployment Insurance (Defining Roles)* 9 (1996).

³ For example, a recent study found that in Texas, only 21% of unemployed women, 8.5% of part-time workers, and 18.4% of low wage workers, received UC benefits. Maurice Emsellem *et al.*, *The Texas Unemployment Insurance System: Barriers to Access for Low-Wage, Part-Time & Women Workers* (National Employment Law Project/Institute for Women's Policy Research), 1999.

The failure of the UC system to keep pace with the changing workforce is highlighted by the fact that low-wage and contingent workers often do not qualify for unemployment compensation because of the way in which many States count prior earnings to determine eligibility for benefits. Shifting to a system of "moveable" or "alternate" base period accounting could significantly reduce this problem. By including a worker's most recent earnings in the eligibility calculation, more low wage and contingent workers, whose earnings are often less regular, would be eligible for benefits. In fact, broad-based adoption of moveable base, as the ACUC recommended, ACUC, *Unemployment Insurance* at 17, would permit an additional six to eight percent of unemployed workers access to benefits. Wayne Vroman, *Alternative Base Period in Unemployment Insurance: Final Report* (Urban Institute), 1995.

The UC system often unfairly excludes part-time workers. By expanding coverage to claimants who are looking for part-time work, the UC system would much more accurately reflect today's economy, which demands high levels of part-time employment.

The determination of what constitutes good cause for unemployment in many States fails to reflect the unique situation of women workers, who may have compelling personal reasons for leaving employment, such as domestic violence and child and elder care. Reforms must be made, with leadership on a Federal level, that would bring the good cause exceptions up to date with the reality of the demographics of the workforce.

In addition to reform of the eligibility criteria, efforts must be made to address problems in the administration of UC. The trend toward using telephone and internet access as the exclusive means for applying for UC benefits, and in some States even for hearings, must be halted. This practice creates additional barriers for less sophisticated workers who have fewer resources. True

reform of the UC system must ensure, at a minimum, that all unemployed workers have reasonable and fair access to the system's application process.

We also support several general reforms that would increase benefits as well as strengthen UC reserve funds. The system has become far too unresponsive to increases in the duration of long-term unemployment. To address this problem, adjustments must be made to the manner in which the Extended Benefits portion of the program is triggered. We support ACUC's recommendation that the Total Unemployment Rate, which measures unemployment in the States, be used as a trigger for the Federal Extended Benefits program. *See generally, ACUC, Report and Recommendations* at 7-11.

Raising the taxable wage base, which has remained the same since 1983, is also essential to reforming the UC system. ACUC, *Defining Roles* at 66. As the ACUC found, increasing the base had the effect of both increasing the States' reserve ratios as well as increasing benefit levels. *Id.* at 68. In addition, no unemployment reform can succeed without adequate administration, and we therefore encourage increased administrative funding of UC. Finally, while the UC system grants the States a large degree of latitude with respect to the determination of eligibility requirements, administrative financing decisions remain with the Federal government. We strongly support the continued reliance on a Federal-based financing system in order to ensure the long-term viability of the UC scheme.

II. BAA-UC Is a Modest and Appropriate UC Reform that Responds to Changes in the Workforce

The AFL-CIO and its affiliates believe that the Department's proposal, allowing States to provide unemployment benefits to parents of newborn or newly-adopted children, is a modest step

in the right direction of comprehensive unemployment compensation reform. The Department clearly has authority to promulgate the proposed regulations. The Federal-State unemployment compensation system leaves virtually all eligibility criteria to the states. As a result, no provision of Federal law requires amendment in order for States to enact BAA-UC. To the extent that the Department of Labor and its predecessors have found implicit in Federal unemployment compensation law a requirement that claimants remain able for and available to work, provision of BAA-UC fulfills that requirement because those who receive such benefits remain attached to the workforce while they stay at home temporarily to take care of a newborn or newly-adopted child. Indeed, BAA-UC benefits will, like UC benefits in general, actually strengthen workforce attachment.

Current trust fund solvency has created optimal conditions for enacting BAA-UC on an experimental basis. However, we believe that only those states whose trust fund balances are and remain solvent should provide BAA-UC benefits and we therefore suggest modifications to DOL's proposed rules.

A. Providing Unemployment Compensation During Brief Periods of Leave to Care for Newborn or Newly-Adopted Children Meets the Needs of Today's Working Families.

As noted above, the nation has witnessed enormous work force changes over the last few decades. Today, more than 60% of all women work for pay, up from 42% in 1975. U.S. Department of Labor, *Employment and Earnings*, Table 2 (Jan. 1999). In 1977, wives worked for pay in only about half of married-couple families; 20 years later, two-thirds of wives were in the workforce. During the same period, the share of families with children in which both parents worked rose from 54% to 71% of married couples. U.S. Department of Labor, *Employment*

Characteristics of Families in 1997, (May 21, 1998); U.S. Department of Commerce, U.S. Census Bureau, *Historical Income Tables, Families - 1976-1996*, F-14A and F-14C (March 1997). More than 70% of mothers (with children under 18) who are maintaining households are working. *Handbook of U.S. Labor Statistics*, Berman Press (Lanham, MD), 1999, at 133, Table 1-47. The greater work effort of parents – married or single – has placed enormous strains on working families.

Although the Federal-State unemployment compensation system has not yet met the demands of the changing workforce, other laws have responded directly to those changes. For instance, Congress passed the Family and Medical Leave Act (FMLA), 29 USC § 2611 *et seq.*, in 1993 to address the growing tension between work and family responsibilities created by the entrance of women into the workforce and the increasing number of homes with two working parents. Nonetheless, research indicates that many workers simply are not able to take advantage of FMLA leave provided for under the Act because it is unpaid.

The Commission on Family and Medical Leave, charged with evaluating the effectiveness and impact of the FMLA, found that nearly 64% of workers who needed to take family and medical leave were unable to do so because they could not afford to lose their income for this period of time. Commission on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 273 (1996). Furthermore, the Commission found that workers with the lowest wages were the least likely to receive some compensation when taking leave. *Id.* at 282. These findings highlight the compelling need for paid family leave, as the initial legislation would have provided. The Department's BAA-UC regulations represent a modest step toward addressing that need. The regulations are also consistent with the

union movement's longstanding support for paid family leave. However, BAA-UC is at best a partial and imperfect solution to a significant problem for working families. We believe that securing additional and alternative means for providing paid leave should be accorded the highest priority, and that the Department should take leadership in such efforts in order to ensure that the promise of family leave does not ring hollow for working families.

B. Provision of BAA-UC Is Consistent with Federal Unemployment Compensation Law.

We agree with DOL that Federal law creates no impediments to the provision of unemployment compensation benefits for workers on approved leave for the birth or adoption of a child, or who otherwise leave employment for this reason. *See* 26 U.S.C. §§ 3304, 3306; 42 U.S.C. §§ 503, 504. States are free, therefore, to add this class of workers to those who are eligible for the receipt of UC benefits.

The Department asserts that although Federal UC law contains no requirement that an unemployed individual remain able to and available for work as a condition of receiving benefits, “[a]gencies administering the Federal-State UC program have for over 60 years interpreted these . . . statutory provisions to require a participating State to have able and available requirements.”⁴ 64 Fed. Reg. at 67972. DOL states, and we agree, that the BAA-UC program it has proposed fulfills these “requirements.” *Id.* at 67973. To the extent, as DOL argues, that a reinterpretation of the “able and available requirement” must precede any action by the States, the Department need not undertake formal rulemaking under the Administrative Procedure Act, 5 U.S.C. §

⁴ The states each have their own able and available requirements. *See* Amy Chasanov, *Unemployment Compensation and Eligibility: Clarifying Conditions for Nonmonetary Eligibility in the Unemployment Insurance System*, 29 U. Mich. J.L. Ref. 89, 111 (1995-1996).

553(b).⁵ Rather, DOL can clarify its understanding of this requirement through the issuance of a Program Letter that explains how workers who are temporarily unemployed because of birth or adoption remain able to and available for work to the same extent as workers who continue to receive unemployment compensation under a variety of other circumstances. See Unemployment Insurance Program Letter No. 1-96 (Oct. 5, 1996) (interpretive rule explains particular terms in statute or opines as to their meaning and does not require notice and comment). By engaging in formal rulemaking, however, the Department will reap the substantial benefits of public comments as it seeks to promulgate effective regulations.

C. Provision of BAA-UC Falls Well Within the Current Federal-State UC Scheme.

Congress enacted the Social Security Act of 1935 in response to massive unemployment. Title IX of the Act, which established the unemployment compensation scheme, reflects Congress's attempt to ameliorate the effects of this substantial unemployment. See H.R. Rep. No. 615, 74th Cong., 1st Sess. 8 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 11 (1935). Only five states had passed their own unemployment compensation law when Congress undertook consideration of Title IX, *N.Y. Tel. Co. v. N.Y.S. Dep't of Labor*, 440 U.S. 519, 540-41 (1979), the others having chosen not to "handicap their industries in competition with the industries of other States." H.R. Rep. No. 615 at 8; see E. Witte, *An Historical Account of Unemployment Insurance in the Social Security Act (Historical Account)*, 3 L. & Contemp. Prob. 157, 158, 168 (1936). Congress recognized the necessity of Federal legislation that would impose "[a] uniform Nation-wide tax upon industry, thus removing this principal obstacle in the way of unemployment

⁵ Of course, since BAA-UC does not conflict with any requirements of Federal law, Congress need not undertake any legislative action.

insurance" provided by the States. H.R. Rep. No. 615 at 8; *see* United States Social Security Board, *Annual Report* 8 (1936) (legislation assigned "primary role" to Federal government of "remov[ing] obstacles to State action"); S. Rep. No. 628 at 12.⁶ The provision of benefits would allow workers unemployed through no fault of their own to "tide themselves over" until they found new employment or returned to their old jobs, thus avoiding the need for relief. *Cal. Dep't of Human Resources Devel. v. Java*, 402 U.S. 121, 131-132 (1971) (*citations omitted*). The Administration also believed that providing benefits would strengthen individual attachment to the workforce by allowing the unemployed worker to focus on finding a job. Furthermore, benefits provided a public function by stabilizing the purchasing power on which the economy depended. H.R. Rep. No. 615 at 8.

The Committee on Economic Security, whose recommendations to Congress became the models for the legislation ultimately enacted,⁷ considered at length a strictly Federal UC system in which Congress both administered the program and set the criteria for benefits eligibility. While

⁶ Under the bill that ultimately became law the Federal government also performed other "important functions." H.R. Rep. No. 615 at 9. The Social Security Board was to "study[] and mak[e] recommendations with respect to the broad problems of economic security." *Id.* The States received financial aid from the Federal government to help defray their administrative costs. The Federal government was placed in charge of the unemployment reserve funds by maintaining them in a trust account for the benefit of the States, thus "afford[ing] maximum safety for these funds" and promoting business stability. *Id.*

⁷ President Roosevelt established the Committee on Economic Security by Executive Order No. 6757, June 29, 1934. The Committee consisted of the Secretaries of Agriculture, Labor, and the Treasury, the Attorney General, and the Federal Emergency Relief Administrator. An Advisory Council was also created whose members were appointed by the President. Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess. 224-225 (1935). The Social Security Act received its impetus from the Report of the Committee on Economic Security." *Cal. Dep't of Human Resources Devel. v. Java*, 402 U.S. 121, 130 (1971).

it recognized the benefits of uniformity, it could not, however, agree on the substantive details of such a scheme. E. Witte, *Historical Account* at 162; see *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 483 (1977). The Committee finally “reached the conclusion that, in the absence of experience with unemployment insurance in this country, *it [was] desirable to allow wide latitude for experimentation*” on the part of the States. E. Witte, *Historical Account* at 162 (*emphasis added*); see *id.* at 163 n.17, 165 n.20. Since “considerable controversy ha[d] developed over the type of unemployment compensation legislation that should be enacted,” including “the type of unemployment to be benefited,” it made sense to allow for “considerable variation, so that we may learn through demonstration what is best.” *Report of the Committee on Economic Security*, Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess. 1323 (1935).

Consistent with this approach, Section 903(a) of the Act, now codified at 26 U.S.C. § 3304(a) (as a provision of the Federal Unemployment Tax Act (FUTA)), provided that a State unemployment compensation law had to meet only six specific requirements in order to qualify under the Federal scheme, only one of which related to benefits eligibility.⁸ From time to time Congress has “explicitly codified” additional “fundamental standards from which States may not

⁸ Section 903(a)(5) of the Act, 26 U.S.C. § 3304(a)(5), provides that States may not deny benefits to otherwise eligible individuals who refuse employment:

(A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization

deviate.” *Steward Mach. Co. v. Davis*, 301 U.S. 548, 594 (1937); see *N.Y. Tel.*, 440 U.S. at 537; see generally Amy Chasanov, *Unemployment Compensation and Eligibility: Clarifying Conditions for Nonmonetary Eligibility in the Unemployment Insurance System*, 29 U. Mich. J. L. Ref. 89 (1995-1996). For example, in 1976, Congress amended FUTA to require States to provide unemployment benefits to their own workers. Pub. L. No. 94-566. And, as discussed below, Congress followed the lead of many States in 1976 by prohibiting the disqualification of otherwise eligible claimants who enrolled in training programs in lieu of searching for work. 26 U.S.C. § 3304(a)(8). Congress has not, however, legislated a Federal “able and available” requirement, or sought to impose the criteria under which “a claimant [i]s considered unavailable for work.” U.S. Social Security Board, *Annual Report* 87 (1945).

D. States Already Provide Benefits to Groups of Workers Who Do Not Maintain Continuous Availability for Work.

As discussed above, Congress has not created an explicit able and available requirement in Federal law, and we do not find a basis for such an “interpretation” in the relevant statutory provisions. See *Hodory*, 431 U.S. at 488; *N.Y. Tel.*, 440 U.S. at 538 n.29; *Steward Mach.*, 301 U.S. at 595. Nonetheless, an availability requirement comports with Federal UC law insofar as it reflects Congress’s intent that UC provide short-term benefits, as opposed to long-term relief, to those workers temporarily separated from employment through no fault of their own. See H.R. Rep. No 615 at 7. An able and available requirement tests an individual’s prospective or continuing attachment to the workforce, just as an earnings requirement tests the individual’s retrospective attachment. See L. Freeman, *Able to Work and Available for Work*, 55 Yale L.J. 123, 126 (1945); see also 64 Fed. Reg. at 67974.

As a surrogate for prospective attachment to the workforce, the able and available requirement clearly should not, and does not, require that a UC recipient experience no lapse in his or her availability for work. Indeed, the Department points with approval to several different circumstances in which States provide benefits to individuals who are not, in the strictest sense of the term, available for work. 64 Fed. Reg. at 67973.⁹ These examples provide ample precedent for the provision of BAA-UC.

I. Recall

Eight states – Massachusetts, Arkansas, Delaware, Michigan, Missouri, New Mexico, Ohio, and South Dakota – provide UC benefits to individuals on temporary layoff.¹⁰ Because these claimants will return to their former employment within a given period, they are not required to maintain their availability for work or conduct a work search.¹¹ However, they clearly maintain their prospective attachment to the workforce by virtue of the fact that they have not suffered a separation from employment and will return to their original employment within a short period of

⁹ The Department does not claim that it needed to give prior approval to States that undertook these initiatives, either in the form of regulations or program letters.

¹⁰ See Ark. Code Ann. § 11-10-507(3)(E) (Michie 1999); Del. Code Ann., tit. 19, § 3314(3) (1999); Mass. Div. of Emp. and Training, *Service Representative Handbook*, § 1051, *Vacation Shutdown or Brief Layoff* (1996); Mich. Comp. Laws § 421.28(1)(a) (1979); Mo. Rev. Stat. § 288.040.1(2)(b) (1999); N.M. Stat. Ann. § 51-1-5-A (3) (1999); Ohio Rev. Code Ann. § 4141.29(4)(a) (1999); S.D. Admin. R. § 47:06:04:11 (2) (1999).

¹¹ See n.10, *infra*.

time.¹² In fact, the same provision of the Delaware law that waives the able and available requirement for those on temporary layoff provides for:

waiv[er] or alter[ation] of the requirements that such individual be able to work, available for work and actively seeking work as to such types of cases or situations with respect to which . . . [the state employment service] finds that compliance with such requirements would be oppressive or would be inconsistent with the purpose of this chapter.

Del. Code Ann., tit. 19, § 3314 (1)(3). And the New Mexico UC statute allows the State UC administrator to waive by regulation the requirement that claimants register for work at, and continue to report to, an unemployment office:

as to individuals attached to regular jobs and as to such other types of cases or situations with respect to which he finds that compliance with such requirements would be oppressive or would be inconsistent with the purposes of the . . . Law.

N.M. Stat. Ann. § 51-1-5-A (2). Both States thus recognize that there may well be categories of otherwise eligible workers who are attached to the workforce but whose attachment should not be tested through the claimant's availability for a new job.

2. Training

Congress amended FUTA in 1976 to prohibit States from disqualifying individuals otherwise eligible for UC on the basis of their participation in approved training programs. 26 U.S.C. § 3304(a)(8). This amendment followed enactment of such a provision by almost half of

¹² The Department has also decided that unemployed seasonal workers may refuse work that would interfere with their return to seasonal employment. 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"). These employees clearly are not available for many jobs during the off-season, but are nonetheless prospectively attached to the workforce by virtue of their impending return to seasonal work.

the States.¹³ Indeed, disqualifying unemployed workers who take steps to make themselves more employable would, as in the case of temporary layoff, frustrate the purpose of UC to “enable most workers who lose their jobs to tide themselves over, until they get back their old work or find other employment.” H.R. Rep. No. 615 at 7. Those in training clearly are not available for work during that period, nor is it likely that they could conduct a meaningful job search. However, this is a result of their taking effective steps to preserve and maximize their attachment to the workforce.

3. Illness

Eleven States lift the availability requirement for individuals who initially qualify for benefits but subsequently become ill. 64 Fed. Reg. at 67973. The Department has “approved such State laws in an effort to deter disqualification for UC where a claimant was not ‘able and available’ for perhaps one day, or even one hour, out of a week.” *Id.* The claimant’s minimal unavailability for work under these circumstances does not lessen his or her continuing attachment to the workforce. While two States place a cap on the number of weeks in which a claimant can receive benefits while ill, *id.*, the cap can be viewed simply as a way of marking a point in time when illness begins to interfere with workforce attachment.

4. Jury Duty

The Department does not disqualify State UC programs that continue to pay benefits to unemployed persons who serve on jury duty. Continuation of benefits recognizes the important

¹³ See William Haber & Merrill G. Murray, *Unemployment Insurance in the American Economy*, 114 (1966).

public policy behind jury service, as well as the fact that claimants have a legal obligation to serve as jurors when called.

E. Provision of BAA-UC Preserves Workforce Attachment to the Same Extent as the Provision of Benefits for Jury Duty, Illness, Temporary Layoff and Training.

The above examples demonstrate that the able and available requirement is met even when UC claimants experience some break in their availability for work. Providing BAA-UC to workers “who take approved leave or who otherwise leave their employment” to take care of newborns or newly-adopted children, 64 Fed. Reg. at 67973, satisfies this requirement in a similar manner.¹⁴

By securing a leave of absence to care for a newborn or newly-adopted child, a worker clearly maintains his or her prospective attachment to the workforce, as do those individuals who are on temporary layoff. In both cases, it would defeat the purposes of UC to require such individuals to look for or accept alternative employment. See Del. Code Ann., tit. 19, § 3314 (1)(3); N.M. Stat. Ann. § 51-1-5-A (2). As the Department recognizes, many workers may not have a leave of absence available to them under the FMLA or otherwise, and may have to leave the workforce temporarily to care for a child. 64 Fed. Reg. at 67975. These individuals, like their

¹⁴ There is no basis for the argument that under Federal UC law benefits belong only to those who are “involuntarily” unemployed. *N.Y. Tel.*, 440 U.S. at 537 n.28 (upholding New York statute authorizing UC payments to strikers); *Hodory*, 431 U.S. at 484. Many States have historically provided benefits to persons who quit their jobs voluntarily for good personal cause. See Katherine Kempfer, *Disqualifications for Voluntary Leaving and Misconduct*, 55 Yale L.J. 147, 151-158 (1945) (noting, *inter alia*, that risk to health or safety, and denial of leave in the face of incapacitating illness present good cause in some States, *id.* at 155); United States Department of Labor, *Comparison of State Unemployment Compensation Laws*, Table 401.1 (Jan. 1999) (sexual or unwelcome harassment, claimant’s illness and “compelling personal reasons,” *id.* n.4, such as need to care for family member).

counterparts on leaves of absence, intend to return to work shortly, and thus preserve their workforce attachment.

Moreover, BAA-UC is likely to strengthen that attachment “by providing . . . [parents] with the time and financial support to address several vital needs that accompany the introduction of a new child into the family.” 64 Fed. Reg. at 67973. As the Department has stated:

The program would allow such parents to provide the initial care that the child will need, to form a strong emotional bond with the child, and to establish a secure system of child care that, once in place, will promote the parents’ long-term attachment to the workforce.

Id. Just as the unemployed worker who pursues training should not be penalized for enhancing his or her prospects of reemployment, *see Java*, 402 U.S. at 133, so too the worker who takes time off at the beginning of the parent-child relationship and puts in place “a secure system of child care” maximizes the long-term stability of his or her employment. In fact, the cap on BAA-UC benefits imposed by virtue of the fixed duration of the leave serves to maintain a workforce-attachment requirement in the same manner as those State statutes that place a cap on the amount of time someone who becomes sick may continue to collect benefits.

Congress designed the UC system to allow the States to engage in broad experimentation. E. Witte, *Historical Account* at 162, 164 n.19. During a period of vast demographic changes in the workforce, coupled with dramatic declines in reciprocity rates, experimentation becomes critical. *See generally* A. Chasanov, *Unemployment Compensation and Eligibility*, 29 U. Mich. J.L. Ref. 89. Allowing States to provide BAA-UC, and collecting data about cost and usage, will ultimately strengthen the UC system overall. *See* E. Witte, *Historical Account* at 165 n. 19.¹⁵

¹⁵ Because the States have the authority to enact BAA-UC, there is no basis for an experiment that determines whether or not States should enact such a program on a permanent

III. COMMENTS ON SPECIFIC PROVISIONS OF THE PROPOSED REGULATION

A. Solvency

As the representative of 13 million working men and women in the United States, the AFL-CIO has an abiding interest in the solvency of the unemployment insurance trust fund. Congress understood in 1935 when it enacted the Social Security Act that “[t]he essential idea in unemployment compensation . . . is the accumulation of reserves in times of employment from which partial compensation may be paid to workers who become unemployed.” Protecting the integrity of those funds was of paramount importance. H.R. Rep. No. 615 at 7. While Congress allowed the States to determine most aspects of a UC program, Congress was unwilling to delegate to them stewardship over the employer tax fund that financed UC benefits. Congress recognized that one of the most important functions of the *Federal* government in the UC scheme was “to handle all unemployment reserve funds, in a trust account in the United States Treasury for the benefit of the States to which they belong.” In so doing, Congress intended to “afford maximum safety for these funds” and “to insure that they will operate to promote the stability of business rather than the reverse.” *Id.*; see Sen. Rep. No. 628 at 12-13, 14-15. The Federal government thus occupies a crucial role in safeguarding the availability of UC benefits to the unemployed.

basis. As discussed below in text, however, DOL should gather and analyze data during an early or “experimental” phase of BAA-UC in order to provide guidance to the States. Moreover, as at least one commenter has pointed out, there is no need to test whether BAA-UC strengthens workforce attachment since the research has already shown that it does. Letter from Janet C. Gornick, Associate Professor of Political Science, City University of New York, to Grace A. Kilbane, Director, Unemployment Insurance Service, January 14, 2000.

Any proposal to expand the pool of unemployed workers currently eligible for UC must not threaten the integrity of the reserve funds. Several factors have led us to conclude that State initiatives to provide BAA-UC, with proper safeguards, will comport with responsible stewardship over UC reserve funds. First, as a general matter, unemployment insurance trust funds currently enjoy unprecedented surpluses. This has led to increasing pressure on the part of the business community for employer tax cuts. We believe that raising the often-insufficient levels of benefits, as well as expanding the number of individuals eligible for UC in accordance with national priorities regarding work and family, represents a far sounder response to the surplus now found in many States than across-the-board tax cuts.¹⁶ This is particularly the case with respect to BAA-UC which, according to DOL estimates, will cause only modest withdrawals from State trust funds. However, we believe States should not initiate BAA-UC during periods when their reserve funds are too low. The proposed regulations should include such a provision, and the data analysis DOL conducts should contain information that allows States to protect their funds while providing BAA-UC.

State unemployment trust fund balances have shown a steady increase over the last seven years. Between 1992 and 1999, total yearly increases overall averaged an unprecedented 85.62%. In Massachusetts, for example, the fund grew by 574.58%, while in Maryland it grew by

¹⁶ With respect to benefit levels, DOL data seem to indicate that several of the States with the highest reserves have built their trust funds, at least in part, by granting fewer benefits. For example, three of the five States with the highest average high cost multiples also have some of the lowest wage replacement rates. See U.S. Dept. of Labor, Employment & Training Administration, *UI Data Summary* (1999).

415.22%. These are the fourth and sixth largest increases in the Nation, respectively.¹⁷ Trust fund balances declined in only six States over the same period. National Employment Law Project, *Expanding Unemployment Insurance for Workers on Family and Medical Leave*, Table 1 (Jan. 2000). The significance of these large increases can also be gauged by looking at solvency, measured by the average high cost multiple (AHCM) of each State's fund.¹⁸ As of 1998, thirty-three states had an AHCM of one or greater, including Massachusetts (1.07), Vermont (2.44), and Washington (1.02). In fact, Massachusetts raised its AHCM from negative to positive capability over the period 1992-1998. National Employment Law Project, *Expanding Unemployment Insurance for Workers on Family and Medical Leave*, Table 3.

The business community has responded to these high rates of solvency, as well as record profits during this period, by demanding -- and in many States receiving -- cuts in taxes that fund UC benefits. In 1998, for example, Idaho employers received their fifth UC tax cut since 1983, including a \$24 million tax cut enacted in 1997. The 1998 cut reduces taxes by \$112 million over four years. In Arizona, tax cuts in 1996 and 1998 resulted in a \$68.4 million decrease in the trust fund (see National Employment Law Project, *Unemployment Tax Cuts on the Rise: A Summary of Recent State Experiences* (rev. July 1999)) an amount equal to the estimated total cost of BAA-UC in Massachusetts, Maryland, Vermont and Washington. U.S. Department of Labor BAA-UC Cost Estimates (Dec. 1999) The South Carolina legislature cut tax rates by 50% in 1998, which

¹⁷ The Department's own cost estimates of BAA-UC focus on these two States, as well as Vermont and Washington, since there is legislative activity in each of them to enact BAA-UC. U.S. Department of Labor BAA-UC Cost Estimates (Dec. 1999).

¹⁸ The AHCM, which measures state UC trust fund solvency, indicates how many years a state could pay benefits if it paid an amount equal to the highest three annual cost rates in the last 20 years, or the last three business cycles, *without collecting any additional revenues*.

cost the State trust fund an estimated \$50 million. In Michigan employers received a 10% cut in their UC tax rate for the fourth straight year. In Kansas, employers with positive UC fund balances received a moratorium on unemployment compensation balances from 1995 to 1999. National Employment Law Project, *Unemployment Tax Cuts on the Rise: A Summary of Recent State Experiences*. Overall in 1998, tax cuts saved employers an astounding \$5 billion. National Employment Law Project, *Expanding Unemployment Insurance for Workers on Family and Medical Leave: Question and Answer* (rev. Jan. 2000).

The AFL-CIO, through its state federations, has advocated strongly against employer tax cuts and will continue to do so. Congress could not have made clearer its intent to *build* state reserve funds during prosperous times. See H.R. Rep. No. 615 at 9; S. Rep. No. 628 at 14-15. This cannot be done if State legislatures favor employers with tax breaks that erode the very basis of unemployment reserve funds. Instead, high solvency periods can and should provide legislators with the opportunity to enact measures that help to fulfill the underlying purpose of the UC system to provide as many workers as possible with security “during the period following unemployment while . . . [workers] are seeking another job, or are waiting for a return to their old position.” S. Rep. No. 628 at 12. BAA-UC is such a measure.

Moreover, BAA-UC imposes a virtually *de minimis* cost on State reserves. DOL estimates that such a program would cost a maximum of \$68 million in the four states where BAA-UC initiatives are underway, as follows: Massachusetts – \$34 million (25,996 recipients); Vermont – \$1 million (1,892 recipients); Maryland – \$21 million (19,617 recipients); and Washington – \$12 million (23,543 recipients). U.S. Dep’t of Labor BAA-UC Cost Estimates (Dec. 1999). Based upon 1998 figures (and assuming no increase in trust fund balances) BAA-UC would thus call

upon no more than 2.79% of Maryland's reserves; .74% of Washington's reserves; .39% of Vermont's reserves; and 1.89% of Massachusetts' reserves.¹⁹

These figures show that BAA-UC is an incremental measure that has a small impact on current State UC programs, particularly when compared with tax cuts sought and won by business each year. For example, the total annual cost of providing BAA-UC in Massachusetts is only \$34 million, *see* U.S. Dep't of Labor BAA-UC Cost Estimates (Dec. 1999), while employers in that State have received over \$400 million in tax cuts during the last three years. Comments submitted by Massachusetts Women's Statewide Legislative Network and Massachusetts Family Leave Coalition, *Comments on Birth and Adoption unemployment Compensation Proposed Regulations* (Feb. 2, 2000) 14 n.43. The cost in Washington for one year -- \$12 million (*see* U.S. Dep't of Labor BAA-UC Cost Estimates (Dec. 1999)) -- is only 13% of the \$513 million dollar drain on the State's trust fund that would occur under a recent tax cut proposal. National Employment Law Project, *Unemployment Insurance Tax Cuts on the Rise: A Summary of Recent State Experiences*.

Despite the current *de minimis* costs of BAA-UC, an economic downturn that results in high unemployment could result in steep demands on State reserve funds. In such a situation, it would be unwise to place an even greater draw on those funds through enactment of BAA-UC in States that had yet to do so. In certain States it might even be necessary to contract coverage, at least temporarily, for the sake of trust fund solvency.

¹⁹ These figures were arrived at by using the Department's cost estimates for BAA-UC, cited above in text, and 1998 figures for trust fund balances, *see* National Employment Law Project, *Expanding Unemployment Insurance for Workers and Families*, Table 2.

While the political process might respond adequately to such a crisis, our overarching concern with the continued viability of the trust funds leads us to conclude that the proposed regulations should deal directly with this situation, and we therefore urge the Department to revise them as follows: First, the regulations should require any state that chooses to adopt BAA-UC to have an average high cost multiple of at least 1.00 at the time it seeks DOL approval of its program, or to demonstrate that it will achieve an AHCM of at least 1.00 during the first year the program is in effect, either through a projected increase in revenue from changes in the taxable wage base, or a projected increase in the trust fund balance based on current levels of unemployment. This is particularly important since so many States have AHCMs just slightly below that threshold. Second, State legislation enacting BAA-UC should suspend approval of new BAA-UC claims if and when the State's AHCM falls below 1.00. A State should remain free to reinstate claims approval when the AHCM once again reaches 1.00, and no one currently receiving benefits when suspension of new claims is triggered should be cut off. DOL should amend the Model State legislation appended to the regulations accordingly.

B. Approved Leave

Section 604.3(a) of the proposed regulations defines "approved leave" as:

a specific period of time, agreed to by both the employee and employer, during which an employee is temporarily separated from employment and after which the employee will return to work for that employer.

64 Fed. Reg. at 67977. On its face, the definition does not limit approved leave to those authorized under the Family and Medical Leave Act. However, we urge the Department to clarify that "approved leave" is not limited to FMLA leave. For example, employers who are not covered by the FMLA because they do not meet the Act's employee threshold, 29 USC § 2611(4), may

nonetheless grant leave to their employees for reasons that would allow for provision of BAA-UC benefits. Because the proposed regulations reference FMLA repeatedly, and FMLA-authorized leave will most likely represent the bulk of the approved leaves for which parents will file claims for BAA-UC, this could create the impression that DOL intends for approved leave to include only FMLA leave. *See, e.g.*, 64 Fed. Reg. at 67972, 67976, 67978. Any such limitation, however, would clearly violate the requirement that “[j]ust as with current unemployment compensation programs, individuals may not be denied experimental Birth or Adoption unemployment compensation based on facts or causes unrelated to the claimant’s unemployment, such as . . . employer size.” 20 C.F.R. § 602.20 (proposed), 64 Fed. Reg. at 67977. A clarification on this point would serve to avoid future controversy over this aspect of BAA-UC eligibility.

C. Earnings and Employment and Benefits Requirements

In Appendix B to the Proposed Regulations- Commentary on Model State Legislation, Including Policy Issues, the Department states that while “States may set their own requirements” for earnings and employment under their BAA-UC programs, “[t]he Model State legislation assumes that States will use the same earnings and employment criteria that apply to all other individuals.” 64 Fed. Reg. at 67978. The Commentary contains a similar statement with respect to the weekly benefit amount that States set under BAA-UC. *Id.*

Not only should the Model Legislation embody this assumption, but the regulations should make clear that providing separate eligibility and employment criteria, as well as benefit levels, for BAA-UC, is fundamentally at odds with the UC scheme. We assume that this is the intent of proposed Section 604.20, which provides that “all individuals covered by the State’s unemployment compensation law must also be covered for Birth and Adoption Unemployment

Compensation.” 64 Fed. Reg. at 67977. While Congress recognized that “[u]nemployment is due to many causes,” H.R. Rep. No. 615 at 7, it did not contemplate a system in which certain causes of unemployment would net higher benefits than others or trigger more or less strict eligibility requirements. Indeed, this type of graded system would undermine the role of UC universally to “enable *most* workers who lose their jobs to tide themselves over until they get back to their old work or find other employment.” H.R. Rep. No. 615 at 7 (*emphasis added*); *see id.* (“Even in depressions *it will cover a considerable part of all unemployment and will be all that many workers will need*” (*emphasis added*)). Nothing about the BAA-UC population makes it more or less deserving of a State’s uniform benefits, or employment and earnings requirements.

D. Evaluation of UC Reform Efforts in States that Enact BAA-UC

The Department should use its evaluation of State BAA-UC initiatives as a vehicle for working towards broader UC reform. Therefore, we propose that when a State seeks approval to implement BAA-UC, DOL should require it to detail any other initiatives it has undertaken to increase participation and replacement rates, as well as eligibility. DOL should collect data about all of these initiatives during the evaluation phase proposed in the regulations. These measures emphasize the importance of overall UC reform and help make clear the fact that BAA-UC addresses the needs of only one segment of the workforce. Moreover, by tracking both BAA-UC and other initiatives, the Department will develop -- for the benefit of the States and its own leadership -- a greater understanding of the interplay between various reform measures, their timing, impact, and effect on solvency.

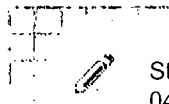
The regulations should also state that DOL will collect data on the effect of BAA-UC on trust fund reserves and the effect of employer tax cuts on those reserves. We are confident that

such a comparison will make clearer the *de minimis* nature of BAA-UC and the significant threat to solvency posed by tax cuts.

Conclusion

The AFL-CIO supports the proposed regulations with the above modifications. BAA-UC takes a small and incremental step towards broader UC coverage. We urge the Department to work closely with the States to enact more comprehensive reform consistent with the fundamental purposes of unemployment compensation.

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Stuart Shapiro
04/05/2000 02:32:11 PM

Record Type: Record

To: Carole Kitt/OMB/EOP@EOP
cc: Bennie C. Rogers/OMB/EOP@EOP, Debra J. Bond/OMB/EOP@EOP, Daniel I. Werfel/OMB/EOP@EOP, Ann O'Leary/OPD/EOP@EOP
bcc:
Subject: Re: LRM BCR75 - - LABOR Report on LABOR Testimony on Birth and Adoption Unemployment Compensation Proposal

I agree with Ann's comments that some additional information on DOL's updating of the estimates is desirable. A list of state legislative activity and a statement that the costs for these states will be calculated similarly to the states already calculated would be a good addition to the letter.

I think we want to be careful about promising to provide the new estimates when they are available. Given DOL's timetable, the rule will be here for review soon and I don't think we want DOL providing information on the rule to the Hill while we are reviewing. Perhaps promising to provide the cost info. prior to publication of the rule (i.e. after our review)?

Carole Kitt



Carole Kitt

04/05/2000 02:15:35 PM

Record Type: Record

To: Stuart Shapiro/OMB/EOP@EOP, Debra J. Bond/OMB/EOP@EOP
cc:
Subject: Re: LRM BCR75 - - LABOR Report on LABOR Testimony on Birth and Adoption Unemployment Compensation Proposal

Ann O'Leary's comments. Your reactions?

----- Forwarded by Carole Kitt/OMB/EOP on 04/05/2000 02:24 PM -----



Bennie C. Rogers

04/05/2000 11:55:29 AM

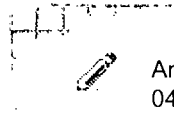
Record Type: Record

To: Carole Kitt/OMB/EOP@EOP

cc:

Subject: Re: LRM BCR75 -- LABOR Report on LABOR Testimony on Birth and Adoption Unemployment Compensation Proposal

----- Forwarded by Bennie C. Rogers/OMB/EOP on 04/05/2000 11:55 AM -----



Ann O'Leary
04/05/2000 11:52:02 AM

Record Type: Record

To: Bennie C. Rogers/OMB/EOP@EOP

cc: Bruce N. Reed/OPD/EOP@EOP, Eric P. Liu/OPD/EOP@EOP, Anna Richter/OPD/EOP@EOP

bcc:

Subject: Re: LRM BCR75 -- LABOR Report on LABOR Testimony on Birth and Adoption Unemployment Compensation Proposal

Ben -

I have a number of concerns with Labor's response to Congresswoman Johnson's letter:

(1) On their first point of complying with the request of the Department's cost estimate and methodology used.

On the letter -- if we are going to state that the cost estimate might change due to state legislative activity, I think we need to provide the Congresswoman with an update of the state legislative activity and how we will revise our estimate (based on which states?) and assure her that we will provide her with a revised estimate once we have calculated it.

On the detailed explanation of the methodology -- My overall comment is that this document is very cumbersome for a layperson to interpret. More detailed comments:

(a) On the opening paragraph -- could we define reciprocity rates and be more clear about why States with high reciprocity rates would be more likely to be receptive to the BAA-UC

✓ (b) question 1 references the "employment-population ratio from the above press release" -- it is not clear to which press release this statement is intended to refer. Also -- in the last sentence it would be helpful to give an example, i.e., "For example, in Massachusetts, using this method we determined that 68,805 women had a child under one year of age and 54% of these women...."

✓ (c) question 2 final sentence, add "...therefore reduced by another 3% bringing the percentage of women in the workforce covered by UI to 92%."

✓ (d) question 3 -- The answer to this question was not clear. How do you reach the conclusion that an "estimated 98% would take leave under existing conditions"? Does this sentence mean that 98% of women would take unpaid leave under FMLA? And, does the next sentence mean that implementing BAA-UC would only increase the percentage of women taking leave by 1%? If that is what the conclusion indicates, I think it is highly problematic b/c our research and basis for argument is that, in fact, many women cannot afford to take

leave under FMLA. If I am inaccurately drawing a conclusion from this sentence, could you please clarify to me and in the response?

In addition, early in the answer to #3, I would prefer that we do not say that we are "manipulating" the FMLA data. Could we change that sentence to read, "The FMLA study provided some categorized data that was used as a base to account for these two factors."

(e) question 5 -- how did you arrive at the assumption that 10% of those in the fully paid category would shift to partially paid category and 10% of partial would slip to unpaid? I believe that Congresswoman Johnson would estimate this percentage at a much higher level. We need to have a rationale for our assumption. In addition, it would be helpful to include a concluding sentence, e.g. "Therefore, the BAA-UC would provide partial wage replacement for 26.3% of workers and fully wage replacement for 37.2% of workers."

(2) On the second point in the letter regarding the possible cost increase associated with employers changing their leave policies, as I stated above, I think it is critical that we justify the basis for our 10% assumption.

(3) On the final point in the letter, does DOL believe that it might be helpful to States to provide general guidance to States on the solvency issue or have we provided such guidance in the past that we could cite here in the letter?

Thank you.

-Ann O'L
6-6275

Ending

Bennie C. Rogers

Bennie C. Rogers

04/03/2000 11:29:58 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: llr@do.treas.gov @ inet, justice.lrm@usdoj.gov @ inet, lrm@os.dhhs.gov @ inet

Subject: LRM BCR75 - - LABOR Report on LABOR Testimony on Birth and Adoption Unemployment Compensation Proposal

Following is LRM ID: BCR 75. Please read and respond by NOON, Wednesday, April 5th.

Attached, please find: (1) Labor's Q's and A's for clearance, (2) the incoming letter from Congresswoman Johnson, and (3) Labor's enclosures which include a copy of OMB's 1997 SAP on S. 4, the "Family Friendly Workplace Act." The Q's and A's are in response to Congresswoman Johnson's questions after a March 9th House Ways and Means subcommittee hearing on Labor's Birth and Adoption Unemployment Compensation proposal.



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LRM ID: BCR75

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001**

Monday, April 3, 2000

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: Robert J. Pellicci (for) Assistant Director for Legislative Reference

OMB CONTACT: Bennie C. Rogers
PHONE: (202)395-7754 FAX: (202)395-6148

SUBJECT: **LABOR Report on LABOR Testimony on Birth and Adoption
Unemployment Compensation Proposal**

DEADLINE: **NOON Wednesday, April 5, 2000**

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. **Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

COMMENTS: Attached, please find: (1) Labor's Q's and A's for clearance, (2) the incoming letter from Congresswoman Johnson, and (3) Labor's enclosures which include a copy of OMB's 1997 SAP on S. 4, the Family Friendly Workplace Act. The Q's and A's are in response to Congresswoman Johnson's questions after a March 9th House Ways and Means subcommittee hearing on Labor's Birth and Adoption Unemployment Compensation proposal.

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EOP:

Barbara Chow

Brian V. Kennedy

Larry R. Matlack

Carole Kitti

Debra J. Bond

Eric P. Liu

Anna Richter

U.S. Department of Labor

Assistant Secretary for
Employment and Training
Washington, D.C. 20330

The Honorable Nancy L. Johnson
Chairman
Subcommittee on Human Resources
B317 Rayburn House Office Building
United States House of Representatives
Washington, DC 20515

Dear Madam Chairman:

Thank you for inviting me to testify on Birth and Adoption Unemployment Compensation (BAA-UC). I am writing in response to your followup letter of March 13 requesting additional information.

The Department has a long history of developing and publishing accurate unemployment compensation (UC) data. These data enjoy a high degree of credibility and are regularly relied upon by the Bureau of Labor Statistics and the Federal Reserve as well as researchers analyzing the program. We work diligently to maintain the integrity of our data, and I hope you will agree after analyzing this letter and its enclosures that the estimates we developed for BAA-UC meet this high standard.

First, you requested a description of our cost estimating methodology. Enclosed is a detailed explanation of that methodology (Enclosure 1). It should be noted that the estimate was based on information on State legislative activity available at the time of publication of the Notice of Proposed Rulemaking. Based on legislative activity since that time, we are now considering a revision to the estimate.

Second, you asked for an estimate of the possible cost increase associated with employers changing their leave policies in response to BAA-UC. As you can see from the cost description, we did in fact assume that this would occur. Specifically, we assumed that 10% of leave spells that would have been fully employer-paid in the absence of BAA-UC would shift to either the partially-paid or unpaid leave categories (5% to each). Similarly, we assumed that 10% of leave spells that would have been partially-paid would shift to the unpaid category. The cost associated with these shifts was estimated at \$6 million.

Third, you asked for cost information on specific states. Detailed spreadsheets for the four States covered by our cost estimate are included in Enclosure 1.

- 2 -

Fourth, you asked for the material we used to estimate the number of leave-takers and the percent using employer-paid leave. That material is enclosed (Enclosure 2), with the pertinent numbers highlighted.

Fifth, you asked for material concerning the Department's position on the compensatory time issue. In response to your request, I have conferred with officials of the Employment Standards Administration who have provided information about Administration policy. The Administration believes that our nation's workers deserve responsible compensatory time legislation that truly gives them the flexibility they need to meet their responsibilities both at work and at home. But the Administration also believes that any legislation to authorize compensatory time off, "comp time" or paid time off for overtime hours worked, for employees in the private sector covered by the Fair Labor Standards Act must effectively and satisfactorily uphold three fundamental principles: real choice for employees, real protection against employer abuse, and preservation of fair labor standards such as the 40-hour workweek and the right to receive time-and-a-half overtime pay. Enclosure 3 contains Statements of Administration Policy and White House and Department of Labor correspondence which describe the Administration's position in greater detail.

If you have further questions on "comp time" or the enclosure pertaining to it, please address them to the Department's Wage and Hour Administrator, T. Michael Kerr, at 693-0051

Finally, you asked why there are no unemployment fund solvency guidelines for States considering implementing a BAA-UC program and how the Federal government could assure workers that funds will be available when they are needed. The Department expects that a State will not choose to enact BAA-UC changes without assessing the effect on its unemployment fund. Each State has the responsibility to assess the cost to its unemployment fund whenever coverage, benefit expansions, or tax changes are considered within its UC program. As discussed above, we do not anticipate BAA-UC costs to be great. Although a number of States have trust fund balances below the level recommended by the Advisory Council on Unemployment Compensation, none are currently insolvent. Additionally, while we recognize that States have experienced solvency problems in the past, payment of UC has never stopped due to lack of funds.

If you or your staff have any questions or need further explanation of the enclosed material, please contact Grace Kilbane at 219-7831.

Sincerely,

Raymond J. Uhalde

Enclosures

Could
be
But at
Dinner
Gordon
for the
Singing

Bennie C. Rogers

04/03/2000 11:29:58 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: llr@do.treas.gov @ inet, justice.lrm@usdoj.gov @ inet, lrm@os.dhhs.gov @ inet

Subject: LRM BCR75 -- LABOR Report on LABOR Testimony on Birth and Adoption Unemployment Compensation Proposal

Following is LRM ID: BCR 75. Please read and respond by NOON, Wednesday, April 5th.

Attached, please find: (1) Labor's Q's and A's for clearance, (2) the incoming letter from Congresswoman Johnson, and (3) Labor's enclosures which include a copy of OMB's 1997 SAP on S. 4, the "Family Friendly Workplace Act." The Q's and A's are in response to Congresswoman Johnson's questions after a March 9th House Ways and Means subcommittee hearing on Labor's Birth and Adoption Unemployment Compensation proposal.



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EOP Staff: You will not receive a paper copy of this LRM.

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LRM ID: BCR75

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001**

Monday, April 3, 2000

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: Robert J. Pellicci (for) Assistant Director for Legislative Reference

OMB CONTACT: Bennie C. Rogers

PHONE: (202)395-7754 FAX: (202)395-6148

SUBJECT: **LABOR Report on LABOR Testimony on Birth and Adoption
Unemployment Compensation Proposal**

DEADLINE: **NOON Wednesday, April 5, 2000**

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. **Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of**

the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: Attached, please find: (1) Labor's Q's and A's for clearance, (2) the incoming letter from Congresswoman Johnson, and (3) Labor's enclosures which include a copy of OMB's 1997 SAP on S. 4, the Family Friendly Workplace Act. The Q's and A's are in response to Congresswoman Johnson's questions after a March 9th House Ways and Means subcommittee hearing on Labor's Birth and Adoption Unemployment Compensation proposal.

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Ruby Shamir

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Audrey T. Haynes

Attia Little

Kirsten N. Pflomm

Robert J. Pellicci

James J. Jukes

Jack A. Smalligan

LRM ID: BCR75 **SUBJECT:** LABOR Report on LABOR Testimony on Birth and Adoption
Unemployment Compensation Proposal

**RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM**

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or

(2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

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 Office of Management and Budget
 Branch-Wide Line (to reach legislative assistant): 395-7362

FROM: _____ (Date)
 _____ (Name)
 _____ (Agency)
 _____ (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur
_____ No Objection
_____ No Comment
_____ See proposed edits on pages _____
_____ Other: _____
_____ FAX RETURN of _____ pages, attached to this response sheet

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ENCLOSURE 1

BIRTH AND ADOPTION UNEMPLOYMENT COMPENSATION
Methodology for Cost Estimates Accompanying Notice of Proposed Rulemaking

At the time the Notice of Proposed Rulemaking was published, the Department of Labor (DOL) estimated that the possible annual aggregate BAA-UC cost could range from zero to approximately \$68 million. The regulation is permissive, and DOL does not know how many States will choose to enact experimental BAA-UC programs. Based on legislative activity and expressed interest at the time, four States were included in the \$68 million estimate:

Massachusetts, Vermont, Maryland, and Washington. These four States' Average High Cost Multiples (AHCM) were either at or above the US average of 0.94 in 1998. (The AHCM is DOL's measure of fund adequacy.) Because of their relatively high AHCMs, solvency may not be an overriding concern for these States when deciding whether to adopt the program. With the exception of Maryland, these States also have high reciprocity rates, which would indicate that State policy makers might be receptive to BAA-UC. Although legislation had also been introduced in New York, the State's AHCM for 1998 was the lowest of any State, and therefore it was considered unlikely to adopt the program and not included in the Department's estimate.

For Each State:

1. **Determine the number of women with a child under one year of age.** The estimate began with 1997-1998 data from the Current Population Survey (CPS), published in the Bureau of Labor Statistics (BLS) news release, "Employment Characteristics of Families in 1998." These data contained the annual U.S. average number of women with a child under one-year old. Table 4 from the September 1997 issue of *Monthly Vital Statistics Report* [Vol.46, No.1(S)2], provides the proportion of live births per State to total live births in the U.S. This proportion was then used to disaggregate, by State, the U.S. average number of women with a child under one-year old. The employment-population ratio (from the above press release) (54%) was then applied to each State's average number of women with a child under one-year old, in order to get the number of *employed* women with a child under one-year old. This was assumed to be the number of annual births to employed women in each of the four States included in the estimate.

2. **Adjust this number to account for those not covered by State UI laws.** Birth rate data were then combined with data on self-employment by age to achieve the proportion of these employed women who are wage and salary workers and thus likely to be covered by UI. Specifically, the article "Characteristics of Self-employed Women in the United States" in the March 1994 BLS Monthly Labor Review provided a breakdown [Table 4] of self-employment rates by age in five and ten year increments. The April 1999 *National Vital Statistics Report* [Vol. 47, No. 18] provides a breakdown of birth rates by age in five year increments up to age 50. The average self-employment rate for women under age 50 was weighted by the product of birth rates and number of employed women. The source of the number of employed women by age was the BLS *Employment and Earnings* report, published in January 1999. Table 3 of this report provides the employment status of women by age in five year increments. An estimated 95% of employed women with children under one-year old were not self-employed, and thus would be

covered under the UI system. Further, according to a BLS news release titled "Average Annual Pay by State and Industry, 1997", about 3% of wage and salary civilian employment is not covered by UI. The number of covered employed women was therefore reduced by another 3%. *to 92%*

3. Estimate the number of employed women with a child under one year, and covered by State UI laws, who are likely to take leave to care for the new child. Data from a report by the Commission on Family and Medical Leave, titled *A Workable Balance: Report to Congress on Family and Medical Leave Policies* (April 30, 1996), hereafter referenced as the "FMLA study," were used. Two main features of this proposal are different from those in the FMLA study. On one hand this proposal has a broader scope, because those who work for companies with fewer than 50 employees will be able to receive BAA-UC benefits, whereas they would not be covered under the FMLA. On the other hand, this proposal is more limited because it only provides benefits to those taking leave to care for a newborn or newly adopted child. The FMLA study provides some categorized data that was *manipulated* to account for these two factors. The proportion of women who would take leave was calculated by taking the weighted average of women leave takers for newborn, foster, or adopted child care between FMLA-covered and non-covered respondents, and dividing that by total women who had the potential to take leave for newborn care (leave takers + non-leave takers for newborn or adopted child care). (Note: The FMLA study includes foster care in this category, but BAA-UC would not cover foster care.) To account for an overlap between newborn care and maternity-disability leave, both the leave takers and non-leave takers were increased by 50% of those who cited maternity-disability as the main reason for taking or needing leave. The assumption was that about half of maternity disability leave would take place after the birth of the child, and therefore those women would also be caring for their children. *Why?* [It was estimated that 98% would take leave under existing conditions.] Furthermore, to account for added leave taking because of the BAA-UC benefit the percentage was increased by 1% to 99%.

Can be used as a base

interpolated

Assumed or interpolated

FMLA was used on the leave?

Since we are getting an additional 1%??

4. Estimate the number of men who would take leave under BAA-UC, and add that number to the estimated number of women leave takers. The ratio of men to women was then applied to calculate the number of men who would take leave. This ratio was *interpolated* from the FMLA study. Tables 5.B and 5.C provide the percentages of men and women who took leave for the care of a newborn, adopted or foster child. These percentages, weighted by covered/non-covered worksites were used to calculate the total number of men (numerator) and women (denominator) leave takers to care for a newborn, foster, or adopted child. Again, the denominator also includes 50% of the leave takers from the maternity-disability category. The ratio from the FMLA study, 63%, already assumed a small increase in leave takers because it was applied to the number of women leave-takers adjusted for the BAA-UC incentive. The final estimate, 68%, assumed an additional 5% of men would take leave due to the incentive. The result of multiplying this percentage by the number of women leave takers was the total number of BAA-UC-covered leave takers in the State.

5. Adjust the estimate of leave takers to account for those who receive employer paid leave and would not be eligible for BAA-UC. The leave-takers were then divided between those estimated to receive full BAA-UC benefits and those estimated to receive partial BAA-UC benefits. Tables 5.O and 5.P in the FMLA study show the percentages of leave takers at both

FMLA-covered and non-covered work sites whose leave was fully paid, partially paid, or unpaid by their employers. Those receiving employer-paid leave would not be eligible for BAA-UC. Those unpaid would receive full BAA-UC benefits, and those partially paid would receive partial benefits from BAA-UC. Weighting the averages between covered and non-covered, 35% are unpaid in the FMLA study and 22% are partially paid. It was then assumed that 10% of those 43% (4.3%) currently in the fully paid category would be shifted to either the partial or unpaid category by employers because of the alternative payments from BAA-UC. For the same reason, 10% of the 22% (2.2%) currently in the partially paid category would be shifted to the unpaid.

6. Apply the estimated "take-up" rate and monetary eligibility rate to the number of leave takers potentially eligible for BAA-UC; the result is the number of BAA-UC beneficiaries estimated for each State. Both Massachusetts and Maryland are assumed to have an 80% take-up rate in the unpaid category. Based on studies on UI take-up rates, about 65% of eligible workers would actually apply for UI before phone claims were available. The introduction of phone claims increases take-up rates by about 15%. In addition, BAA-UC claimants may behave differently than regular UI claimants, so an additional 5 percentage points was added, the result for these two States being 80%. In the calculation of take-up rates for partially paid leave takers, a slightly smaller percentage, 60%, was assumed before phone claims. The difference accounts for the fact that take-up rates are positively correlated with potential durations. Unpaid leave takers have a higher potential duration as BAA-UC claimants, and therefore a higher take-up rate, than do partially paid leave takers. Since Vermont does not offer telephone claims, and Washington has only partially implemented its program, their take-up rates are slightly lower (70% and 77% respectively for unpaid leave takers). Each State's average monetary eligibility rate for the past 3 years was then multiplied by the number applying in order to get a final estimate for BAA-UC beneficiaries.

7. Estimate the average number of weeks of BAA-UC that would be paid to each beneficiary. Table 5.D and 5.E of the FMLA study provide details about the lengths of leave at covered and non-covered worksites. First, the weighted averages of the weekly durations for the care of a new child were calculated between covered and non-covered worksites. Second, there are several studies that examine the relationship between increased UI replacement rates and the average duration of UI claimants. In Chapter 7 of Unemployment Insurance in the United States (Upjohn, 1997), Paul T. Decker summarizes these studies and concludes that "the lengthening in average unemployment spells is likely to be in the range of 0.5 weeks to 1.5 weeks for every 10 percentage-point increase in replacement rates." [p.296] The midpoint of this range (1 week) was used as the point estimate. Since BAA-UC would increase replacement rates by 50 percentage points (i.e. from zero to about 50%), that would translate to an additional 5 weeks. Each cell in the duration distribution was increased by a proportion of the above incentive, namely the ratio of leave duration to overall average UI duration of 14 weeks (US average, 12 months ending June 1999). For example, the incentive on a 4 week duration would be $(4/14) \cdot 5$, or 1.4 weeks. Of course, the resulting duration was capped at the maximum potential duration for each State. The maximum potential duration was assumed to be 12 weeks, except in Washington and Vermont, which had maximum durations of 4 and 6 weeks respectively, as stated in their bills. If the State has a waiting week for UI, that week was subtracted from each cell. The weighted average of the resulting durations was then taken, based on percentages from the FMLA study. Partially paid workers were assumed to have a final BAA-UC average duration of half that of unpaid leave-takers. For each group (unpaid and partially paid), total weeks of BAA-UC are calculated by multiplying beneficiaries by average duration.

17.270
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=
28.381
new
total
28.381

17.270
+
11.111
=
28.381

8. Estimate the average weekly benefit amount (AWBA) for each State's BAA-UC beneficiaries. The last 12 month average of each State's AWBA as of June 1999 was the starting point. Then, the proportion of men to women was again employed to adjust this benefit amount. In the regular UI system, the proportion of men to women is about 57 to 43, whereas in the projected BAA-UC population the ratio was around 40 to 60. Because of this difference, and because of the lower average benefit amount for women compared to men, each AWBA was adjusted down by 3%.

9. Multiply total weeks of BAA-UC by the average weekly benefit amount to determine the total estimated BAA-UC cost for each State.

The attached estimates represent the initial annual benefit cost in each State. Implementation and on-going administrative costs were not included in the cost estimate.

Maryland

Number of women w/child < 1 year (proportion of 1998 CPS):	59,603
Employment-population ratio for women w/child < 1 year (1998 CPS):	54%
Number of employed women giving birth:	32,186
% of total employed who are wage/salary workers (ie. not self-employed) (1997 BLS):	95%
% of wage/salary who are covered by UI (1997 BLS):	97%
Number of covered employed women giving birth:	29,659
% of employed women who take leave for newborn (without BAA-UC):	98%
added % who would take leave with BAA-UC available:	1%
% of women leave-needers who take leave for newborn (with BAA-UC):	99%
Number of women taking leave for newborn care:	29,362
ratio of men to women among newborn leave-takers (FMLA employee survey):	68%
Total new-born leave takers (with BAA-UC):	49,328

Full Benefits from BAA-UC (Unpaid leave)

% of newborn leave takers whose leave is unpaid:	35%
% shifted from fully paid to unpaid leave:	2%
% shifted from partially-paid to unpaid leave:	2%
Total unpaid leave takers (with BAA-UC):	19,238
BAA-UC Takeup rate * BAA-UC monetary eligibility (3yr avg):	80% * 84%
BAA-UC Recipients:	12,889
Average BAA-UC duration: (weeks):	6.6
Total BAA-UC weeks for those receiving full benefits:	85,067

Partial Benefits (receive some payment from employers)

% of newborn leave takers whose leave is partially paid:	22%
% shifted from fully paid to partially-paid leave:	2%
% shifted to unpaid from partially-paid leave:	-2%
Total partially-paid leave takers (with BAA-UC):	10,852
BAA-UC Takeup rate * UI monetary eligibility (3yr avg):	74% * 84%
BAA-UC Recipients:	6,728
Average BAA-UC duration (weeks):	3.3
Total BAA-UC weeks for those receiving full benefits:	22,202

Total BAA-UC recipients:	19,617
Total Weeks of BAA-UC:	107,269
Average weeks of BAA-UC:	5.5
Average Weekly Benefit Amount (last 12 mos., June 1999):	\$197
Total BAA-UC benefits (\$M):	\$21

137P

NANCY L. JOHNSON, CONNECTICUT, CHAIRMAN
SUBCOMMITTEE ON HUMAN RESOURCES

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L2000-245371
COMMITTEE ON WAYS AND MEANS

U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

SUBCOMMITTEE ON HUMAN RESOURCES

March 13, 2000

BILL ARCHER, TEXAS, CHAIRMAN
COMMITTEE ON WAYS AND MEANS

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RON WASSON, SUBCOMMITTEE STAFF DIRECTOR

JARCE MAYE, MINORITY CHIEF COUNSEL
MICHAEL CUYNE, SUBCOMMITTEE MINORITY

Grace Kiebone

The Honorable Raymond J. Uhalde
Deputy Assistant Secretary
Employment and Training Administration
U.S. Department of Labor
200 Constitution Ave., N.W., Rm. S-2307
Wash., DC 20210

Terry
Bergman

200 MAR 17 PM 3:34

Dear Mr. Uhalde:

Thank you for testifying at our hearing on Unemployment Compensation and the Family and Medical Leave Act.

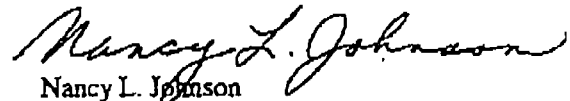
To follow-up on the lively exchange we had during the hearing, I am requesting additional information about the Administration's Birth and Adoption Unemployment Compensation proposal. Specifically, I would like:

1. A detailed copy of the Department's cost estimate, including the method used;
2. An estimate of possible increased costs of the program based on the assumption that some employers would drop their Family Leave programs and rely instead on a new state Unemployment Compensation based program;
2. Detailed information about the special cost study of a few states you mentioned;
3. A copy of the material the Department used to determine the number of leave-takers and the percent using employer-paid leave;
4. Written material outlining the Department's position on the compensation time issue;
5. Explanation of why there are no trust fund solvency guidelines for states considering implementation of the new program in the proposed rule. How can the federal government assure workers that there will be unemployment benefits available to them when they need them if insolvent states like Maryland, or barely solvent states such as Washington, open up their unemployment systems to other uses?

As you no doubt gathered from the hearing, I am very interested in this issue and the effects it may have on my Connecticut constituents. If you have questions about this request, you may call Ron Haskins or Margo Smith at the subcommittee on 225-1025.

Thanks again for presenting the Administration's views at our hearing.

Sincerely,


Nancy L. Johnson
Chairman

RH/p

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Massachusetts

Number of women w/child < 1 year (proportion of 1998 CPS):	68,805
Employment-population ratio for women w/child < 1 year (1998 CPS):	54%
Number of employed women giving birth:	37,155
% of total employed who are wage/salary workers (ie. not self-employed) (1997 BLS):	95%
% of wage/salary who are covered by UI (1997 BLS):	97%
Number of covered employed women giving birth:	34,238
% of employed women who take leave for newborn (without BAA-UC):	98%
added % who would take leave with BAA-UC available:	1%
% of women leave-needers who take leave for newborn (with BAA-UC):	99%
Number of women taking leave for newborn care:	33,896
ratio of men to women among newborn leave-takers (FMLA employee survey):	68%
Total new-born leave takers (with BAA-UC):	56,945

Full Benefits from BAA-UC (Unpaid leave)

% of newborn leave takers whose leave is unpaid:	35%
% shifted from fully paid to unpaid leave:	2%
% shifted from partially-paid to unpaid leave:	2%
Total unpaid leave takers (with BAA-UC):	22,209
BAA-UC Takeup rate * BAA-UC monetary eligibility (3yr avg):	80% * 96%
BAA-UC Recipients:	17,101
Average BAA-UC duration: (weeks):	5.9
Total BAA-UC weeks for those receiving full benefits:	100,896

Partial Benefits (receive some payment from employers)

% of newborn leave takers whose leave is partially paid:	22%
% shifted from fully paid to partially-paid leave:	2%
% shifted to unpaid from partially-paid leave:	-2%
Total partially-paid leave takers (with BAA-UC):	12,528
BAA-UC Takeup rate * UI monetary eligibility (3yr avg):	74% * 96%
BAA-UC Recipients:	8,895
Average BAA-UC duration (weeks):	3.0
Total BAA-UC weeks for those receiving full benefits:	26,240

Total BAA-UC recipients:	25,996
Total Weeks of BAA-UC:	127,136
Average weeks of BAA-UC:	4.9
Average Weekly Benefit Amount (last 12 mos., June 1999):	\$269
Total BAA-UC benefits (\$M):	\$34

Vermont

Number of women w/child < 1 year (proportion of 1998 CPS):	5,768
Employment-population ratio for women w/child < 1 year (1998 CPS):	54%
Number of employed women giving birth:	3,115
% of total employed who are wage/salary workers (ie. not self-employed) (1997 BLS):	95%
% of wage/salary who are covered by UI (1997 BLS):	97%
Number of covered employed women giving birth:	2,870
% of employed women who take leave for newborn (without BAA-UC):	98%
added % who would take leave with BAA-UC available:	1%
% of women leave-needers who take leave for newborn (with BAA-UC):	99%
Number of women taking leave for newborn care:	2,841
ratio of men to women among newborn leave-takers (FMLA employee survey):	68%
Total new-born leave takers (with BAA-UC):	4,773

Full Benefits from BAA-UC (Unpaid leave)

% of newborn leave takers whose leave is unpaid:	35%
% shifted from fully paid to unpaid leave:	2%
% shifted from partially-paid to unpaid leave:	2%
Total unpaid leave takers (with BAA-UC):	1,861
BAA-UC Takeup rate * BAA-UC monetary eligibility (3yr avg):	70% * 95%
BAA-UC Recipients:	67%
Average BAA-UC duration: (weeks):	1,238
Total BAA-UC weeks for those receiving full benefits:	3.1
	3,838

Partial Benefits (receive some payment from employers)

% of newborn leave takers whose leave is partially paid:	22%
% shifted from fully paid to partially-paid leave:	2%
% shifted to unpaid from partially-paid leave:	-2%
Total partially-paid leave takers (with BAA-UC):	1,041
BAA-UC Takeup rate * UI monetary eligibility (3yr avg):	70% * 95%
BAA-UC Recipients:	64%
Average BAA-UC duration (weeks):	1.6
Total BAA-UC weeks for those receiving full benefits:	1,032

Total BAA-UC recipients:	1,883
Total Weeks of BAA-UC:	4,870
Average weeks of BAA-UC:	2.6
Average Weekly Benefit Amount (last 12 mos., June 1999):	\$190
Total BAA-UC benefits (\$M):	\$1

Washington

Number of women w/child < 1 year (proportion of 1998 CPS):	68,380
Employment-population ratio for women w/child < 1 year (1998 CPS):	54%
Number of employed women giving birth:	36,925
% of total employed who are wage/salary workers (ie. not self-employed) (1997 BLS):	95%
% of wage/salary who are covered by UI (1997 BLS):	97%
Number of covered employed women giving birth:	34,026
% of employed women who take leave for newborn (without BAA-UC):	98%
added % who would take leave with BAA-UC available:	1%
% of women leave-needers who take leave for newborn (with BAA-UC):	99%
Number of women taking leave for newborn care:	33,686
ratio of men to women among newborn leave-takers (FMLA employee survey):	68%
Total new-born leave takers (with BAA-UC):	56,592

Full Benefits from BAA-UC (Unpaid leave)

% of newborn leave takers whose leave is unpaid:	35%
% shifted from fully paid to unpaid leave:	2%
% shifted from partially-paid to unpaid leave:	2%
Total unpaid leave takers (with BAA-UC):	22,071
BAA-UC Takeup rate * BAA-UC monetary eligibility (3yr avg):	77% * 91%
BAA-UC Recipients:	15,450
Average BAA-UC duration: (weeks):	2.3
Total BAA-UC weeks for those receiving full benefits:	35,535

Partial Benefits (receive some payment from employers)

% of newborn leave takers whose leave is partially paid:	22%
% shifted from fully paid to partially-paid leave:	2%
% shifted to unpaid from partially-paid leave:	-2%
Total partially-paid leave takers (with BAA-UC):	12,450
BAA-UC Takeup rate * UI monetary eligibility (3yr avg):	71% * 91%
BAA-UC Recipients:	8,093
Average BAA-UC duration (weeks):	1.2
Total BAA-UC weeks for those receiving full benefits:	9,712

Total BAA-UC recipients:	23,543
Total Weeks of BAA-UC:	45,247
Average weeks of BAA-UC:	1.9
Average Weekly Benefit Amount (last 12 mos., June 1999):	\$261
Total BAA-UC benefits (\$M):	\$12

ENCLOSURE 2

Table 6. Employment status of mothers with own children under 3 years old by single year of age of youngest child, and marital status, 1997-98 annual averages

(Numbers in thousands)

Characteristic	Civilian noninstitutional population	Civilian labor force							
		Total	Percent of population	Employed				Unemployed	
				Total	Percent of population	Full-time workers ¹	Part-time workers ²	Number	Percent of labor force
1997									
TOTAL MOTHERS									
With children under 3 years old	9,347	5,738	61.4	5,306	56.8	2,560	1,746	432	7.5
2 years	2,871	1,890	65.8	1,763	61.4	1,208	555	127	6.7
1 year	3,306	2,012	60.9	1,851	56.0	1,205	646	161	8.0
Under 1 year	3,170	1,836	57.9	1,692	53.4	1,147	545	144	7.8
Married, spouse present									
With children under 3 years old	7,049	4,296	60.9	4,105	58.2	2,718	1,387	191	4.4
2 years	2,142	1,380	64.4	1,327	62.0	883	444	53	3.8
1 year	2,459	1,468	59.7	1,389	56.8	890	509	63	4.7
Under 1 year	2,448	1,448	59.2	1,379	56.3	845	434	69	4.8
Other marital status ³									
With children under 3 years old	2,297	1,445	62.8	1,201	52.3	842	361	241	16.7
2 years	729	511	70.1	436	59.8	325	112	74	14.5
1 year	847	545	64.3	452	53.4	315	138	82	16.9
Under 1 year	721	389	54.0	313	43.4	202	111	75	19.3
1998									
TOTAL MOTHERS									
With children under 3 years old	8,333	5,779	61.9	5,384	57.7	3,626	1,758	395	6.8
2 years	2,772	1,786	64.4	1,673	60.4	1,149	524	113	6.3
1 year	3,213	2,055	64.0	1,917	59.7	1,281	636	138	6.7
* Under 1 year	3,348	1,838	57.9	1,734	53.6	1,196	598	144	7.4
Married, spouse present									
With children under 3 years old	7,110	4,316	60.7	4,145	58.3	2,765	1,380	171	4.0
2 years	2,073	1,281	62.3	1,244	60.0	831	413	47	3.6
1 year	2,493	1,560	62.6	1,487	60.0	988	508	63	4.0
Under 1 year	2,544	1,465	57.6	1,404	55.2	945	459	61	4.2
Other marital status ³									
With children under 3 years old	2,225	1,463	65.8	1,238	55.6	860	378	223	15.2
2 years	700	485	70.7	428	61.3	318	111	65	13.1
1 year	721	485	68.7	420	58.3	292	129	75	15.2
Under 1 year	804	473	58.8	389	48.4	250	139	89	17.5

¹ Usually work 35 hours or more a week at all jobs.
² Usually work less than 35 hours a week at all jobs.

³ Includes never-married, divorced, separated and widowed persons.
 NOTE: See NOTE, table 4.

Source: BLS newsrelease, "Employment Characteristics of Families in 1998"

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Table 4. Live births by race and Hispanic origin of mother: United States, each State, Puerto Rico, Virgin Islands, and Guam, preliminary 1996, and birth and fertility rates, final 1995 and preliminary 1996

[By place of residence. Data are based on a continuous list of records received from the States. Birth rates per 1,000 total population, fertility rates per 1,000 women aged 15-44 years. Figures for 1995 are based on weighted data rounded to the nearest individual, so categories may not add to totals.]

Area	Number						Birth rate		Fertility rate	
	All races	White	Black	American Indian ¹	Asian or Pacific Islander	Hispanic ²	1995	1996	1995	1996
United States ³	9,914,959	3,113,014	598,039	38,458	167,444	697,829	14.8	14.8	65.7	65.6
Alabama	81,477	40,843	19,833	124	577	937	14.4	14.2	63.1	61.9
Alaska	10,161	8,930	425	2,405	400	673	16.7	17.0	72.6	73.2
Arizona	79,590	69,889	2,447	5,770	1,504	29,217	18.0	17.2	81.4	79.5
Arkansas	36,418	27,915	7,821	244	398	1,315	14.5	14.2	67.2	65.0
California	539,769	440,219	97,805	3,462	58,420	251,129	18.9	17.5	74.8	76.5
Colorado	55,840	51,100	2,579	587	1,575	12,980	14.6	14.5	63.6	62.5
Connecticut	44,312	37,755	5,224	106	1,227	5,614	13.5	13.5	61.5	61.0
Delaware	10,244	7,620	2,391	17	215	686	14.1	14.3	60.3	61.2
District of Columbia	8,336	2,062	6,123	4	147	772	15.3	16.3	81.9	85.3
Florida	189,458	142,670	42,288	631	3,669	35,708	13.2	13.3	64.8	64.9
Georgia	114,848	73,782	38,777	185	2,115	6,312	15.6	15.6	64.9	64.5
Hawaii	18,334	4,790	508	183	12,853	2,151	15.5	15.7	72.2	72.2
Idaho	19,059	18,446	76	290	247	2,220	16.0	15.5	72.9	71.6
Illinois	184,389	141,603	36,488	225	8,043	33,040	15.8	15.7	68.5	69.3
Indiana	83,303	73,257	9,034	122	920	9,095	14.3	14.3	62.6	62.2
Iowa	37,120	35,125	1,047	200	748	1,481	13.0	13.0	60.5	59.9
Kansas	36,734	35,510	3,006	315	894	3,504	15.4	14.5	70.5	68.1
Kentucky	52,632	47,243	4,882	77	449	558	13.6	13.6	59.9	58.0
Louisiana	66,178	37,963	26,860	253	1,083	1,288	15.2	15.1	66.1	65.2
Maine	13,775	13,461	85	84	145	115	11.1	11.2	49.5	49.7
Maryland	69,696	44,789	22,949	187	2,417	3,146	13.7	14.4	56.6	60.6
Massachusetts	80,457	69,418	7,329	162	3,548	7,737	13.2	13.4	57.2	57.9
Michigan	187,471	109,200	24,873	837	2,561	5,197	14.3	14.1	63.0	61.3
Minnesota	63,779	57,003	3,034	1,065	2,877	2,287	13.7	13.7	60.6	60.5
Mississippi	41,662	21,801	19,288	197	976	253	15.3	15.3	66.7	66.5
Missouri	73,782	61,277	11,091	270	1,143	1,516	13.8	13.7	62.1	61.5
Montana	10,707	9,580	37	1,173	108	299	12.1	12.8	57.7	60.2
Nebraska	23,321	21,379	1,209	331	413	1,855	14.1	14.2	64.3	64.5
Nevada	26,034	22,262	1,872	419	1,381	6,846	16.2	16.4	75.2	75.2
New Hampshire	14,548	14,252	112	83	181	232	12.5	12.8	53.4	54.2
New Jersey	113,902	86,407	20,101	228	7,168	19,458	14.3	14.5	64.6	64.8
New Mexico	27,235	23,183	487	3,184	391	19,250	15.9	16.0	71.7	71.8
New York	271,456	197,275	55,805	682	17,747	59,024	14.8	15.0	68.5	69.1
North Carolina	105,741	74,710	27,462	1,571	1,899	5,500	14.4	14.1	63.7	61.7
North Dakota	8,356	7,418	87	752	103	137	13.0	13.2	60.6	61.3
Ohio	152,684	128,738	21,705	260	1,559	2,992	13.7	13.8	60.7	61.0
Oklahoma	46,204	36,842	4,486	4,363	778	2,882	14.0	13.9	65.0	64.3
Oregon	43,677	40,456	893	673	1,855	5,484	13.6	13.6	62.7	62.2
Pennsylvania	149,862	125,639	20,781	222	3,310	8,811	12.4	12.5	57.6	57.8
Rhode Island	12,514	11,040	931	137	398	1,693	12.6	12.9	56.3	57.3
South Carolina	50,807	32,187	17,881	114	635	360	13.7	13.9	59.2	59.3
South Dakota	10,475	8,682	83	1,035	96	146	14.3	14.4	66.6	66.9
Tennessee	73,779	56,539	16,029	181	1,020	1,425	13.9	13.9	60.8	60.6
Texas	327,163	278,760	38,708	823	8,972	140,539	17.1	17.2	74.3	74.5
Utah	41,380	39,291	331	626	1,140	3,865	20.7	20.3	87.6	84.2
Vermont	6,743	6,668	17	9	63	39	11.5	11.5	50.1	50.2
Virginia	92,400	67,359	20,920	172	3,949	5,158	13.8	14.0	58.5	58.6
Washington	78,953	62,328	3,187	1,915	5,529	9,183	14.5	14.2	63.6	63.1
West Virginia	20,704	19,808	744	10	141	122	11.3	11.6	52.4	52.7
Wisconsin	67,034	57,898	6,425	646	1,887	3,099	13.0	13.2	58.2	58.8
Wyoming	6,285	5,556	48	218	62	523	13.1	13.0	59.8	59.3
Puerto Rico	63,108	58,106	5,002	—	—	—	16.7	17.0	70.8	72.2
Virgin Islands	1,905	350	1,503	48	6	321	—	—	—	—
Guam	4,266	601	76	22	3,566	53	—	—	—	—

¹ Figure does not meet standards of reliability or precision.

— Data not available.

² Includes births to Alaska and Guam.³ Percent of Hispanic origin may be of any race. See Technical notes.⁴ Excludes data for Puerto Rico, Virgin Islands, and Guam.

NOTE: Data are subject to sampling and/or random variation. For information on the relative standard error of the data and further discussion, see Technical notes.

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SOURCE: HUMAN RESOURCE RESEARCH REPORT TO CONGRESS ON FAMILY
and Medical Leave Policies (FMLA Study)

TABLE 5. B

Leave-Takers at FMLA-Covered Worksites: Demographic and Job Characteristics, by Reason for Leave

(NUMBER OF EMPLOYEES AND PERCENTAGE OF ALL LEAVE-TAKERS REPORTING EACH REASON)

DEMOGRAPHIC AND JOB CHARACTERISTICS	n	Own Health	* Maternity- Disability	* Care For Newborn, Adopted or Foster Child	Care For Ill Child	Care For Ill Spouse	Care For Ill Parent	Care For Ill Relative or Other
ALL RESPONDENTS		8,886,950 60.0%	563,153 3.8%	1,972,861 13.3%	1,123,486 7.6%	542,298 3.7%	1,271,182 8.6%	455,510 3.1%
* GENDER								
Male		65.1%	0.0%	14.5%	6.5%	5.5%	6.6%	1.5%
Female		56.4%	6.3%	12.5%	8.3%	2.3%	10.0%	4.1%
AGE								
18-24		54.6%	8.4%	18.2%	6.1%	1.8%	3.4%	7.5%
25-34		44.0%	7.7%	24.9%	12.8%	2.0%	7.2%	1.4%
35-49		65.4%	1.2%	8.9%	6.0%	3.9%	11.8%	2.8%
50-64		77.9%	0.0%	0.6%	3.8%	6.2%	7.6%	4.0%
65 or over		81.5%	0.0%	0.0%	0.0%	14.0%	4.5%	0.0%
RACE								
Latino		54.9%	2.4%	14.7%	17.0%	0.0%	8.5%	2.5%
African American		66.4%	5.8%	8.2%	5.6%	5.6%	6.7%	1.8%
Non-Latino White		59.7%	3.6%	14.0%	6.6%	3.8%	8.9%	3.4%
Other		42.1%	0.0%	26.4%	15.2%	0.0%	16.3%	0.0%
MARITAL STATUS								
Married/Living w/Partner		52.4%	4.7%	16.7%	9.5%	4.3%	8.8%	3.6%
Separated/Divorced/Widowed		74.4%	0.6%	6.4%	4.6%	4.0%	7.9%	2.3%
Never been Married		78.4%	3.6%	5.9%	2.1%	0.0%	8.4%	1.6%
CHILDREN UNDER 18								
None		77.6%	0.4%	0.4%	1.9%	4.8%	11.4%	4.3%
One or more		44.2%	6.8%	24.9%	12.7%	3.4%	6.0%	2.0%
EDUCATION								
Less than High School		73.0%	1.1%	5.0%	11.7%	4.0%	4.1%	1.1%
High School Graduate		64.6%	3.0%	14.7%	5.3%	4.0%	4.4%	4.0%
Some College		57.3%	4.4%	9.5%	7.8%	5.4%	10.2%	5.4%
4 Years of College or more		54.7%	4.7%	18.1%	8.0%	1.8%	11.8%	0.9%
ANNUAL FAMILY INCOME								
Less than \$20,000		69.5%	2.8%	12.8%	6.4%	2.3%	5.1%	1.1%
\$20-30,000		60.6%	2.5%	11.2%	11.4%	5.7%	6.5%	2.0%
\$30-50,000		60.0%	5.1%	13.6%	5.5%	4.3%	6.3%	5.3%
\$50-75,000		52.4%	3.0%	13.8%	7.6%	6.4%	12.7%	4.1%
\$75,000 or more		52.7%	5.0%	21.9%	7.0%	0.9%	10.0%	2.5%
COMPENSATION TYPE								
Salary		53.5%	5.9%	18.1%	6.8%	2.0%	12.9%	0.6%
Hourly		64.7%	2.5%	10.4%	8.3%	4.9%	4.7%	4.5%
Other		49.5%	4.1%	13.2%	4.0%	0.0%	24.6%	4.4%
UNION STATUS								
Union		69.5%	2.7%	10.0%	5.3%	4.5%	5.8%	2.3%
Non-union		57.1%	4.2%	14.3%	8.3%	3.4%	9.5%	3.2%

SOURCE: ACQUIRE INTERNATIONAL TABULATION OF DATA FROM INSTITUTE FOR SOCIAL RESEARCH, SURVEY RESEARCH CENTER, UNIVERSITY OF MICHIGAN. SURVEY OF EMPLOYEES, 1995
Note: Percentages do not add to 100% because respondents could choose more than one category.

TABLE 5.C
Leave-Takers at Non-Covered Worksites: Demographic and Job Characteristics,
by Reason for Leave
(NUMBER OF EMPLOYEES AND PERCENTAGE OF ALL LEAVE-TAKERS REPORTING EACH REASON)

DEMOGRAPHIC AND JOB CHARACTERISTICS	n=	Own Health	* Maternity- Disability	* Care for Newborn, Adopted or Foster Child	Care for Ill Child	Care for Ill Spouse	Care for Ill Parent	Care for Ill Relative or Other
ALL RESPONDENTS	3,140,551	56.1%	385,556 6.9%	822,955 14.7%	558,738 10.0%	144,917 2.6%	226,624 4.1%	316,442 5.7%
GENDER								
Male		65.2%	0.0%	15.4%	6.3%	4.3%	4.0%	4.9%
Female		49.3%	12.1%	14.2%	12.8%	1.3%	4.1%	6.2%
AGE								
18-24		52.5%	12.1%	12.0%	12.4%	0.0%	5.4%	5.6%
25-34		35.7%	14.4%	34.1%	9.9%	3.8%	0.0%	2.2%
35-49		59.7%	3.7%	9.1%	11.8%	1.8%	6.7%	7.2%
50-64		76.3%	0.0%	0.0%	5.9%	5.6%	4.2%	8.1%
65 or over		94.9%	0.0%	0.0%	0.0%	0.0%	0.0%	5.1%
RACE								
Latino		49.6%	18.4%	6.2%	5.7%	0.0%	3.4%	16.8%
African American		35.2%	0.0%	8.4%	46.7%	0.0%	4.9%	4.9%
Non-Latino White		57.0%	5.9%	16.2%	8.3%	3.3%	4.4%	4.9%
Other		40.5%	38.7%	21.0%	0.0%	0.0%	0.0%	0.0%
MARITAL STATUS								
Married/Living w/ Partner		51.3%	8.6%	18.1%	10.8%	3.0%	3.1%	5.1%
Separated/Divorced/Widowed		68.5%	2.2%	4.1%	8.6%	1.9%	6.5%	8.3%
Never been Married		77.4%	0.0%	2.5%	5.1%	0.0%	8.4%	6.5%
CHILDREN UNDER 18								
None		83.6%	0.0%	0.0%	3.8%	1.8%	3.8%	7.1%
One or more		36.0%	12.1%	25.5%	14.3%	3.3%	4.3%	4.6%
EDUCATION								
Less than High School		57.9%	5.0%	4.9%	5.3%	4.6%	7.6%	12.7%
High School Graduate		65.0%	3.7%	8.4%	13.9%	1.9%	3.9%	3.1%
Some College		53.7%	7.5%	20.2%	8.3%	2.4%	17.6%	6.3%
Four Years of College or more		48.5%	10.3%	18.2%	9.9%	2.8%	5.5%	4.9%
ANNUAL FAMILY INCOME								
Less than \$20,000		64.7%	4.9%	14.2%	4.6%	1.6%	1.8%	8.3%
\$20-30,000		56.6%	8.3%	6.7%	8.8%	5.0%	3.4%	11.7%
\$30-50,000		54.0%	5.5%	26.9%	7.8%	2.2%	3.5%	0.0%
\$50-75,000		55.1%	12.8%	16.1%	9.9%	2.9%	3.2%	0.0%
\$75,000 or more		43.4%	8.3%	13.7%	13.4%	2.7%	7.8%	11.0%
COMPENSATION TYPE								
Saloried		50.0%	6.9%	19.4%	7.8%	5.2%	7.7%	3.1%
Hourly		52.6%	8.3%	14.5%	12.1%	1.2%	2.5%	7.8%
Other		72.9%	4.1%	7.7%	7.3%	1.3%	1.3%	5.5%
UNION STATUS								
Union		56.6%	6.8%	14.7%	0.0%	0.0%	14.2%	7.7%
Non-union		56.1%	6.9%	14.5%	10.5%	2.7%	3.7%	5.6%

SOURCE: ACUMRI INTERNATIONAL TABULATION OF DATA FROM INSTITUTE FOR SOCIAL RESEARCH, SURVEY RESEARCH CENTER, UNIVERSITY OF MICHIGAN, SURVEY OF EMPLOYEES, 1995
 Note: Percentages do not add to 100% because respondents could choose more than one category.

TABLE 5.G

**Reason for Needing Leave Among Employees Who Needed
but Did Not Take Leave, by Demographic and Job Characteristics**
(NUMBER AND PERCENTAGE OF ALL LEAVE-NEEDERS REPORTING EACH REASON)

DEMOGRAPHIC AND JOB CHARACTERISTICS	All Leave- Needers	Own Health	Maternity/ Disability	Care for Newborn Adopted or Foster Child	Care for Ill Child, Spouse, or Parent	Care for Ill Relative or Other
ALL RESPONDENTS	n= 4,129,261	1,797,814	19,762	345,096	1,721,782	424,200
	100.0%	43.7%	0.5%	8.4%	41.7%	10.2%
GENDER						
Male	100.0%	41.6%	0.0%	14.4%	39.5%	10.0%
Female	100.0%	45.1%	1.0%	2.1%	44.0%	10.3%
AGE						
18-24	100.0%	52.8%	0.0%	16.7%	25.3%	5.6%
25-34	100.0%	45.0%	0.0%	14.4%	39.6%	4.5%
35-49	100.0%	36.4%	1.2%	5.2%	49.1%	12.7%
50-64	100.0%	51.9%	0.0%	2.5%	38.2%	15.2%
65 or over	100.0%	100.0%	0.0%	0.0%	0.0%	0.0%
RACE						
Non-Latino White	100.0%	42.6%	0.7%	7.7%	42.4%	11.3%
All Other	100.0%	44.5%	0.0%	10.9%	40.1%	8.2%
MARITAL STATUS						
Married/Living w/Partner	100.0%	35.6%	0.0%	11.7%	44.0%	12.9%
Separated/Divorced/Widowed	100.0%	54.7%	2.3%	0.0%	45.3%	4.7%
Never been Married	100.0%	68.6%	0.0%	3.9%	25.5%	3.9%
CHILDREN UNDER 18						
None	100.0%	56.8%	0.0%	1.0%	31.1%	15.1%
One or more	100.0%	31.6%	0.9%	15.1%	51.3%	6.1%
EDUCATION						
Less than High School	100.0%	67.6%	0.0%	0.0%	23.1%	10.8%
High School Graduate	100.0%	42.7%	1.9%	11.7%	38.5%	8.7%
Some College	100.0%	41.7%	0.0%	7.6%	45.5%	7.6%
4 Years of College or more	100.0%	39.5%	0.0%	8.4%	45.6%	15.1%
ANNUAL FAMILY INCOME						
Less than \$20,000	100.0%	52.8%	0.0%	9.0%	33.1%	9.0%
\$20-\$30,000	100.0%	48.6%	0.0%	2.9%	45.5%	12.9%
\$30-\$50,000	100.0%	39.4%	1.9%	7.7%	45.9%	10.6%
\$50-\$75,000	100.0%	32.6%	0.0%	17.4%	46.0%	4.3%
\$75,000 or more	100.0%	36.1%	0.0%	5.6%	53.2%	5.6%
COMPENSATION TYPE						
Salaried	100.0%	41.7%	0.0%	8.3%	40.7%	9.2%
Hourly	100.0%	44.2%	0.0%	9.1%	44.0%	9.9%
Other	100.0%	100.0%	4.8%	4.8%	31.6%	14.3%
UNION STATUS						
Union	100.0%	46.3%	0.0%	14.9%	37.2%	17.9%
Non-union	100.0%	42.8%	0.6%	7.2%	49.8%	9.0%

SOURCE: ACQUIRE INTERNATIONAL TABULATION OF DATA FROM INSTITUTE FOR SOCIAL RESEARCH, SURVEY RESEARCH CENTER, UNIVERSITY OF MICHIGAN, SURVEY OF EMPLOYEES, 1995.

Note: Row totals do not add to 100% because respondents could choose more than one category.

Source: FMLA study

Appendix f

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TABLE F-1
Leave Taken in FMLA-Covered Worksites Extent to Which Leave Was Paid, by Reason for Leave
(NUMBER AND PERCENTAGE OF EMPLOYEES)

Reason for Leave	Fully Paid	Partially Paid	Unpaid
All employees	57,397 66.4%	2,044 2.5%	3,790 15.7%
Maternity leave	52.3%	21.7%	21.5%
Paternity leave	29.1%	22.7%	21.7%
Care for dependent child	46.2%	23.5%	21.5%
Care for dependent adult	55.6%	21.0%	21.5%
Employee's illness	51.7%	22.5%	21.5%
Family member's illness	57.6%	10.9%	21.5%

NOTE: Data from Institute for Social Policy Studies, Survey of Family and Employee Health, 1997-1998. Data are based on 1,000 randomly selected employees in 100 randomly selected worksites. Percentages are based on the total number of employees in the sample.

SOURCE: CIVILIL Study

Appendix F

TABLE 5.1
Leave-Takers at Non-Covered Worksites:
Extent to Which Leave Was Paid, by Reason for Leave
 (NUMBER AND PERCENTAGE OF LEAVE)

REASONS FOR LEAVE	Fully Paid	Partially Paid	Unpaid
ALL REASONS n= 17,270	57,336 33.4%	2,779,630 53.0%	
Own health		14.9%	52.4%
Maternity/Disability		26.3%	58.3%
Care for Newborn, Adopted, or Foster Child		16.1%	46.9%
Care for ill Child		11.0%	67.6%
Care for ill Spouse		10.0%	59.3%
Care for ill Parent		10.0%	46.6%

SOURCE: AGENCE INTERNATIONALE DE STATISTIQUE, SOCIAL SCIENCE RESEARCH CENTER, UNIVERSITY OF MICHIGAN, SURVEY OF EMPLOYEES, 1995.
 Note: Because missing data are excluded from the group, percentages always equal the total number of respondents.

ENCLOSURE 3

THE WHITE HOUSE

WASHINGTON

March 19, 1997

Dear Mr. Speaker:

America's working families find it increasingly difficult to balance the demands of work and family. Our nation's workers and their employers deserve responsible compensatory time legislation that gives working people the flexibility they need to meet their obligations at home and in the workplace, while upholding three fundamental principles: real choice for employees, real protection against employer abuse, and preservation of fair labor standards such as the 40 hour work week and the right to overtime pay.

The legislation currently pending House consideration, H.R. 1, the Working Families Flexibility Act of 1997, does not meet these principles. As a result, I strongly oppose H.R. 1 and will veto this bill if passed in its current form.

We should enact comp time legislation this year that meets the needs of working families and U.S. businesses. Last year, I proposed employee-choice flex-time legislation and included expansion of the Family and Medical Leave Act (FMLA) so that workers could take leave for parent-teacher conferences or attend to the routine medical needs of their families. With these objectives in mind, I encourage you to support a substitute amendment to be offered by Representative George Miller. Unlike H.R. 1, the Miller amendment allows comp time without endangering fair labor standards, and without burdening business with greater costs or risks:

The Honorable Newt Gingrich
Page Two

It is time for us to work together to give America's working families the help they need to succeed in an increasingly demanding environment. Although I am prepared to support and sign a responsible comp time bill, I intend to veto any legislation that fails to guarantee real choice for employees, real protection against employer abuse, and preservation of fair labor standards such as the 40 hour work week and the right to overtime pay. To that end, I hope that you can support the Miller amendment -- a good step toward responsible comp time reform.

Sincerely,

Rita Chiswick

The Honorable Newt Gingrich
Speaker of the
House of Representatives
Washington, D.C. 20515



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

March 19, 1997
(House)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

H.R. 1 - Working Families Flexibility Act of 1997 (Ballenger (R) NC and 99 others)

The President will veto H.R. 1 if it is passed in its current form. The President will not sign H.R. 1, or any other comp time legislation, unless it adheres to three fundamental principles: (1) real choice for workers; (2) real protection against employer abuse; and (3) preservation of workers' rights.

H.R. 1 purports to give working families greater flexibility. In reality, it grants employers more rights at the expense of working people:

- H.R. 1 fails to offer workers real choice. In particular, H.R. 1 would allow an employer to decide when a worker could use his or her compensatory time-off by disapproving such time-off if the employer claims it would "unduly disrupt" its operations. In addition, H.R. 1 would permit an employer to "cash out" a worker's earned compensatory time over 80 hours.
- H.R. 1 fails to protect workers against employer abuse. For example, H.R. 1 offers inadequate protections for vulnerable workers and part-time, seasonal, and temporary employees, including garment and construction workers, and those who are employed in industries with histories of Fair Labor Standards Act violations. H.R. 1 also fails to prohibit employers from substituting compensatory time-off for paid vacation or sick leave benefits. Furthermore, H.R. 1 lacks meaningful remedies for workers when employers penalize them for electing to receive overtime pay in lieu of compensatory time-off. In addition, H.R. 1 contains inadequate worker safeguards in cases where an employer goes bankrupt or out-of-business.
- H.R. 1 fails to preserve workers' rights. Workers who take compensatory time-off can be forced to work additional overtime in the same week — even on the weekend — without being paid overtime premium pay.

The Administration supports the substitute amendment to be offered by Representative George Miller, although procedural obstacles in the House have prevented the amendment from addressing all of the important issues that need to be treated, including expansion of Family and Medical Leave Act (FMLA). The Administration strongly believes that any legislation to authorize compensatory time under the Fair Labor Standards Act should be linked to expansion of

the FMLA. Expanding the FMLA to give working families greater flexibility to foster the education of their children or provide routine health care for their children or elderly relatives will go a long way toward achieving the stated goals of H.R. 1.

The Miller amendment, however, would ensure real employee choice, by adding crucial provisions not found in H.R. 1. For example, employers that adopt comp time programs would have to make comp time available to similarly-situated employees on a fair and non-discriminatory basis. Working families are guaranteed real protection against possible comp time abuse through the Miller amendment.

Furthermore, the Miller amendment would preclude employers from using comp time to modify or reduce existing paid leave plans. It would entitle employees choosing comp time to get regular statements of their accrual and use of comp time; put a reasonable limit on the number of hours of comp time that can be accrued; and allow employees to seek damages when they incur costs because an employer wrongfully denies them use of the comp time they earned. The Secretary of Labor would have the authority to bar employers with a pattern and practice of comp time abuse from continuing to offer comp time. H.R. 1 has none of these protections. These are all improvements to H.R. 1 that guarantee the legislation enhances rather than decreases flexibility for America's working families.

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

MAR 4 1997

The Honorable William F. Goodling
Chairman
Committee on Education and the Workforce
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Goodling:

We understand that your Committee will consider H.R. 1, the "Working Families Flexibility Act of 1997," on Wednesday, March 5. I am writing to emphasize the Administration's strong opposition to H.R. 1, and to urge your Committee not to order the bill reported.

The Administration believes strongly that any legislation to authorize compensatory time -- "comp time," or paid time-off -- under the Fair Labor Standards Act (FLSA) should be linked to expansion of the Family and Medical Leave Act (FMLA), as the President proposed during the last Congress. The FMLA provides important benefits to working families and has proved effective in meeting the needs of both families and businesses. And, unlike comp time, which would be optional, family and medical leave is a right that covered employers may not deny to eligible employees. Expanding FMLA to give working families the flexibility they need for greater involvement in the education of their children and elder care will go a long way toward achieving the stated goals of H.R. 1. The bill before your Committee does not include FMLA expansion, and it should.

Any comp time legislation must effectively and satisfactorily address three fundamental principles: real choice for employees; real protection against employer abuse; and preservation of basic worker rights including the 40-hour workweek.

Real choice for employees must include the right to choose whether to earn comp time or overtime premium pay; the right to take comp time when needed for FMLA purposes; the right to choose to use comp time for any purpose with two weeks notice unless its use would cause substantial injury to the employer; and the right to "cash out" accrued comp time for pay on 15 days notice, as well as a prohibition against giving employers the unilateral right to cash out an employee's accrued comp time at their discretion. Real protection against employer abuse must include a number of protections that are entirely absent from H.R. 1, such as the exclusion of vulnerable workers and

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part-time, seasonal and temporary workers, including garment and construction workers; special protections in cases where the employer goes bankrupt or out-of-business; prohibitions against employers' substituting comp time for paid vacation or sick leave benefits, or penalizing employees who choose overtime premium pay instead of comp time; a reasonable limit on the number of bankable hours for comp time; damages that allow an employee to obtain adequate relief if denied the use of comp time or denied overtime assignments; and strong effective provisions for enforcement. Preservation of worker rights requires preserving the 40-hour workweek and the right to receive premium pay for overtime work.

President Clinton will veto any bill that does not meet these three fundamental principles. While the President has called for and strongly supports enactment of responsible comp time legislation, he will not sign any bill -- including H.R. 1 -- that diminishes employees' rights to receive time-and-a-half overtime premium pay when they work more than a 40-hour workweek. Workers -- not employers -- must be able to decide how best to meet the current needs of their families.

The Office of Management and Budget advises that there is no objection to the submission of this report.

Sincerely,


CYNTHIA A. METZLER
Acting Secretary of Labor

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

FEB 26 1997

The Honorable James M. Jeffords
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Chairman Jeffords:

We understand that your Committee will consider S. 4, the "Family Friendly Workplace Act," on Wednesday, February 26. I am writing to emphasize the Administration's strong opposition to S. 4, and to urge your Committee not to order the bill reported.

The Administration believes strongly that any legislation to authorize compensatory time -- "comp time," or paid time-off -- under the Fair Labor Standards Act (FLSA) should be linked to expansion of the Family and Medical Leave Act (FMLA), as the President proposed during the last Congress. The FMLA provides important benefits to working families and has proved effective in meeting the needs of both families and businesses. And, unlike comp time which would be optional, family and medical leave is a right that covered employers may not deny to eligible employees. Expanding FMLA to give working families the flexibility they need for greater involvement in the education of their children and elder care will go a long way toward achieving the stated goals of S.4. The bill before your Committee does not include FMLA expansion, and it should.

Any comp time legislation must effectively and satisfactorily address three fundamental principles: real choice for employees; real protection against employer abuse; and preservation of basic worker rights, including the 40-hour workweek.

Real choice for employees must include the right to choose whether to earn comp time or overtime premium pay; the right to take comp time when needed for FMLA purposes; the right to choose to use comp time for any purpose with two weeks notice unless its use would cause substantial injury to the employer; and the right to "cash out" accrued comp time for pay on 15 days notice, as well as a prohibition against giving employers the unilateral right to cash out an employee's accrued comp time at their discretion. Real protection against employer abuse must include a number of protections that are entirely absent

from S.4, such as the exclusion of vulnerable workers; special protections in cases where the employer goes bankrupt or out-of-business; prohibitions against employers substituting comp time for paid vacation or sick leave benefits, or penalizing employees who choose overtime premium pay instead of comp time; damages that allow an employee to obtain adequate relief if denied the use of comp time or denied overtime assignments; and strong effective provisions for enforcement. Preservation of worker rights requires preserving the 40-hour workweek, the right to receive premium pay for overtime work, and the cardinal FLSA principle that overtime is earned whenever an employer knows or has reason to know that overtime is being worked. Several provisions of S. 4., including the 80-hour biweekly work program and the flexible credit hour program, could effectively eliminate these rights.

President Clinton will veto any bill that does not meet these fundamental principles. While the President has called for and strongly supports enactment of responsible comp time legislation, he will not sign any bill -- including S. 4 -- that obliterates the principle of time-and-a-half for overtime or that destroys the 40-hour workweek. Workers -- not employers -- must be able to decide how best to meet the current needs of their family.

The Office of Management and Budget advises that there is no objection to the submission of this report.

Sincerely,


CYNTHIA A. METZLER
Acting Secretary of Labor



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 9, 1997 (SENT)
(Semic)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

S. 4 - Family Friendly Workplace Act (Auerbach (B) MO and 41 others)

The Administration strongly opposes S. 4, as reported by the Senate Labor and Human Resources Committee, because it does not uphold three fundamental principles: (1) real choice for workers; (2) real protection against employer abuse; and (3) preservation of workers' rights. The President will veto S. 4 or any other compensatory time legislation that does not fulfill these principles.

S. 4 purports to give working families greater flexibility. In reality, it grants employers more rights and leaves working Americans and their families worse off.

- S. 4 fails to offer workers real choice. In particular, S. 4 would allow an employer to unfairly pick and choose which employees are offered compensatory time. Moreover, it would allow the employer to decide when workers use their compensatory time-off by disapproving such time-off if the employer claims it would "unduly disrupt" its operations -- even if a worker needed the time off for family leave or medical emergencies. In addition, S. 4 would permit an employer to unilaterally "cash out" a worker's earned compensatory time over 80 hours. These provisions do not guarantee real choices to workers.
- S. 4 fails to protect workers against potential abuse. As a time when overtime is reaching an all-time high in some industries, S. 4 offers inadequate protections against employer abuse, especially for vulnerable workers and part-time, seasonal, and temporary employees, including garment and construction workers. The bill also fails to prohibit employers from substituting compensatory time-off for paid vacation or sick leave benefits. It does not adequately safeguard workers when an employer goes bankrupt or out of business: workers could lose up to six weeks of pay due to S. 4's unreasonably high cap of 240 hours of bankable compensatory time. S. 4 also lacks meaningful remedies when workers exercise their private right of action against employers who penalize them for choosing overtime pay in lieu of compensatory time.
- S. 4 fails to preserve workers' rights. It effectively eliminates the 40-hour workweek by allowing employers to establish an 80-hour biweekly work schedule or a flexible credit hour program that allows employers to pay straight time pay for overtime work. That is money out of the employee's pocket. It also ends the 60-year-old right to time and a half pay whenever an employee works more than 40 hours a week, not just when the employer orders it. In addition, workers who take compensatory time-off can be forced to work extra hours in the same week even on the weekend without being paid time and a half pay.

2

This gives families less flexibility, not more. If compensatory time legislation is truly to provide more flexibility to working families, it must not be allowed to undermine the 40-hour workweek.

Finally, the Administration strongly believes that any legislation to authorize compensatory time under the Fair Labor Standards Act should be linked to expansion of the Family and Medical Leave Act (FMLA). Expanding the FMLA to give working families greater flexibility to foster the education of their children or provide elder care will go a long way toward achieving the stated goals of S. 4.



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

LABOR BRANCH FAX SHEET

DATE: 4/6/00

TO: Ann O'Leary
62878

FROM: Paul Heltz - 75-3264

COMMENTS:

*Attached is the proposed
passback to DOL on BPA-UK,
which we discussed with you
last night.*

NUMBER OF PAGES (INCLUDING COVER) 10

CONFIRMATION: (202) 395-3262
FAX NUMBER: (202) 395-1596

MAR-31-2000 16:04

OMB/LRD/RDI

202 395 5691 P.01/29

U.S. Department of Labor

Assistant Secretary for
Employment and Training
Washington, DC 20206

The Honorable Nancy L. Johnson
Chairman
Subcommittee on Human Resources
B317 Rayburn House Office Building
United States House of Representatives
Washington, DC 20515

Dear Madam Chairman:

Thank you for inviting me to testify on Birth and Adoption Unemployment Compensation (BAA-UC). I am writing in response to your followup letter of March 13 requesting additional information.

Replace
with
Insert 1.
(attached)

The Department has a long history of developing and publishing accurate unemployment compensation (UC) data. These data enjoy a high degree of credibility and are regularly relied upon by the Bureau of Labor Statistics and the Federal Reserve as well as researchers analyzing the program. We work diligently to maintain the integrity of our data, and I hope you will agree after analyzing this letter and its enclosures that the estimates we developed for BAA-UC meet this high standard.

First, you requested a description of our cost estimating methodology. Enclosed is a detailed explanation of that methodology (Enclosure 1). It should be noted that the estimate was based on information on State legislative activity available at the time of publication of the Notice of Proposed Rulemaking. Based on legislative activity since that time, we are now considering a revision to the estimate.

Second, you asked for an estimate of the possible cost increase associated with employers changing their leave policies in response to BAA-UC. As you can see from the cost description, we did in fact assume that this would occur. Specifically, we assumed that 10% of leave spells that would have been fully employer-paid in the absence of BAA-UC would shift to either the partially-paid or unpaid leave categories (5% to each). Similarly, we assumed that 10% of leave spells that would have been partially-paid would shift to the unpaid category. The cost associated with these shifts was estimated at \$6 million.

Third, you asked for cost information on specific states. Detailed spreadsheets for the four States covered by our cost estimate are included in Enclosure 1.

MAR-31-2000 16:04

OMB/LRD/RDI

202 395 5691 P.02/29

- 2 -

Fourth, you asked for the material we used to estimate the number of leave-takers and the percent using employer-paid leave. That material is enclosed (Enclosure 2), with the pertinent numbers highlighted

Fifth, you asked for material concerning the Department's position on the compensatory time issue. In response to your request, I have conferred with officials of the Employment Standards Administration who have provided information about Administration policy. The Administration believes that our nation's workers deserve responsible compensatory time "comp time," legislation that truly gives them the flexibility they need to meet their responsibilities both at work and at home. But the Administration also believes that any legislation to authorize ~~compensatory time off~~ "comp time" or paid time off for overtime hours worked for employees in the private sector covered by the Fair Labor Standards Act must effectively and satisfactorily uphold three fundamental principles: real choice for employees, real protection against employer abuse, and preservation of fair labor standards such as the 40-hour workweek and the right to receive time-and-a-half overtime pay. Enclosure 3 contains Statements of Administration Policy and White House and Department of Labor correspondence which describe the Administration's position in greater detail

If you have further questions on "comp time" or the enclosure pertaining to it, please address them to the Department's Wage and Hour Administrator, T. Michael Kerr, at 693-0051

Finally, you asked why there are no unemployment fund solvency guidelines for States considering implementing a BAA-UC program and how the Federal government could assure workers that funds will be available when they are needed. The Department expects that a State will not choose to enact BAA-UC changes without assessing the effect on its unemployment fund. Each State has the responsibility to assess the cost to its unemployment fund whenever coverage, benefit expansions, or tax changes are considered within its UC program. ~~As discussed above, we do not anticipate BAA-UC costs to be great. Although a number of States have trust fund balances below the level recommended by the Advisory Council on Unemployment Compensation, none are currently insolvent. Additionally, while we recognize that States have experienced solvency problems in the past, payment of UC has never stopped due to lack of funds.~~

If you or your staff have any questions or need further explanation of the enclosed material, please contact Grace Kilbane at 219-7831.

Sincerely,

Raymond J. Uhalde

Enclosures

Insert 1

Before addressing your specific questions, let me assure you that the Employment and Training Administration (ETA) works diligently to maintain the integrity of its analyses. ETA pays close attention to improving its understanding of the behavioral factors that affect the UC program, such as take up rates and the duration of benefits. I hope that you will agree after analyzing this letter and its enclosures that the estimates we developed for BAA-UC meet this high standard.

First, you requested...the Notice of Proposed Rulemaking. Based on that information, we estimated that the costs of the rule could range between \$0 and \$68 million. (See Enclosure 1 for a summary of the methodology used.) The lower end of the range reflects the fact that the regulation is permissive – it does not mandate adoption of a BAA-UC program – while the higher end reflects limited adoption by States. Since that estimate was made, there has been additional legislative activity in the following States: *[List States]*. For the final rule, we are now considering a revised cost estimate and methodology.

MAR-31-2000 16:05

OMB/LRD/RDI

202 395 5691 P.03/29

13784

NANCY L. JOHNSON, CONNECTICUT, CHAIRMAN
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Cerv
L2000-245371
COMMITTEE ON WAYS AND MEANS

U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

SUBCOMMITTEE ON HUMAN RESOURCES

March 13, 2000

BILL ARCHER, TEXAS, CHAIRMAN
COMMITTEE ON WAYS AND MEANS

RON SMILETON, CHIEF OF STAFF
RON MATHIAS, SUBCOMMITTEE STAFF DIRECTOR

JAMIE HAYES, MINORITY CHIEF COUNSEL
MICHAEL CUNY, SUBCOMMITTEE MINORITY

Grace Kiehn

The Honorable Raymond J. Uhalde
Deputy Assistant Secretary
Employment and Training Administration
U.S. Department of Labor
200 Constitution Ave., N.W., Rm. S-2307
Wash., DC 20210

Dear Mr. Uhalde:

Thank you for testifying at our hearing on Unemployment Compensation and the Family and Medical Leave Act.

To follow-up on the lively exchange we had during the hearing, I am requesting additional information about the Administration's Birth and Adoption Unemployment Compensation proposal. Specifically, I would like:

1. A detailed copy of the Department's cost estimate, including the method used;
2. An estimate of possible increased costs of the program based on the assumption that some employers would drop their Family Leave programs and rely instead on a new state Unemployment Compensation based program;
2. Detailed information about the special cost study of a few states you mentioned;
3. A copy of the material the Department used to determine the number of leave-takers and the percent using employer-paid leave;
4. Written material outlining the Department's position on the compensation time issue;
5. Explanation of why there are no trust fund solvency guidelines for states considering implementation of the new program in the proposed rule. How can the federal government assure workers that there will be unemployment benefits available to them when they need them if insolvent states like Maryland, or barely solvent states such as Washington, open up their unemployment systems to other uses?

X
Suggest providing the President's letter and the most recent SAP. Sending additional documents appears unnecessary and duplicative.

MAR-31-2000 16:05

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202 395 5691 P.04/29

As you no doubt gathered from the hearing, I am very interested in this issue and the effects it may have on my Connecticut constituents. If you have questions about this request, you may call Ron Haskins or Margo Smith at the subcommittee on 225-1025.

Thanks again for presenting the Administration's views at our hearing.

Sincerely,


Nancy L. Johnson
Chairman

RH/p

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MAR-31-2000 16:05

OMB/LRD/RDI

202 395 5691 P.05/29

ENCLOSURE 1

BIRTH AND ADOPTION UNEMPLOYMENT COMPENSATION

Methodology for Cost Estimates Accompanying Notice of Proposed Rulemaking

At the time the Notice of Proposed Rulemaking was published, the Department of Labor (DOL) estimated that the possible annual aggregate BAA-UC cost could range from zero to approximately \$68 million. The regulation is permissive, and DOL does not know how many States will choose to enact experimental BAA-UC programs. Based on legislative activity and expressed interest at the time, four States were included in the \$68 million estimate: Massachusetts, Vermont, Maryland, and Washington. These four States' Average High Cost Multiples (AHCM) were either at or above the US average of 0.94 in 1998. (The AHCM is DOL's measure of fund adequacy.) Because of their relatively high AHCMs, solvency may not be an overriding concern for these States when deciding whether to adopt the program. ~~With the exception of Maryland, these States also have high reciprocity rates, which would indicate that State policy makers might be receptive to BAA-UC.~~ Although legislation had also been introduced in New York, the State's AHCM for 1998 was the lowest of any State, and therefore it was considered unlikely to adopt the program and not included in the Department's estimate.

For Each State:

1. Determine the number of women with a child under one year of age. The estimate began with 1997-1998 data from the Current Population Survey (CPS), published in the Bureau of Labor Statistics (BLS) news release, "Employment Characteristics of Families in 1998." These data contained the annual U.S. average number of women with a child under one-year old. Table 4 from the September 1997 issue of *Monthly Vital Statistics Report* [Vol.46, No.1(S)2], provides the proportion of live births per State to total live births in the U.S. This proportion was then used to disaggregate, by State, the U.S. average number of women with a child under one-year old. The employment-population ratio from the above ~~press~~ ^{news} release (54%) was then applied to each State's average number of women with a child under one-year old, in order to get the number of employed women with a child under one-year old. This was assumed to be the number of annual births to employed women in each of the four States included in the estimate.

2. Adjust this number to account for those not covered by State UI laws. Birth rate data were then combined with data on self-employment by age to achieve the proportion of these employed women who are wage and salary workers and thus likely to be covered by UI. Specifically, the article "Characteristics of Self-employed Women in the United States" in the March 1994 BLS Monthly Labor Review provided a breakdown [Table 4] of self-employment rates by age in five and ten year increments. The April 1999 *National Vital Statistics Report* [Vol. 47, No. 18] provides a breakdown of birth rates by age in five year increments up to age 50. The average self-employment rate for women under age 50 was weighted by the product of birth rates and number of employed women. The source of the number of employed women by age was the BLS *Employment and Earnings* report, published in January 1999. Table 3 of this report provides the employment status of women by age in five year increments. An estimated 95% of employed women with children under one-year old were not self-employed, and thus would be

X For example, in Massachusetts using this method we determined that 68,805 women had a child under one year of age and 54% of these women ...

MAR-31-2000 16:06

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202 395 5691 P.06/29

covered under the UI system. Further, according to a BLS news release titled "Average Annual Pay by State and Industry, 1997", about 3% of wage and salary civilian employment is not covered by UI. The number of covered employed women was therefore reduced by another 3%.

X bringing the percentage of women in the workforce covered by UI to 92%.

3. Estimate the number of employed women with a child under one year, and covered by State UI laws, who are likely to take leave to care for the new child. Data from a report by the Commission on Family and Medical Leave, titled *A Workable Balance: Report to Congress on Family and Medical Leave Policies* (April 30, 1996), hereafter referenced as the "FMLA study," were used. Two main features of this proposal are different from those in the FMLA study. On one hand this proposal has a broader scope, because those who work for companies with fewer than 50 employees will be able to receive BAA-UC benefits, whereas they would not be covered under the FMLA. On the other hand, this proposal is more limited because it only provides benefits to those taking leave to care for a newborn or newly adopted child. The FMLA study provides some categorized data that was manipulated to account for these two factors. The proportion of women who would take leave was calculated by taking the weighted average of women leave takers for newborn, foster, or adopted child care between FMLA-covered and non-covered respondents, and dividing that by total women who had the potential to take leave for newborn care (leave takers + non-leave takers for newborn or adopted child care). (Note: The FMLA study includes foster care in this category, but BAA-UC would not cover foster care.) To account for an overlap between newborn care and maternity-disability leave, both the leave takers and non-leave takers were increased by 50% of those who cited maternity-disability as the main reason for taking or needing leave. The assumption was that about half of maternity disability leave would take place after the birth of the child, and therefore those women would also be caring for their children. It was estimated that 98% would take leave under existing conditions. Furthermore, to account for added leave taking because of the BAA-UC benefit the percentage was increased by 1% to 99%.

X but does not imply that the leave-takers would take a substantial period of leave.

4. Estimate the number of men who would take leave under BAA-UC, and add that number to the estimated number of women leave takers. The ratio of men to women was then applied to calculate the number of men who would take leave. This ratio was interpolated from the FMLA study. Tables 5.B and 5.C provide the percentages of men and women who took leave for the care of a newborn, adopted or foster child. These percentages, weighted by covered/non-covered worksites were used to calculate the total number of men (numerator) and women (denominator) leave takers to care for a newborn, foster, or adopted child. Again, the denominator also includes 50% of the leave takers from the maternity-disability category. The ratio from the FMLA study, 63%, already assumed a small increase in leave takers because it was applied to the number of women leave-takers adjusted for the BAA-UC incentive. The final estimate, 68%, assumed an additional 5% of men would take leave due to the incentive. The result of multiplying this percentage by the number of women leave takers was the total number of BAA-UC-covered leave takers in the State.

5. Adjust the estimate of leave takers to account for those who receive employer paid leave and would not be eligible for BAA-UC. The leave-takers were then divided between those estimated to receive full BAA-UC benefits and those estimated to receive partial BAA-UC benefits. Tables 5.O and 5.P in the FMLA study show the percentages of leave takers at both

MAR-31-2000 16:06 OMB/LRD/RDI 202 395 5691 P.07/29

Comment: Suggest adding a concluding sentence, e.g. "Therefore, the BAA-UC would provide partial benefits for 26.3% of workers and full benefits for 37.2% of workers."

FMLA-covered and non-covered work sites whose leave was fully paid, partially paid, or unpaid by their employers. Those receiving employer-paid leave would not be eligible for BAA-UC. Those unpaid would receive full BAA-UC benefits, and those partially paid would receive partial benefits from BAA-UC. Weighting the averages between covered and non-covered, 35% are unpaid in the FMLA study and 22% are partially paid. It was then assumed that 10% of those 43% (4.3%) currently in the fully paid category would be shifted to either the partial or unpaid category by employers because of the alternative payments from BAA-UC. For the same reason, 10% of the 22% (2.2%) currently in the partially paid category would be shifted to the unpaid.

Comment:
Regarding the "10%," please check the NPRM preamble to see if there is narrative language related to this assumption.

6. Apply the estimated "take-up" rate and monetary eligibility rate to the number of leave takers potentially eligible for BAA-UC; the result is the number of BAA-UC beneficiaries estimated for each State. Both Massachusetts and Maryland are assumed to have an 80% take-up rate in the unpaid category. Based on studies on UI take-up rates, about 65% of eligible workers would actually apply for UI before phone claims were available. The introduction of phone claims increases take-up rates by about 15%. In addition, BAA-UC claimants may behave differently than regular UI claimants, so an additional 5 percentage points was added, the result for these two States being 80%. In the calculation of take-up rates for partially paid leave takers, a slightly smaller percentage, 60%, was assumed before phone claims. The difference accounts for the fact that take-up rates are positively correlated with potential durations. Unpaid leave takers have a higher potential duration as BAA-UC claimants, and therefore a higher take-up rate, than do partially paid leave takers. Since Vermont does not offer telephone claims, and Washington has only partially implemented its program, their take-up rates are slightly lower (70% and 77% respectively for unpaid leave takers). Each State's average monetary eligibility rate for the past 3 years was then multiplied by the number applying in order to get a final estimate for BAA-UC beneficiaries.

X Comment:
This appears to add to 85% versus 80%. Please verify.

7. Estimate the average number of weeks of BAA-UC that would be paid to each beneficiary. Table S.D and S.E of the FMLA study provide details about the lengths of leave at covered and non-covered worksites. First, the weighted averages of the weekly durations for the care of a new child were calculated between covered and non-covered worksites. Second, there are several studies that examine the relationship between increased UI replacement rates and the average duration of UI claimants. In Chapter 7 of Unemployment Insurance in the United States (Upjohn, 1997), Paul T. Decker summarizes these studies and concludes that "the lengthening in average unemployment spells is likely to be in the range of 0.5 weeks to 1.5 weeks for every 10 percentage-point increase in replacement rates." [p.296] The midpoint of this range (1 week) was used as the point estimate. Since BAA-UC would increase replacement rates by 50 percentage points (i.e. from zero to about 50%), that would translate to an additional 5 weeks. Each cell in the duration distribution was increased by a proportion of the above incentive, namely the ratio of leave duration to overall average UI duration of 14 weeks (US average, 12 months ending June 1999). For example, the incentive on a 4 week duration would be $(4/14) \cdot 5$, or 1.4 weeks. Of course, the resulting duration was capped at the maximum potential duration for each State. The maximum potential duration was assumed to be 12 weeks, except in Washington and Vermont, which had maximum durations of 4 and 6 weeks respectively, as stated in their bills. If the State has a waiting week for UI, that week was subtracted from each cell. The weighted average of the resulting durations was then taken, based on percentages from the FMLA study. Partially paid workers were assumed to have a final BAA-UC average duration of half that of unpaid leave-takers. For each group (unpaid and partially paid), total weeks of BAA-UC are calculated by multiplying beneficiaries by average duration.

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8. Estimate the average weekly benefit amount (AWBA) for each State's BAA-UC beneficiaries. The last 12 month average of each State's AWBA as of June 1999 was the starting point. Then, the proportion of men to women was again employed to adjust this benefit amount. In the regular UI system, the proportion of men to women is about 57 to 43, whereas in the projected BAA-UC population the ratio was around 40 to 60. Because of this difference, and because of the lower average benefit amount for women compared to men, each AWBA was adjusted down by 3%.

9. Multiply total weeks of BAA-UC by the average weekly benefit amount to determine the total estimated BAA-UC cost for each State.

The attached estimates represent the initial annual benefit cost in each State. Implementation and on-going administrative costs were not included in the cost estimate.

General Comment : It was our understanding that
some value was assigned to administrative costs.
Please verify.

KL: UI-BAA



Stuart Shapiro
04/05/2000 04:37:54 PM

Record Type: Record

To: Carole Kitt/OMB/EOP@EOP
cc: daniel i. werfel/omb/eop@eop, debra j. bond/omb/eop@eop, ann o'leary/opd/eop@eop, bennie c. rogers/omb/eop@eop
bcc:
Subject: Re: LRM BCR75 -- Revised language in letter 

okay with one edit below
Carole Kitt



Carole Kitt

04/05/2000 03:35:39 PM

Record Type: Record

To: Stuart Shapiro/OMB/EOP@EOP, Daniel I. Werfel/OMB/EOP@EOP, Debra J. Bond/OMB/EOP@EOP, Ann O'Leary/OPD/EOP@EOP
cc: Bennie C. Rogers/OMB/EOP@EOP
Subject: Re: LRM BCR75 -- Revised language in letter

Below is my attempt at a revised letter to Congresswoman Johnson on BAA-UC. I've tried to capture the comments from Ann and Stuart on revised cost estimates as well as address the inconsistency Stuart noted in the second-to-last paragraph which refers to cost estimates "discussed above" where there were no overall costs discussed.

I also tried to address my concern that the second paragraph on accurate UI data was a "red herring." The quality of actual data on UI claims, etc, which are used by BLS and the Fed, does not necessarily carry over to the quality of DOL's analyses and estimates of program costs. I do think DOL has done a very credible job with the cost estimates based on available data, but I wanted the distinction made between data and analyses.

What are your thoughts?

Paragraph 2

The Employment and Training Administration (ETA) has a long history of developing and publishing accurate unemployment compensation (UC) data. These data enjoy a high degree of credibility and are regularly relied upon by the Bureau of Labor Statistics and the Federal Reserve as well as researchers analyzing the program. ETA pays equal attention to improving its understanding of the behavioral factors that affect the UC program, such as take-up rates

and the duration of benefits. We work diligently to maintain the integrity of our data and our analyses, and I hope you will agree after reviewing this letter and its enclosures that the estimates we developed for BAA-UC meet this high standard.

Paragraph 3

First, you requested a description of our cost estimating methodology. Enclosed is a detailed explanation of that methodology (Enclosure 1). It should be noted that the estimate was based on information on State legislative activity available at the time of publication of the Notice of Proposed Rulemaking. Based on that information, we estimated that the costs of the rule could range between \$0 and \$68 million. The low ~~estimate~~ **end of the range** reflects the fact that the regulation is permissive -- it does not mandate adoption of a BAA-UC program. Since that estimate was made, there has been additional State legislative activity [list States]. For the Final Rule, we are now considering a revised cost estimate using the same methodology described in Enclosure 1. ~~[We will provide you with any revised estimates prior to publication of the Final Rule.]~~



Weg Arkins >



Carole Kitt

04/21/2000 04:24:50 PM

Record Type: Record

To: Stuart Shapiro/OMB/EOP@EOP
cc: daniel i. werfel/omb/eop@eop, debra j. bond/omb/eop@eop
Subject: Re: ui/fmla comments

--- Deliberative Process Materials - - Privileged and Confidential ---

I've taken a crack at organizing the comments that we all had on the BAA-UC rule. This can be a starting point for our strategy discussion next week. These are not in priority order. I think we need to discuss the design issues some more and decide where we want to be.

Rule Format Issues

- Include draft model legislation and commentary in the final rule. (Does this include preamble?)
- Include discussion of cost estimating methodology.

greater or equal

Overarching Issues

- Cost estimates -- implications of being major rule
- Cost estimates -- methodology; criteria for eliminating States; inclusion of administrative costs
- DOL claim that BAA-UC is not a "program." But what is it? Is it category of worker (like seasonal employees)? Is it a reason for leaving job (like workers who quit because spouse is transferred)? Need to be able to relate what BAA-UC is to reasons for treating it differently from regular UC (e.g., shorter duration)
- DOL claim the BAA-UC is an "experiment." Can we improve the experimental/evaluation features of BAA-UC? Sunset date? Evaluation with fewer than 4 States if States have similar legislative models?
- Need to clarify that goal of providing BAA-UC is to extend length of leave taken (already have high leave take-up by women for these reasons)

15 states

2 additional criteria

1 avg. high cost multiple-States

2 receiving rates

ratio of insured unemployed

-- above avg. cost would frustrate

Design Issues

- Approved leave, especially with respect to small firms not covered by FMLA. Consider those who can get approved leave but still quit; consider those who may not get same length of approved leave as those covered under FMLA. What kinds of equity do we want to encourage States to provide?
- Non-charging of benefits
- Experience rating

high rate long past to expand

- Solvency, especially if want to eliminate some States from cost estimate
- Age limit on adoptions -- suggest 18

Responses to Public Comments

- p. 10 Federal law setting caps.
This argument seems to be a red herring because Federal law sets some parameters but a lot is still left to the discretion of States, e.g., Federal prohibition of benefits for professional athletes but State exclusions from UI for some workers like yacht salesmen. Also, this argument about Federal caps might provide support for opponents of rule who argue that DOL should have sought law change.
- p. 13 Able and available in temporary layoff situation.
The example of the economic reality in the temporary layoff situation seems to be describing work search requirements. Does DOL view active work search as synonymous with more passive able and available requirements?
- p. 28 Discussion of BAA-UC claimants being unemployed.
Whole discussion of "unemployed" is disingenuous. Perhaps those commenting used the word "unemployed," but the real issue is the nexus between "unemployed" and the reason for unemployment, e.g., "involuntarily unemployed" or "unemployed through no fault of their own" or unemployed because a disaster.
- p. 36 BAA-UC is an experiment but limited funding constrains options.
Delete the funding sentence. What is limited funding constraining options supposed to mean? Are we saying we are not seeking a legislative change because we don't have PAYGO offsets? Are we saying we don't have mandatory or discretionary funds for DOL to run an experiment -- so we want the States to pay for the experiment?
- p. 36 Fact-finding in experiment is critical to assisting DOL fulfill authority and responsibility to assure State conformity.
Those commenting noted that DOL did not require experimentation in other areas. Why doesn't DOL do evaluations of other State choices regarding UI eligibility (such as seasonal workers or voluntary quits for good personal cause) which DOL hopes to broaden?
- p. 51 Eligibility of employees of small businesses for BAA-UC.
Last sentence does not seem responsive to concerns about lack of eligibility for employees of small firms. "States are free to evaluate ... and can choose to cover..." Can we establish stronger requirements that State legislation be crafted in a way so as not to discriminate against employees of smaller firms?

Final
UI-BAA reg

4510-30

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 604

RIN: 1205-AB21

Birth and Adoption Unemployment Compensation

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Final Rule.

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

EFFECTIVE DATE: This Final Rule is effective [enter the date 60 days after the publication in the FEDERAL REGISTER.]

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

SUPPLEMENTARY INFORMATION:

I. INTRODUCTION

A. Overview

On December 3, 1999, we published for comment in the Federal Register a Notice of Proposed Rulemaking (NPRM) proposing to add new part 604 to 20 CFR. Part 604 will permit the State agencies that administer the UC program to provide partial wage replacement, on a voluntary, experimental basis, to parents who take approved leave or who otherwise leave employment following the birth or placement for adoption of a child.

The preamble in the NPRM contained a detailed explanation, by subpart, of each proposed section. Much of the material in the NPRM is repeated in this document to adequately respond to comments and to eliminate the need for readers to refer to the NPRM for context. Where substantive changes to the proposed rule are made, the changes are discussed in the relevant preamble section of this Final Rule. Technical revisions, however, are not discussed in this preamble. Unless otherwise mentioned, references in this preamble to changes are comparisons between the NPRM and Final Rule.

The NPRM was published with two appendices: Model State Legislation (Appendix A), which is optional draft legislation that States may use as a guide in developing legislation, and a Commentary (Appendix B) in question-and-answer format that provides information on the Model State Legislation and will aid States in making policy decisions. Comments received regarding these appendices are discussed in this preamble. The appendices are attached to this notice in the form of an Unemployment Insurance Program Letter (UIPL). The appendices will not appear in the CFR.

The NPRM invited the public to comment over a 45-day period. We believed this period was ample because of the simple nature of the experiment and the relatively short length of the proposed rule, although we did receive a number of requests for additional time. To accommodate the holiday season, we extended the comment period 15 days, through February 2, 2000. Comments were accepted by mail and electronic media. All comments submitted by this date, including correspondence received prior to publication of the proposed rule, were considered in developing this Final Rule.

B. Background

Based on findings from a 1996 study conducted by the Commission on Family and Medical Leave, which indicated that parents were not able to take needed leave because they could not afford it, and in response to the legislative efforts by some States to provide UC to parents, the President directed the Secretary of Labor on May 23, 1999, to propose regulations allowing unemployment fund moneys to be used to provide partial wage replacement to mothers and fathers on leave following the birth or adoption of a child. The President elaborated on this Birth and Adoption UC (BAA-UC) proposal in a May 24, 1999, memorandum to the heads of executive departments stating that “the Department of Labor is to evaluate the effectiveness of using the system for these or related purposes.”

Through the BAA-UC experiment, States will be able to provide partial wage replacement to enable some parents, who otherwise would not have taken any leave, to do so. Others, who took leave but were compelled to return to work prematurely because they could not afford to be off work, may be able to take longer leave periods. We believe this increase in both the incidence and duration of leave-taking will benefit these parents and their children by allowing more time for parent-child bonding and for

arranging stable child care. The BAA-UC experiment will test whether enabling these parents to have this time to be with their newborns and newly-adopted children by providing them with partial wage replacement will promote their long-term attachment to the workforce.

C. The Federal-State UC Program

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

D. Ability to Work and Availability for Work

The Department has the authority and responsibility to interpret the provisions of Federal UC law such as the requirements that individuals must be "able to work and available for work" (known as the A&A requirements) to be eligible for UC. Although no explicit A&A requirements are stated in Federal law, the Department and its

predecessors (the Social Security Board and the Federal Security Agency) interpreted Federal UC law as requiring participating States to have A&A requirements.

In response to practical economic and societal concerns, we have, on several prior occasions, exercised our authority to interpret Federal UC statutes regarding the A&A requirements to address several specific areas: approved training, illness, jury duty and temporary layoffs.

(1) Approved Training

Prior to incorporating the training provision into the Federal laws, we encouraged States to treat individuals in training approved by the State agency as meeting the A&A requirements since such training represents the most effective step available to the individual to return to work. We cautioned that State agencies should only approve short-term training that would make individuals job ready. In 1970, Congress, recognizing the importance of training in remedying unemployment, made this training provision mandatory for all States. (Section 3304 (a)(8), FUTA.)

(2) Illness

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

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

(3) Jury Duty

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

(4) Temporary Layoffs

In a temporary layoff, the employer is unable to provide work for a short period of time, but both the employer and the employee have the expectation that the employee will return to work on a specific date. When the employer recalls the employee, the employee must accept or be denied UC. In these cases, the availability requirement is essentially

limited to the employer who laid off the employee. This recognizes that such employees are frequently career employees who would likely quit a new job to return to their former employer when the layoff ends; therefore, other employers would not likely hire such employees.

E. The BAA-UC Experiment

Under its authority to interpret Federal UC law and consistent with its broad oversight responsibility, we interpret the Federal A&A requirements to include this voluntary experiment for examining the use of the UC program to provide partial wage replacement to employees who take approved leave or who otherwise leave employment to be with their newborns or newly-adopted children. This experiment will allow parents of newborns and newly-adopted children to strengthen their availability for work by providing them with the time and financial support to address several vital needs that accompany the introduction of a new child into the family. The experiment will test whether this opportunity for parents to provide the initial care that the child will need, to form a strong emotional bond with the child, and to establish a secure system of child care, will promote the parents' long-term attachment to the workforce.

II. COMMENT OVERVIEW

A. Pre-NPRM Publication Correspondence

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

The bulk of the pre-NPRM publication correspondence addressed compensation to individuals on leave under the Family and Medical Leave Act (FMLA) without regard to the differences between the FMLA and the Birth and Adoption UC (BAA-UC)

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

B. Post-NPRM Publication Comments

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

We also received comments that were beyond the realm of both the BAA-UC regulation and the UC program (e.g., prison reform, income tax reform, Federally-mandated vacations, availability of compensatory time in lieu of overtime pay under the Fair Labor Standards Act, eligibility of BAA-UC recipients for employer-paid benefits). Because these comments exceed the parameters of the UC program and this regulation, they are not addressed herein.

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

III. THE ISSUES

A. General Overview

Generally, proponents of BAA-UC commented that BAA-UC is a logical extension of the UC program that would help new parents balance work and family responsibilities, would keep people off welfare, and could be easily and inexpensively administered. Many proponents referred to studies that discussed the positive effects on the workforce attachment of individuals who receive paid parental leave. Conversely, those opposing the rule urged that we withdraw the rule because the costs would be too great, child care and rearing are the personal responsibility of parents and beyond the scope of government, and the BAA-UC initiative runs counter to the intent of both the UC program and the FMLA. Some respondents consider the idea of partial wage replacement for new parents who are not working commendable, but they think that the UC program is the incorrect vehicle for such a benefit.

B. Misconceptions About The Rule

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

(1) Relationship Between BAA-UC and the FMLA

Many respondents referred to BAA-UC as “paid FMLA” leave or “paid family leave.” It was also apparent from the many comments expressing concerns about the potential for employee abuse, personal illness, and time away from work to care for family members, as well as the administrative burdens on employers in regard to the FMLA, that respondents viewed BAA-UC as tied to FMLA leave. The misconception that BAA-UC is for leave taken under the FMLA is understandable, as an impetus for BAA-UC was the finding in the 1996 study conducted by the Commission on Family and

Medical Leave that new parents were not taking available unpaid leave because they could not afford it. Although there may be many cases where parents of newborns and newly-adopted children will be simultaneously eligible for BAA-UC and leave under the FMLA, the two are legally unrelated to each other. For example, the FMLA applies to employers with 50 or more employees and guarantees job retention for up to 12 weeks for employees on leave of absence for a variety of circumstances, including personal illness, family illness, and maternity leave. The BAA-UC initiative, on the other hand, is voluntary on the part of the States, may not be made contingent on employer size, is limited to parents of newborns and newly-adopted children, does not guarantee leave, and has no job retention component.

(2) BAA-UC Is Not a “New” Program

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

BAA-UC is not a new program. Rather, it creates a new basis for eligibility under the “regular” UC program. BAA-UC is an experimental opportunity that is based on an expanded interpretation of the Federal requirements that UC recipients be able to work and available for work. As discussed, interpretation of Federal UC requirements is our

responsibility and within our authority.

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

C. The Comments

(1) Legal Authority For BAA-UC

(a) Presidential directive

We received comments arguing that Congress should act on this proposal through legislation and that the President's directive to the Department to use the UC program to pay benefits in this manner is unconstitutional and violates the Administrative Procedure Act (APA). As the agency overseeing the Federal-State UC program, the Department has the authority to interpret the Federal UC laws, and we are exercising this authority through notice-and-comment rulemaking. The President's directive in no way limits the Secretary's discretion to consider comments in developing a final BAA-UC rule. Nor does this rulemaking usurp Congress's legislative authority; this rule represents the Department's interpretation of existing Federal UC law requirements.

(b) Federal authority

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

the BAA-UC proposal is inconsistent with the Federal A&A requirements, as they have been interpreted in the past, as part of the Federal-State UC program.

The Department and its predecessors (the Social Security Board and the Federal Security Agency) have interpreted and enforced Federal A&A requirements since the inception of the Federal-State UC program. Several respondents noted that the A&A requirements are not clearly stated in the Federal UC statutes. Although no explicit A&A requirements are stated in Federal law, the Department and its predecessors interpreted four provisions of Federal UC law, contained in the Social Security Act (SSA) and Federal Unemployment Tax Act (FUTA), as requiring that UC claimants be able to and available for work. Two of these provisions, at section 3304(a)(4), FUTA, and section 303(a)(5), SSA, limit withdrawals, with specific exceptions, from a State's unemployment fund to the payment of "compensation." Section 3306(h), FUTA, defines "compensation" as "cash benefits payable to individuals with respect to their unemployment." The A&A requirements provide a test of an individual's "unemployment." The other two provisions, found in section 3304(a)(1), FUTA, and section 303(a)(2), SSA, require that compensation "be paid through public employment offices." The requirement that UC be paid through the public employment system (the purpose of which is to find people jobs) ties the payment of UC to an individual's ability to work and availability for work. These A&A requirements serve, in effect, to "cap" UC eligibility.

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

notice-and-comment rulemaking.

In addition to interpreting Federal UC laws to include A&A requirements, we have previously interpreted the A&A requirements in some specific areas: approved training, temporary layoffs, illness, and jury duty. We received some comments suggesting that existing interpretations of the A&A requirements, such as those regarding approved training and temporary layoffs, are not comparable to the payment of BAA-UC because they are directed toward re-employment. However, the goal of the BAA-UC experiment is to test the proposition that providing UC to new parents can enhance and strengthen their attachment to the workforce through the provision of benefits during a time when they are faced with the added responsibilities of a newborn or newly-adopted child so that they will remain in the workforce.

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

Each of our four prior interpretations of the Federal A&A requirements recognize situations in which the classic definitions of A&A should not apply for reasons of practicality or economic reality. The illness interpretation recognizes that it is

unreasonable to penalize an individual who has already established that s/he is available for work simply because s/he becomes ill for a short time. The jury duty interpretation recognizes that it is unreasonable to hold an individual unavailable for work when the State has compelled his or her attendance in court for jury service. Both of these interpretations derive from a flexible application of the A&A requirements because we want a practicable, sound, workable system. The purpose of UC is to provide partial wage replacement during temporary spells of unemployment. Terminating or denying UC to someone for serving on a jury or because the individual has a short illness undermines this purpose by leaving the individual without financial support for no good reason. It would deprive the individual of UC support without regard to the realities of working life, that is, that no one can be constantly available for work. The approved training interpretation recognizes the economic reality that, in some cases, making oneself unavailable for immediate work opportunities produces a greater benefit to an individual's ability to obtain good work and strengthens his or her attachment to the workforce. The temporary layoff interpretation recognizes the economic reality that when an individual already has a job to which s/he will return, it does not make sense to compel him or her to be able and available for other work. All of these interpretations recognize the reality that attachment to the workforce--the ultimate aim of the A&A requirements--can be demonstrated in other ways than by a continuous availability for any job. While none of these interpretations precisely parallels the payment of BAA-UC, they do operate on the same premises: that situations exist in which it is important to allow a flexible demonstration of availability and in which attachment to the workforce can be demonstrated, and indeed strengthened, without requiring a current demonstration of availability.

Thus, in response to practical economic and societal concerns, we have revised our interpretation of the A&A requirements for the limited purposes of the BAA-UC

experiment to include parents of newborns and newly-adopted children. States may wish to experiment by providing UC to these individuals to measure whether such payments will increase these individuals' attachment to the workforce.

We acknowledge that this is a reversal of our position taken in 1997, denying the State of Vermont's proposal to use UC in this manner to pay individuals on family and medical leave. The subsequent interest shown by several States, by various members of Congress, and by private organizations in using the UC program in this manner led us to analyze and re-evaluate our policy on this subject. While the interpretation that supports this rule is a change from the interpretation we expressed in our 1997 letter to Vermont, we believe that the change is supported by studies showing the benefits of providing cash benefits to those seeking to take parental leave. As demonstrated above, our new interpretation is part of an evolving interpretation of the Federal A&A requirements that recognizes practical and economic realities.

Several studies potentially relevant to BAA-UC were mentioned in the comments submitted by BAA-UC proponents. A few of these studies examined United States (U.S.) parental leave practices, while others studied European or other parental leave systems. A few studies examined paid leave, while others studied unpaid leave; at least three studies examined both, to some extent. The studies also examined differing time periods, controlled for different factors, and used differing statistical methodologies. Nonetheless, these studies collectively contained the following potentially relevant findings: (1) family leave coverage increased the likelihood that a woman will return to her employer after childbirth in the U.S., Britain, and Japan (Waldfogel, Jane, et al. "Family Leave Policies and Women's Retention After Childbirth: Evidence from the United States, Britain, and Japan." *J. Popul. Econ.* (1999) 12:523-545); (2) U.S. women with fully-paid leave worked later into their pregnancies than women with partially paid leave or women with no leave (O'Connell, Martin. "Maternity Leave Arrangements:

1961-85.” Work and Family Patterns of American Women. U.S. Bureau of the Census, Current Population Reports, Special Studies Series P-23, No. 165. (March 1990), 17-20); (3) U.S. women with paid leave started back to work sooner than women with unpaid leave once their infants were at least two months old (Joesch, Jutta M. “Paid Leave and Timing of Women’s Employment Before and After Birth.” J. Marriage & Fam. (November 1997). Vol. 59, No. 4, 1008-1022); (4) women, as opposed to men, account for almost all parental leave taken, and rights to paid leave were found to raise the percentage of women employed in nine European countries (Ruhm, Christopher J. “The Economic Consequences of Parental Leave Mandates: Lessons From Europe.” Q. J. Econ. (February 1998). Vol. CX 113, Issue 1, 285-317); (5) extending paid maternal leave programs was shown to raise rates of labor force participation for women in the prime child-bearing years in 17 industrialized countries (Winegarden, C.R. and Bracy, Paula M. “Demographic Consequences of Maternal-Leave Programs in Industrial Countries: Evidence from Fixed-Effects Models.” S. Econ. J. (April 1995). Vol. 61, No. 4, 1020-1035); and (6) U.S. women, who stayed at their existing jobs instead of quitting or changing jobs, were those with the longest maternity leaves and highest levels of “workplace social support” (Glass, Jennifer L. and Riley, Lisa. “Family Responsive Policies and Employee Retention Following Childbirth.” Social Forces (June 1998). 76(4):1401-35.).

As discussed below, while we do not find these studies definitive, they do appear to support the premise of the BAA-UC experiment, that BAA-UC will strengthen workforce attachment.

(2) Funding Issues

(a) Costs

A number of respondents viewed the proposal’s costs as minimal, while others

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

Some respondents raised general concerns regarding costs. Some also disagreed with our BAA-UC cost estimates. While some stated that our estimate was too high and costs would be minimal, others felt the estimate was too low, suggesting figures in excess of \$36 billion per year. Some respondents presented alternative methodologies which did not account for some important factors that would significantly reduce the cost of BAA-UC.

For example, several respondents assumed that all States would provide 12 weeks of BAA-UC and that all leave-takers would take all 12 weeks. UC data collected by the Department as well as independent research suggest duration would be lower than 12 weeks. Our estimate combines data on distribution of leave duration from the study, A Workable Balance: Report to Congress on Family and Medical Leave Policies (April 30, 1996) (hereinafter called the “FMLA study”), with an assumed increase in duration, based on several independent UC duration studies, due to the availability of BAA-UC. This results in an estimated BAA-UC average duration of about 6 weeks (including any waiting week) for unpaid leave-takers.

Another cause for overestimation was the assumption of a 100% take-up rate for both States and individuals. Several respondents assumed all States would provide BAA-

UC, and all parents would receive benefits. As explained below, we do not think all States will adopt BAA-UC. Also, not all new parents are employed or covered by UC, either because they are self-employed or they do not have a sufficient work history to be eligible. Of those who are eligible, some will receive some form of income support from their employers such as paid annual leave. These individuals either would not apply for BAA-UC or would receive BAA-UC for a shorter duration. Even among those who are not paid by their employer, not all leave-takers would apply for BAA-UC. Based on studies on UC take-up rates, about 65% of eligible workers actually applied for UC before phone claims were available. The introduction of phone claims is estimated to increase take-up rates by about 10 percentage points.

Several respondents provided alternative methodologies for estimating the cost of BAA-UC. For example, one respondent suggested starting with the overall employment-population ratio and adjusting it to the participation rates for women ages 16 to 44, assuming that the majority of women taking leave for a child under one year old would be under 44. This methodology ~~is~~ gives a less precise estimate of the relevant employment-population ratio than the data we relied on from the Current Population Survey, published in the Bureau of Labor Statistics publication, "Employment Characteristics of Families in 1998." This publication provides the employment-population ratio for mothers with a child under one year old (54%). This same respondent also pointed out that parents adopting children from foreign countries should be included in the estimate. These parents were excluded from the original estimate; however, based on the number of immigrant visas issued to orphans by the State Department, foreign adoptions represent only 0.4 percent of the number of women with children under one year old. (For the number of immigrant visas issued to orphans, see the State Department website at http://travel.state.gov/orphan_numbers.html.) Although the effect of foreign adoptions is small, we have now included these adoptions

in our cost estimate.

Another respondent cited problems with using data from the FMLA study. Although we did use some of the percentages gathered in this study, the findings were adjusted for the differences between the FMLA and BAA-UC. On one hand, the BAA-UC proposal has a broader scope, in some respects, because those who work for companies with fewer than 50 employees will be able to receive BAA-UC while they would be ineligible for FMLA leave. Therefore, the percentages of men and women taking leave are found by weighting the average percentages of both FMLA-covered and non-covered leave-takers. On the other hand, BAA-UC is more limited than FMLA-covered leave because it covers only those taking leave to care for a newborn or newly-adopted child. The respondent was concerned that the FMLA study did not account for incentives and changes in leave-taking patterns since the FMLA was enacted, thus representing a “premature look at the FMLA.” The FMLA study provided some categorized data showing that, in fact, 98% of women needing leave for newborn care actually took some leave. There is, therefore, only a small margin for an increase in leave-taking by women because of incentives under either the FMLA or BAA-UC. Even so, we increased the percentage of women leave-takers by 1 percentage point to account for these potential incentives and increased the percentage of men by 5 percentage points, from 63% to 68%, for the same reason. According to the study, 91% of all women and men needing leave for birth or adoption took some leave; however, many felt compelled to cut short their leave because they could not afford to be off work.

In the NPRM, we estimated that the BAA-UC costs would range from zero to approximately \$68 million per year. This figure was based on the “expressed interest” of a small number of States as measured by whether BAA-UC legislation was introduced in a State. A respondent suggested that the four States specifically cited would not enact

BAA-UC legislation; other respondents indicated more States would enact BAA-UC legislation.

Since the publication of the NPRM, a significant number of additional States have introduced BAA-UC legislation indicating that potentially more States than were included in our original estimate may enact BAA-UC. We do not know at this time which States will enact BAA-UC legislation; consequently, as described below, we revised the method of selecting States for inclusion in the cost estimate. This revised methodology and minor revisions in various estimating factors have changed the possible annual aggregate BAA-UC cost to an estimated range from zero to approximately \$196 million.

In our revised methodology, we relied on past enactment of UC benefit expansions as an indicator of possible State participation in the BAA-UC experiment. We think this history of benefit expansions is a better indicator than introduced legislation because: (1) additional States will likely introduce legislation in the future, and (2) it is extremely difficult to predict whether a particular State will actually enact legislation. Thus, to determine the number of States that may enact BAA-UC legislation, we grouped the States based on population as large, medium, and small. We then found the average number of States, by population group, that had enacted certain UC benefit expansions. Based on these findings, we estimated that 3 large states, 6 medium states and 4 small states may enact BAA-UC legislation. We then assigned to each State the average cost for its group. We assumed that States would gradually enact BAA-UC legislation over a 5-year period. We assumed that two States would enact BAA-UC legislation in the first year after the rule becomes effective, two more in the second year, and three more in each of the subsequent three years. The resulting year-by-year costs were then converted to their present value and averaged over the five-year period. The

resulting average annual cost, \$196 million, is the upper limit of our cost range. More detail on the cost calculation can be found in the Regulatory Impact Analysis which is part of the rulemaking record and available to the public.

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

Other respondents, however, expressed concern about additional costs, citing lost productivity as a key problem of paying BAA-UC. However, the FMLA study found that most employers found no effect of the FMLA itself on productivity, and if they did report an effect, it was "as likely to be positive as negative on business productivity and growth" (p. xviii). Another study of nearly 300 employers in November 1993 also found that mandated leave policies can improve morale, public relations, and supervisory relationships, as well as decrease the level of absenteeism. (William M. Mercer et al. "Survey Results: Family and Medical Leave Act" (January 1994); see Final Rule for Family and Medical Leave Act, 60 FR 2237 (January 6, 1995).) Another concern was the loss of income taxes as a result of increased leave-taking. However, those receiving BAA-UC benefits would be required to pay taxes on their benefits. Therefore, although some individuals will pay income taxes on reduced income, some individuals who would have taken unpaid leave will pay more taxes than otherwise. Also, many employers use temporary employees to perform the duties of a person taking leave to care for a new baby. Thus, we believe there would be a minimal loss in income taxes collected.

~~Administrative costs were not included in the cost estimate. We assumed that~~

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

(b) Experience rating

Several respondents expressed concerns regarding the effect of BAA-UC on State experience rating systems and employer contribution rates. They argued that contribution rates will go up as a result of replacement employees being laid off; that charging employer accounts for BAA-UC payments conflicts with Section 3303(a)(1), FUTA; that noncharging will shift the costs from one group of employers to another; and that employers who reimburse States for payments of UC (e.g., local governments and non-profit organizations, such as hospitals, school districts, and health care organizations) would have no relief from charges in some States. A respondent also suggested that contributing employers would be subsidizing reimbursing employers.

Concerning the statements that contribution rates will go up as a result of replacement employees being laid off, we believe that, because many employers already respond to leave-taking by using temporary employees or shifting the duties of current employees, the effect on contribution rates is likely to be small.

Regarding the comment that charging employers for BAA-UC would conflict with Section 3303(a)(1), FUTA, we see no cause for concern. Section 3303(a)(1), FUTA provides that “no reduced rate” of unemployment insurance taxes may be assigned except on the basis of an employer’s “experience with respect to unemployment or other factors bearing a direct relation to unemployment risk.” The objections to charging employers for BAA-UC costs are apparently premised on the fact that the employer may exercise

little or no control over an employee's taking of leave. While this may be true, it is well established that employers may be charged for situations where they did not create the unemployment; section 3303(a)(1), FUTA, permits a State to charge an employer so that the employer possibly pays a higher tax rate. For example, we do not require a State to "noncharge" (i.e., spread the costs among all employers) an employer when an employee quits for good cause not attributable to the employer; however, a State may choose to noncharge these costs.

Concerning the statements that noncharging employer accounts for BAA-UC costs would shift costs from one group of employers to other employers, effectively creating a situation where BAA-UC payments attributable to employers whose employees receive BAA-UC are being subsidized by employers whose employees may not receive BAA-UC, we note that this is not an issue specific to BAA-UC. States currently noncharge employers in specific situations, especially when the separation is beyond an employer's control. Just as States currently consider the effects of noncharging, we expect States to consider the effects of noncharging BAA-UC payments on the overall contribution system. Recognizing the arguments on both sides, we think that spreading BAA-UC costs among all employers is the most equitable means of financing this experiment. Consequently, our Model State Legislation provides for noncharging, and we encourage States to include such a provision in their legislation.

As with experience-rated employers, States may noncharge reimbursing employers. Specifically, in situations where the State determines that the UC paid is not attributable to service in the employ of the reimbursing employer, States may choose not to require reimbursement. As the commentary in Appendix B of the NPRM pointed out (64 FR 67979 (December 3, 1999)), reimbursing employers may be noncharged for BAA-UC payments just as the accounts of contributing employers may be noncharged. A respondent suggested that we make noncharging options for reimbursable employers more clear; however, the BAA-UC regulation makes no changes to the experience rating or reimbursement requirements and we see no reason to single out this one facet of the UC program for elaboration. For more information regarding the noncharging of reimbursable employers, interested individuals are referred to UIPL No. 21-80 and UIPL No. 44-93 (58 FR 52790, 52792 (April 12, 1993)).

(c) Other funding methods

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

Federal law governs how Federal unemployment tax revenues may be used. Nothing in Federal law authorizes the Department to use these revenues for purposes such as the BAA-UC experiment. The other suggested Federal funding mechanisms are beyond the Department's jurisdiction. As for the suggested State funding mechanisms, States are (and always have been) free to develop means outside the UC program to

provide income support for new parents who are not working. Also, if a State elects to use a funding source outside the UC program, the State's program would not be subject to the requirements of the BAA-UC regulation.

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

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

(e) Unemployment fund solvency

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

We have never interpreted Federal law to require "solvency." While we will continue to encourage all States to meet and maintain an AHCM of 1.00, we do not think we should tie BAA-UC specifically to fund solvency. A State in a weak solvency position should not conduct a BAA-UC experiment without also creating a means of financing it. Just as States currently assess the costs to their unemployment funds whenever coverage, benefit expansions, or tax changes are considered, we expect States to consider the costs of BAA-UC before enactment. We ~~are willing to~~ will provide technical assistance to States needing assistance in determining their solvency positions and, if requested, will work with States to determine financing options.

(3) Fundamental Program Changes

(a) The FMLA program

As stated above, we received many comments that relate the BAA-UC proposal to the FMLA. The respondents see the payment of BAA-UC as an attempt to require paid leave under the FMLA, which contains no such requirement. They contended that this proposal violates and/or amends the FMLA by converting unpaid leave under the FMLA into paid leave under the Federal-State UC program and runs counter to the notion that

the FMLA would never require paid leave. Other respondents questioned whether BAA-UC requires the employer to hold the job for a BAA-UC claimant.

The FMLA is a distinct and entirely different statute from the SSA and FUTA which established the Federal-State UC program. The FMLA guarantees certain employees unpaid leave for up to 12 weeks for a variety of personal and family-related purposes. While the FMLA in no way mandates paid leave, it does not prohibit employers from providing paid leave to employees exercising their right to leave under the FMLA. Furthermore, the FMLA contains language saying that nothing in it should be construed to prohibit States from offering benefits greater than those contained in the FMLA. Consequently, neither the BAA-UC regulation nor the implementation of BAA-UC in the States would violate the FMLA. This regulation does not impose paid leave or address employment rights. Rather, it permits the States, through the UC program, to pay partial wage replacement to employees who choose to take time off for the very narrow purpose of being with a new child. The provision of BAA-UC is voluntary for States, and this regulation does not amend or change the FMLA. Thus, while nothing in BAA-UC changes the basic understanding that the FMLA does not require paid leave, States are free to enact BAA-UC as part of an effort to provide benefits greater than those contained in the FMLA. Indeed, we are not interpreting the FMLA, but the Federal UC laws.

(b) The UC program

Based on the premise that Federal UC law requires recipients to be involuntarily unemployed and actively seeking work, many respondents view BAA-UC as a fundamental change to the UC program. We received many comments suggesting that the group covered under this experiment constitutes persons not entitled to UC because they presumably would be voluntarily leaving their employment to be with their

newborns or newly-adopted children. However, we have never interpreted Federal UC law to require that an individual's separation from employment be "involuntary" as a condition of entitlement to benefits. Indeed, in those situations where a job relocation forces a spouse to quit his/her job to follow the other, some States allow the payment of UC without disqualification.

We also received many comments alleging that the group of employees covered by the proposed regulations are not truly "unemployed" as that term has been understood in common usage. The comments focused on the fact that these new parents would not, for the most part, be laid off by their employers but would be leaving a job the employer would continue to allow them to have. These comments appear to assume that there is a requirement in the UC program that in order to be considered unemployed, the employment relationship must be severed. This is not the case as illustrated by the payment of UC to individuals on recall. Whether an individual is unemployed within the meaning of Federal law depends on whether the individual has experienced an actual reduction in hours worked. (See UIPL 08-98, 63 FR 6774, 6776 (February 10, 1998)). (Most States define "unemployment" as a reduction in hours worked. See also 20 CFR 625.2(w)(1).) Persons receiving BAA-UC would come under this definition since they would have suffered a loss of work. Moreover, an individual need not completely sever his or her connection to his or her employment to qualify for UC as Federal law also permits payments to individuals for partial unemployment.

We also received comments expressing concern that the regulation does not require BAA-UC recipients to demonstrate, prior to the end of the leave period, that they intend to go back to work. There was a similar concern that individuals who otherwise leave employment, but do not intend to return to the workforce, will receive BAA-UC. Still other respondents were concerned that BAA-UC recipients are not required to

actively seek work and that the regulation will eliminate the “refusal of suitable work” disqualification. Respondents also noted that BAA-UC would conflict with existing eligibility requirements under State UC laws.

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

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

(4) Scope

Several respondents stated that BAA-UC should be extended to all adults who fulfill parental responsibilities, such as foster parents, step-parents, domestic partners, or any individual who stands in loco parentis to a child. Still others think that experimental

BAA-UC should be expanded to other types of medical and family leave, such as leave

during pregnancy, for personal illness, and to care for ill family members. There was also a suggestion that we clarify that States may provide “supplemental” BAA-UC.

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

As for “supplemental BAA-UC,” States currently have the authority to provide supplemental (commonly known as additional) UC. For example, some States provide supplemental UC to “displaced” workers or to workers in State-approved training. BAA-UC is no different. While the regulation does not prohibit supplemental BAA-UC, we had not contemplated its provision when developing the experiment.

(5) Eligibility

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

(a) Breadth of eligibility

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

- no limitations on the number of times parents may claim BAA-UC, allowing parents to take extensive periods of leave multiple times (for example, BAA-UC eligibility is not restricted to a specific number of births or adoptions);
- no limitation on the number of parents per child who may make a claim for BAA-UC, thereby allowing both the biological and adoptive parents of a child to claim benefits;
- no requirement that the child actually live with the parents or be cared for by the parents; and
- silence in the regulations regarding continuing eligibility in cases where an adoptive parent ceases to be the parent or in cases where the child dies.

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

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

be inconsistent with Federal law.

(b) Length of eligibility period

One respondent felt that the availability of BAA-UC any time within the year following the birth or placement for adoption of a child was longer than needed for parent/child bonding. Several respondents advocated a period of at least one year because they believed it would encourage breast-feeding for the health and well-being of the child, while shorter periods may encourage premature weaning. Another respondent stated that, as long as benefits began within the first year, States should be allowed to extend the eligibility period beyond the first year. Some respondents advocated that BAA-UC be provided intermittently throughout the eligibility period, in some cases in time frames as short as one-half hour.

Research suggests that parental leave is beneficial for early childhood development. In terms of the eligibility period, we selected one year as the eligibility period because it correlates the needs related to introducing a new child into a family with the current benefit year under the UC program: States could establish a shorter eligibility period. Our Model State Legislation provides for a 12-week benefit period within a one-year eligibility period, and we encourage States to include such a provision in their legislation.

The BAA-UC regulation does not require that BAA-UC be paid only for consecutive weeks; therefore, as part of the regular UC program, BAA-UC may be provided intermittently throughout the benefit year. Partial BAA-UC may also be claimed for weeks in which an individual is partially unemployed; however, BAA-UC may be reduced under State law by wages earned during a week of partial unemployment. Typically, wages earned during one-half week or more exceed the available UC; therefore, very short time frames of unemployment (such as one hour per day) would not

be compensable.

(c) Employer-provided benefits

Some respondents expressed the opinions that employers should be able to require employees to take employer-paid leave before being eligible for BAA-UC, and that employers who provide paid leave or disability coverage should be excepted from

BAA-UC coverage. Other respondents suggested that employers who currently provide paid leave will reduce or eliminate those benefits to avoid paying twice.

BAA-UC is part of the UC program and applies to all employers covered by State UC law. Therefore, just as there is no basis for excepting employers who provide private unemployment insurance to their employees, there is no basis for excepting employers from BAA-UC based on employer-provided benefits. As stated earlier, the introduction of factors unrelated to the fact or cause of an individual's unemployment would be inconsistent with Federal law. Consequently, even though employers may require employees to take ~~employer-provided~~ employer-paid leave before taking unpaid leave under the FMLA, States may not make BAA-UC eligibility contingent upon the exhaustion of ~~employer-provided~~ employer-paid leave. States may, however, reduce BAA-UC by the amounts of the employer-paid benefits and wages. Generally, States and employers could have lower costs if employers continue to provide benefits. Our Model State Legislation provides for employer-provided wages and benefits to be deducted from BAA-UC, and we encourage States to include such a provision in their legislation.

(d) BAA-UC exhaustions

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

BAA-UC is a part of the States' regular UC programs. States are, therefore, free to determine BAA-UC's relationship to UC where the conventional A&A requirements apply. Thus, a State could pay an individual conventional UC after BAA-UC is exhausted if the individual meets all conventional UC eligibility requirements. Whether BAA-UC counts toward the maximum number of weeks of conventional UC in this case

is also a State decision. Our Model State Legislation provides for counting BAA-UC weeks toward the maximum UC entitlement, and we encourage States to include such a provision in their legislation.

Concerning overpayments, the questions and answers that accompanied the NPRM indicated that a State may declare an overpayment of BAA-UC when the individual did not return to work after receiving BAA-UC. We note, however, that there may be cases where the individual is unable to return to work. For example, the employer may have had a general layoff. In cases such as this, a more equitable approach is to determine whether the individual meets all other State UC requirements, including actively seeking work. For these and operational reasons, our Model State Legislation does not provide for recoupment of overpayments.

(6) Experimental Nature of BAA-UC

(a) Experiment versus non-experiment

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

Other respondents questioned whether BAA-UC really is an experiment. Among the comments were claims that it would be difficult and politically unpopular to stop once

started, and that the purpose of the experiment (that is to test whether the provision of BAA-UC would promote a continued connection to the workforce) “is an unmeasurable, wholly subjective concept.” Other respondents suggested that BAA-UC was not truly experimental because the proposed regulation did not include specific measures and lacked definitive beginning and ending periods. Still other respondents saw BAA-UC as the first phase of an inevitable, continued expansion of the UC program.

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

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

As stated in the NPRM, this experiment recognizes the impact of women in the workforce and responds to the societal and economic changes resulting from the large number of families where both parents work. We intend to gather information and

evaluate the impact of the provision of partial wage replacement on employees, employers, and States' unemployment funds. We have chosen to adopt an experimental approach because the introduction of BAA-UC represents a significant shift in our view of the Federal UC requirements. We think the impact on not only employees, but also on employers and State unemployment funds should be studied. Consequently, rather than developing a pilot that might be less flexible, we chose an experimental approach ~~for~~

~~compiling the necessary information to evaluate the effects of paying BAA-UC that is~~
designed to promote State innovation.

Several respondents suggested that the U.S. lags behind other developed countries in providing paid family and medical leave and pointed to studies that discussed the positive effects of paid leave in other countries. However, the benefits programs of other countries are dissimilar to the UC program in the U.S. Other respondents pointed to existing studies in this country that indicated positive effects on workforce attachment from paid parental leave. While these studies support our initiative, we believe it advisable to independently study the effects of partial wage replacement for parents of newborns and newly-adopted children on the States' UC programs, since no study was specific to the UC program. Therefore, we see experimentation with BAA-UC as a logical step.

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

Some respondents criticized the regulations for not placing any formal sunset or termination provisions or time frame for the study. Because of the flexible nature of the BAA-UC regulations and the potentially different enactment dates, we have set a target that would trigger a comprehensive evaluation of BAA-UC when at least four States have implemented legislation and operated BAA-UC for a minimum of three years, as noted in

section I. B. (4) of the preamble to the NPRM (64 FR 67974).

We believe an evaluation based on this target will provide reliable information that takes into account the variations among the States' BAA-UC experiments and allows us to ascertain the impact of BAA-UC on States' unemployment funds, employees, and employers' contribution rates, in addition to determining the workforce connections of BAA-UC recipients. While all these factors are important, we note that many respondents were interested in the impact of BAA-UC on State unemployment funds. Therefore, even though we are not establishing a solvency requirement, we will thoroughly evaluate how States determined their solvency positions and the impact of BAA-UC on State unemployment funds.

BAA-UC legislation introduced in States prior to the issuance of the NPRM varied substantially—an early indication that BAA-UC experiments among the States could differ greatly. In addition, regardless of whether States enact vastly different BAA-UC legislation or enact similar legislation, demographics, take-up rates, benefit levels, and benefit charging methodologies could vary substantially among the States. A comprehensive evaluation, therefore, will be conducted when at least four States have operated BAA-UC for at least three years. We are committed to completing a comprehensive evaluation, and this evaluation will serve to determine whether to make BAA-UC permanent, to expand it, or to end it entirely. If four States do not enact BAA-UC legislation, we will then consider how best to comprehensively evaluate the experiment given the limited data.

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

Employees. Numerous respondents commented on the potential negative impact of BAA-UC on employees. Some speculated that, because of costs associated with BAA-

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

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

Employers. As with employees, we received many comments about the impact of BAA-UC on employers. Many speculated that employer costs and administrative burdens would be excessive, that litigation would increase, and that worker shortages would be exacerbated because employees would be more able to take off work. Some employers worried that their global competitiveness would suffer, and some small employers were concerned that they would be subsidizing leave taken by employees of FMLA-covered businesses. Many employers urged a tax cut for businesses instead of expanding UC. A few respondents suggested that, as increased employer State UC taxes

are passed on, employees and consumers will suffer. Others suggested that employer costs would be minimal and employers would benefit from a more stable workforce resulting in lower employee turnover and greater productivity. Respondents also referred to studies that indicate that women who have paid maternity benefits take less time from work and are less likely to quit their jobs than women with access to unpaid leave or women who have no leave available. Others suggested different ways of reporting FMLA leave on UC forms as an alternative to providing BAA-UC.

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

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

As stated in the NPRM, we believe that providing BAA-UC will have a positive impact on families because it will allow more parents to take leave to be with their newborns or newly-adopted children. Although studies suggest a positive impact on the

workforce from compensated maternity and family leave, this is the first test of the effects on employers and employees of using the UC program to provide partial wage replacement for parents following the birth or adoption of a child. Because our cost estimates for the BAA-UC experiment are relatively low as a percentage of overall UC costs, we do not believe that BAA-UC will move jobs out of the country, impair U.S. global competitiveness, or otherwise adversely affect employers. For that same reason, we do not believe that litigation or employer administrative burdens would significantly increase.

Regarding size-of-employer concerns, BAA-UC applies to employees of both small and large employers. Small employers may well approve leave without the compulsion of the FMLA. Also, States are free to offer BAA-UC to individuals who otherwise leave their employment as a result of being ineligible for leave under the FMLA. The effect that the receipt of BAA-UC might have on either employer-paid benefits or non-UC Federally-mandated benefits would be determined by those programs and/or applicable statutes. But these effects are among the things we will review when evaluating the BAA-UC experiment. Finally, we have no data to suggest that providing partial wage replacement promotes higher birth rates, discriminates against individuals of childbearing age, or creates worker shortages; and, as we noted earlier, other options to help families, such as tax cuts or credits, are outside our purview.

(7) Voluntary Effort

Some respondents referred to BAA-UC as a mandate by the Administration. There were also some comments maintaining that the experiment is not really voluntary in that all States will be impacted because of interstate and combined-wage claims. (In an interstate claim, the individual has worked in one State, but files a claim in another. In a combined-wage claim, an individual has worked in more than one State and combines the

work into one State for purposes of qualifying for UC or for receiving higher benefit amounts or longer duration. (See 20 CFR Part 616.)) Noting that each State participating in the Interstate Arrangement for Combining Employment and Wages must act as an agent for other participating States, one respondent held that it would be “impossible for one [S]tate to have an experimental program without impacting other [S]tates.”

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

(8) Administration

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

We will issue specific reporting and other administrative guidance on these issues and others to SESAs in a directive separate from this rule. States will be required to report specific BAA-UC claims data. When States implement BAA-UC, statistics reported for the regular UC program will include all data related to BAA-UC. To identify only BAA-UC activity, we will use the “Quick Response Report” (the report used when collections involve fewer than 10 States, assuming that fewer than 10 States implement BAA-UC) under the standard reporting requirement authority in section 303(a)(6), SSA. This report provides for the collection of up to 12 items of information. It is anticipated that data collected will include, among other items, initial claims, weeks claimed, weeks compensated, and benefits paid. If 10 or more States enact BAA-UC, reporting requirements will be issued in a separate information collection request in accordance with the Paperwork Reduction Act.

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

information for the regular UC program. Guidance on confidentiality is found in UIPL No. 34-97 (62 FR 40118, 40119 (July 25, 1999)).

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

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

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

(10) Fraud and Abuse

Some respondents expressed concern about the potential for fraud and abuse,

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

The purpose of the regulation is to test whether compensating absences from employment will help parents of newborns or newly-adopted children maintain or improve their connection to the workplace; it is not designed to test whether the parents and children actually bond. We do not presume that any specific parental activity or circumstance is more (or less) appropriate for promoting bonding between parents and children. The regulation, therefore, does not impose upon States the burden of verifying

specific bonding activities. As is the current practice, methods of fraud detection and overpayment collection will be developed as deemed appropriate by the SESAs.

(11) UC Program Reform

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

(12) Comment Period

Under the Administrative Procedure Act (APA), an agency is required only to provide a 30-day comment period and public hearings are not required by the APA for notice-and-comment rulemaking. We received several hundred responses from interested parties requesting that we extend the initial 45-day comment period ending on January 18, 2000, and/or that public hearings be held in venues around the country. Given the simple nature of the experiment and the relatively short length of the proposed rule, we thought that a 45-day comment period was adequate and that hearings were unnecessary. Some of the initial comments noted that the comment period fell during the holiday season, so we decided to extend the comment period 15 days through February 2, 2000, for a total 60-day comment period.

A few respondents requested in their timely submissions that we permit them to submit additional comments after February 2, 2000. However, the sheer volume of comments, as well as the extensive detail of some of the comments received, including the timely comments from the respondents asking to submit additional comments, convinced us that sufficient time was allotted for comments and that additional time was

not necessary.

(13) Rulemaking Requirements

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

Respondents challenging our conclusion that BAA-UC is not subject to the Regulatory Flexibility Act requirements suggested that the experiment will undoubtedly have a significant economic impact on a substantial number of small entities since the experiment will result in a potentially higher payment of UC due to the expansion of coverage to include new parents, thus requiring a regulatory flexibility analysis. However, the BAA-UC regulations impose no regulations upon small entities (American Trucking Association v. EPA, 175 F.3d 1027, 1044 (D.C. Cir. 1999)), rather, we are regulating the States that choose to experiment with BAA-UC. Furthermore, the Unfunded Mandates Reform Act of 1995 (UMRA) is not applicable to this regulation

since this is not a “Federal intergovernmental mandate” as defined in section 421(5) of the Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. 658), as amended by section 101(a)(2) of the UMRA. Indeed, we are not mandating that a State, local or tribal government, or the private sector implement BAA-UC.

(14) Model State Legislation

We received some comments about the Model State Legislation that was appended to the proposed rule in the NPRM. Some comments indicated that respondents interpreted the Model State Legislation to be required legislative language. Others suggested that the Model State Legislation be restructured with affirmative language to guarantee payment of BAA-UC and suggested that the Model State Legislation be changed to read “compensation shall be provided” rather than stating that compensation “shall not be denied” as published in the NPRM.

The Model State Legislation is provided only as a guide to aid the States that enact BAA-UC in developing State legislation: States are not required to use it. The Model State Legislation is written in the style that States typically use in their statutes. We think there is no substantive difference between the suggested language style and the style used in the Model State Legislation; therefore, no stylistic changes were made. States that elect to follow the Model State Legislation must adapt it to their State UC laws.

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

There is little difference between the proposed rule and the Final Rule. An explanation is provided where differences occur. Technical changes are not discussed.

Subpart A--General Provisions

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

Definition of “Approved leave”

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

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

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

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

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

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

Definition of “Newly-adopted child”

In an effort to afford States maximum flexibility and in acknowledgment that adopted children may be more than one year old, the definition of “newly-adopted child” in the NPRM included no limitation on the age of an adopted child. We received comments stating that, without an age limitation on adopted children for purposes of BAA-UC, there was potential for adults who adopted adults to be eligible for BAA-UC.

The BAA-UC experiment is clearly designed for the parents of young children and will test whether providing those parents with BAA-UC during the first year of a child’s life or placement for adoption will help maintain or even promote their connection to the workforce by allowing them time to bond with their children and develop stable child care systems while adjusting to the accompanying changes in lifestyle before returning to work. To help assure that BAA-UC is used for this purpose, we are establishing an age limitation of 18 years old or less within the definition of “newly-adopted children.” This age limitation is within the commonly accepted age range of a “child” and also acknowledges that adopted children may be more than one year old. The definition of “newly-adopted children” is amended to read “means children, age 18 years old or less, who have been placed within the previous 12 calendar months with an adoptive parent(s).”

Definition of “Placement”

Respondents also raised concerns about the definition of “placement.” “Placement” was defined in the NPRM as “the time a parent becomes legally responsible for a child pending adoption.” Comments indicated a concern that individuals in the process of adopting a child and who have actually received the child would be precluded from receipt of BAA-UC because adoption agencies may retain legal responsibility for a child until the adoption is complete. Therefore, to assure that these parents are not

excluded on a technicality, the word “legally” has been deleted from the definition. Generally, foster parents are excluded from BAA-UC; however, this change may, in some situations, permit some foster parents in the adoption process to be eligible for BAA-UC. “Placement” is defined in this rule as: “the time a parent becomes responsible for a child pending adoption.” A minor change was made to the definition of “parents” to make it more compatible with the definition of “placement.”

Subpart B--Federal UC Requirements

No changes were made to this section; therefore, Subpart B of the Final Rule is the same as Subpart B in the NPRM.

Subpart C--BAA-UC Eligibility

A review of Subpart C resulted in two changes. First, the subpart title was changed to “Subpart C—Coverage and Eligibility” to better reflect the subpart’s content. Second, the review revealed that § 604.22 was unnecessary because it did not regulate State actions. Consequently, § 604.22 is not included in the Final Rule.

Executive Order 12866

This rule is a “significant regulatory action” within the meaning of Executive Order 12866 because it meets the criteria of Section 3(f)(4) of that Order in that it raises novel or legal policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. It is also “economically significant” within the meaning of Section 3(f)(1) of that Executive Order because it may have an annual effect on the economy of \$100 million or more. Specifically, the estimated costs range from zero to \$196 million. Accordingly, this rule was submitted to, and reviewed by, the Office of Management and Budget. As directed by Section 6(a)(3)(C) of Executive Order 12866, we have prepared ~~an assessment of a~~ Regulatory Impact Analysis that assesses the

costs, benefits, and alternatives associated with this regulation. The ~~assessment~~ Regulatory Impact Analysis is available to the public as part of the rulemaking record.

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

Paperwork Reduction Act

We have determined that this rule contains no information collection requirements. If the evaluation of this experiment requires information collections covered under the Paperwork Reduction Act, we will seek OMB approval at that time.

Executive Order 13132

This regulation has been reviewed in accordance with Executive Order 13132 regarding federalism. The order requires that agencies, to the extent possible, refrain from limiting State policy options, consult with States prior to taking any actions which would restrict States' policy options, and take such action only when there is clear constitutional authority and the presence of a problem of national scope. We do not believe that Executive Order 13132 applies. In the interest of consultation, however, we invited major intergovernmental associations to a meeting at which we briefed the associations on the proposed rule.

Executive Order 12988

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

Unfunded Mandates Reform Act of 1995

This rule has been reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 et seq.). We have determined that this rule does not include any Federal mandate. States have full discretion to decide whether or not to enact BAA-UC.

Regulatory Flexibility Act

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

Effect on Family Life

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

Congressional Review Act

Consistent with the Congressional Review Act, 5 U.S.C. 801, et seq., we will submit to Congress and the Comptroller General of the United States, a report regarding the issuance of this Final Rule prior to the effective date set forth at the outset of this document.

OMB has determined that this rule is a “major rule” as defined in the Congressional Review Act. The rule is likely to result in an annual effect on the economy of \$100 million or more. The cost estimate is discussed in Section III.C.(2)(a) of the “Supplementary Information,” above. The effective date of this rule has been adjusted in accordance with the requirements of the Congressional Review Act.

List of Subjects in 20 CFR Part 604

Employment and Training Administration, Labor, and Unemployment Compensation.

Catalogue of Federal Domestic Assistance Number

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

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

ALEXIS M. HERMAN

Secretary of Labor

Words of Issuance

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

Part 604—REGULATIONS FOR BIRTH AND ADOPTION UNEMPLOYMENT
COMPENSATION

Subpart A—General Provisions

Sec.

§604.1 What is the purpose of this regulation?

§604.2 What is the scope of this regulation?

§604.3 What definitions apply to this regulation?

Subpart B—Federal Unemployment Compensation Program Requirements

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

Subpart C—Coverage and Eligibility

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

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

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

Subpart A—General Provisions

§604.1 What is the purpose of this regulation?

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

§604.2 What is the scope of the regulation?

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

§604.3 What definitions apply to the regulation?

The following definitions apply to this regulation:

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

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

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

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

(e) Newly-adopted children means children, age 18 years old or less, who have been placed within the previous 12 calendar months with an adoptive parent(s).

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

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

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

Subpart B—Federal Unemployment Compensation Program Requirements

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

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

Subpart C—Coverage and Eligibility

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

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

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

Parents may be eligible for Birth and Adoption unemployment compensation during the one-year period commencing with the week in which their child is born or placed with them for adoption. Weeks preceding the week of the birth or placement and

weeks following the end of the one-year period are not compensable.

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

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

DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO.

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : GRACE A. KILBANE
Administrator Office of Workforce Security

SUBJECT : Model State Legislation and Commentary to aid States implementing Birth and Adoption
Unemployment Compensation Unemployment Compensation (BAA-UC)

1. Purpose. To provide Model State Legislation and Commentary for States implementing BAA-UC. The Model State Legislation is offered as a guide for States that need to amend their current UC laws, it is not required. The Commentary provides information on the Model State Legislation and will aid States in making policy decisions.

2. References. 20 Code of Federal Regulations (CFR) parts 604, 615, and 625; sections 303(a)(1) and (8), Social Security Act (SSA); Unemployment Insurance Program Letters (UIPLs) No. 21-80 and No. 44-93; Family and Medical Leave Act, Pub. Law 103-3; the Manual of Employment Security Legislation (rev. 1950); UIPL No.787 transmitting the Secretary of Labor's Decision of September 25, 1964, In the Matter of the Hearing to the South Dakota Department of Employment Security Pursuant to Section 3304(a) of the Internal Revenue Code of 1954; and Jenkins v. Bowling, 691 F.2d 1225 (7th Cir. 1982).

3. Background. The Department of Labor (Department) created, by regulation, an opportunity for State agencies that administer the UC program to pay, as part of a voluntary, experimental effort, UC to parents who take time off from employment after the birth or placement for adoption of a child. (20 CFR Part 604.) This regulation allows States the opportunity to develop innovative ways of using UC to support parents taking approved leave or who otherwise leave their employment to be with their newborns or newly-adopted children and will permit us to evaluate the effectiveness of using the UC program for these or related purposes.

4. Model State Legislation. The attached Model State Legislation is offered as an optional aid for States that choose to enact BAA-UC. The Model State Legislation assumes that States will provide BAA-UC based on the same earnings and employment criteria that apply to other individuals. It also assumes that States will provide BAA-UC for no more than 12 weeks, that BAA-UC payments will count toward the maximum number of weeks of UC, and that employers will not be charged for BAA-UC. Further, the Model State Legislation provides for the deduction of other income from BAA-UC. The Model State Legislation conforms to the regulations at 20 CFR Part 604; however, States have wide latitude in creating their BAA-UC provisions within the parameters of those regulations.

5. Commentary. A Commentary in question-and-answer format is also attached (Attachment II) as an aid for States. The Commentary discusses policy approaches taken in the Model State Legislation and also discusses other matters.

6. Action. We suggest that States consider developing a BAA-UC experiment to provide partial wage replacement to parents on approved leave or who otherwise leave employment to be with their newborns and newly-adopted children.

We expect that States will take into consideration the impact of such an effort on their unemployment funds prior to enactment. Appropriate staff should be provided with this UIPL.

7. Inquiries. Please direct inquiries to the appropriate Regional Office.

Attachments

Attachment I - Model State Legislation

Attachment II - Commentary

Model State Legislation

Section _____. Birth and Adoption Unemployment Compensation.

(a) A parent on a leave of absence from his/her employer or who left employment to be with his/her child during the first year of life, or during the first year following placement of a child age 18 or less with the individual for adoption, shall not be denied compensation under Section _____ for voluntarily leaving employment, Section _____ relating to availability for work, Section _____ relating to inability to work, or Section _____ for failure to actively seek work.

(b) For purposes of this section, the following definitions apply:

(1) Parent means a mother or father (biological, legal, or who has custody of a child pending her or his adoption of that child); and

(2) Placement means the time a parent becomes responsible for a child pending adoption in accordance with [cite State adoption law].

(c) Section _____, concerning the reduction of the amount of compensation due to receipt of disqualifying income, shall apply to payments under this section. In addition, the

following payments shall cause a reduction in the compensation amount:

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

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

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

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

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

(g) Two years following the effective date of this legislation, the commissioner shall issue a report to the governor and the legislature evaluating the effectiveness of Birth and Adoption unemployment compensation.

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

Commentary

General

1. Must States implement Birth and Adoption unemployment compensation (BAA-UC)?

No. This effort is voluntary for the States. However, implementation of BAA-UC will require some legislation on the part of every State seeking to adopt it. The Model State Legislation is provided for the convenience of States that wish to implement BAA-UC.

2. Does the BAA-UC regulation enable a State to pay UC for other types of family or medical leave?

No. This regulation enables States to pay UC, on an experimental basis, to parents on approved leave or who otherwise leave employment to be with their newborns or newly-adopted children. The experiment will test whether providing UC to individuals within this group will strengthen their workforce attachment and will provide data on the impact of BAA-UC on employees, employers, and States’

unemployment funds. Permitting payment of UC for other types of family leave or care would be inconsistent with this experimental effort.

3. Must all employer-paid leave be exhausted before BAA-UC is available?

No. BAA-UC is designed to provide partial wage replacement to parents on approved leave or who otherwise leave employment to be with their newborns or newly-adopted children. The Model State Legislation assumes that any wages paid for the period of employer-provided leave will be deducted. However, States need not deduct these wages from BAA-UC.

4. Does the BAA-UC regulation impose any solvency requirements upon the States before they enact BAA-UC?

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

Monetary Qualifications and Benefits

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

States may establish their own requirements. The Model State Legislation assumes that States will use the same earnings and employment criteria that apply to all other individuals.

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

States may establish their own weekly benefit amounts. The Model State Legislation assumes that individuals eligible for BAA-UC will receive the same weekly benefit amount as other individuals eligible for UC.

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

States will determine whether BAA-UC will be reduced by other income. Under the Model State Legislation, the amount of BAA-UC will be reduced in the same manner as any other payment of UC as provided under State law. The Model State Legislation also provides for the deduction of any payment from the employer as a result of the birth or placement for adoption, and for the deduction of any disability insurance payment received as a result of the birth or placement for adoption in proportion to the employer's contribution to the disability insurance plan. This provision, which is limited to payments triggered by the same event which triggers BAA-UC, reflects the view that the unemployment fund should not be held responsible when wage replacement is available from other sources, particularly when both payments are financed by the employer. States should examine their laws to determine if all types of appropriate income are, or should be, deductible. For example, some leave payments which are not normally deductible under State law may cover costs of birth and adoption leave.

8. How does the BAA-UC entitlement relate to UC payments where conventional able and available requirements apply?

States are free to determine this. The Model Legislation assumes that BAA-UC counts toward the maximum number of weeks of conventional UC.

Period of Eligibility

9. When may BAA-UC benefits begin?

Under 20 CFR 604.21, parents may receive BAA-UC only during the one-year period commencing with the

week in which the child is born or placed for adoption. For example, an individual taking leave in the 51st

week following birth or

placement for adoption, would be eligible for BAA-UC only for weeks 51 and 52. Periods preceding the week

of birth or placement for adoption are not compensable. States are free to reduce the one-year period.

10. How many weeks of BAA-UC may individuals receive?

States are free to determine this. The Model State Legislation provides a maximum duration of 12 weeks per

individual with respect to any one birth or adoption. States may also relate the duration of leave to the

individual's weekly amount of UC. For example, for each birth or adoption, an individual may receive an

amount equal to 12 times the individual's weekly UC amount.

To prevent confusion between the FMLA and BAA-UC, States should inform potential BAA-UC beneficiaries

of the dissimilarities between BAA-UC and leave under the FMLA (for example, BAA-UC does not guarantee

job retention).

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

Under the Model State Legislation, BAA-UC would be payable for this week, assuming all applicable

eligibility conditions, such as the deductible income provisions, are met. States may provide the full weekly

compensation amount for this week or prorate the weekly amount to reflect only periods following birth or

adoption. If the amount is prorated, the State may pay the remaining balance for the last partial week if the

individual is still on leave.

12. Must the individual serve a waiting period?

No. Nothing in Federal law requires States to have a waiting week for conventional UC or BAA-UC.

However, not having a waiting week would eliminate the 50 percent Federal share for the first week of *all* Extended Benefits claims. Under 20 CFR 615.14(c)(3), a State is not entitled to a Federal share for the first week of Extended Benefits if the State's law provides "at any time or under any circumstances" for the payment of UC for the first week of unemployment.

13. When is a child considered "placed" for adoption?

Under 20 CFR 604.3(g), placement occurs at the time a parent becomes responsible for a child pending adoption. State UC agencies should consult the adoption laws of their States to determine precisely when placement occurs.

Other Eligibility Issues

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

The answer to both questions is “yes.” States implementing BAA-UC must allow both parents, if otherwise eligible, to receive BAA-UC concurrently or consecutively. A State may not prohibit payment of BAA-UC simply because the other parent is taking leave for the same purpose. A State law which does so is inconsistent with Federal law because the eligibility of one parent will be determined based on whether the other parent is receiving UC. Specifically, in a 1964 conformity decision involving the State of South Dakota, the Secretary of Labor held that Federal law prohibits the introduction of any eligibility test unrelated to the fact or cause of the individual’s unemployment. (See Secretary of Labor’s Decision of September 25, 1964, In the Matter of the Hearing to the South Dakota Department of Employment Security Pursuant to Section 3304(a) of the Internal Revenue Code of 1954, transmitted by Unemployment Insurance Program Letter No. 787, October 2, 1964.)

The recipient status of the other parent is unrelated to the fact or cause of an individual’s unemployment. Thus, both parents may receive BAA-UC, whether concurrently or consecutively. Similarly, States may not limit use of BAA-UC to the “primary” parent.

15. Must BAA-UC apply to individuals employed by all employers subject to State UI law?

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

16. May States provide BAA-UC to individuals who otherwise leave employment (not on approved leave) to be with their newborns or newly-adopted children?

Yes. While States are free to determine their own requirements, there are compelling reasons for providing BAA-UC to individuals who otherwise leave employment. Although many employers may grant leave, others may not. The Department believes that all parents should be treated identically for UC purposes when they

take time away from employment to be with their newborn or newly-adopted child. As such, their eligibility for BAA-UC should not be based on whether an employer ~~is required to~~ grants the leave, but on the parent's reason for wanting to take the leave.

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

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

18. ~~May eligibility be conditioned on whether~~ Must States declare an overpayment of benefits if the individual ~~returns to work?~~

~~Yes does not return to work?~~

No, although a State may choose to declare an overpayment of benefits if the individual fails to return to work. However, States may not delay payment until after the individual returns to work. Section 303(a)(1), SSA, requires the full payment of benefits when due, precluding States from delaying payment while awaiting the individual's return to work. See Jenkins v. Bowling, 691 F.2d 1225 (7th Cir. 1982). ~~A State may, however, declare an overpayment of benefits if the individual fails to return to work.~~

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

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

Individuals may only receive Disaster Unemployment Assistance (DUA) when their unemployment is caused by a disaster as provided in 20 CFR Part 625. However, if they meet their State's Birth and Adoption UC provisions, then they will satisfy the availability requirement at §625.4(g), and so may continue to qualify for

DUA. For example, an individual who is unemployed due to a major disaster may later give birth. If this individual satisfies the BAA-UC requirements in the State's law, she may receive DUA.

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

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

Financing Costs of BAA-UC

20. May BAA-UC costs be spread among employers?

Yes. States are free to spread the costs—commonly called “noncharging”—of BAA-UC. We think that spreading BAA-UC costs among all employers is the most equitable means of financing this experiment; therefore, the Model State Legislation provides for this. This position applies to both contributory and reimbursing employers.

Noncharging contributory employers is common in most States; however, some States do not noncharge reimbursing employers. States interested in noncharging reimbursing employers for BAA-UC are referred to UIPLs No. 21-80 and No. 44-93 (58 FR 52790, 52792 (April 12, 1993)) for general information about noncharging reimbursing employers.

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

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

Administrative Costs

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

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

Reporting

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

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

24. What are the reporting requirements?

The Department has not yet finalized a methodology for evaluating BAA-UC. When that methodology is completed, State reporting requirements will be issued in a separate information collection request and, if subject to the Paperwork Reduction Act, published for public comment in the Federal Register.

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

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

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

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

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

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

To make family leave more affordable for more Americans, state legislators, activists, and researchers are mobilizing behind a range of innovative proposals. Attached is a sampling of current state efforts compiled by the National Partnership for Women & Families as the leader of the Campaign for Family Leave Income.

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

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

CALIFORNIA

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

Contact: State Senator Hilda Solis
(916) 445-1418

State Senator Tom Hayden
(916) 445-1353

Lisa Ecks
California Labor Federation
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Assemblyman Wally Knox
(323) 932-1201

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Equal Rights Advocates
(415) 621-0672

Patricia Shiu and Joannie Chang
Employment Law Center
(415) 864-8848

CONNECTICUT

During the 2000 legislative session, the Connecticut legislature considered a bill, **HB 5619**, to set up a study of the costs and benefits of providing wage replacement to workers on family and medical leave through new temporary disability or family and medical leave insurance programs, or through existing state systems such as unemployment insurance. The study would also include a comprehensive survey of Connecticut employers and employees to assess current leave policies and usage. **HB 5619** was approved by the Joint Labor and Public Employees and Finance, Revenue and Bonding Committees, but disapproved by the Joint Committee on Legislative Management. As of April 19, 2000, Senate and House leaders hope to pass the study as part of an omnibus budget bill which will be acted on before the end of this legislative session.

Contact: State Representative Christopher Donovan Leslie Brett
(860) 240-0540

Connecticut Permanent Commission on
the Status of Women
(860) 240-8300

ILLINOIS

A bill was introduced in February 2000 to provide up to 12 weeks of unemployment benefits to workers on any approved FMLA leave and to workers who leave a job for any reason specified in the FMLA. On April 14, 2000, the House passed a resolution to study the effectiveness of the state's current unemployment insurance program and its effect on people taking family and medical leave. The resolution created the Subcommittee on Unemployment Insurance for the New Workforce of the House Committee on Labor and Commerce, which must submit a report to the full committee by December 1, 2000.

Contact: State Representative Julie Hamos
(217) 782-8052

Lindsey Crawford
Women Employed
(312) 782-3902

INDIANA

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

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

State Representative Linda Lawson
(317) 232-9600

IOWA

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

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

MARYLAND

Bills were introduced in the House and Senate in February 2000 to provide up to 12 weeks of unemployment insurance benefits to parents who take leave to care for a newborn or newly adopted child. Several local groups, including the Maryland Women's Law Center and the Public Justice Center, have been working to support the bills. Hearings were held in March before the House Committee on Economic Matters (which voted not to move the House bill forward) and the Senate Finance Committee. During the 1999 session, Maryland passed a law requiring employers that grant paid leave to workers following the birth of a child to grant the same leave to employees who adopt a child.

Contact: Delegate Michael Dobson
(410) 841-3850

Debra Gardner
Public Justice Center
(410) 625-9409

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

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MASSACHUSETTS

Spearheaded by the Women's Statewide Legislative Network, a diverse and active Family Leave Coalition is rallying support for a bill to extend unemployment benefits to employees taking family and medical leave. The estimated cost of providing unemployment benefits for family and medical leave is less than \$1.25 per week per employee. Also pending is a bill aiming to create a "family and employment security trust fund." In April 1999, the state legislature's Joint Committee on Commerce and Labor (chaired by Senator Steven Lynch, sponsor of the unemployment insurance bill) held a hearing on the two bills. A broad array of researchers, legislators, advocates, and leave-takers testified in support of the bills, and the hearing was widely and favorably reported by media across the state. The bills are currently pending in the Joint Committee on Commerce and Labor. Further, Massachusetts recently unveiled a \$13 million plan to make the state a more "family friendly" employer, including a proposal to allow state workers to use up to 12 weeks of accumulated sick leave for maternity or adoptive leave without a doctor's note.

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

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

State Representative Anne Paulsen
(617) 722-2140

MINNESOTA

In February 2000, two bills were introduced in the Minnesota House and Senate that would provide income to employees taking leave to care for a newborn or newly adopted child. One bill (SF3541/HF3869) would create financial incentives for employers to offer partially paid parental leave by having the state match an employer's contribution to an employee's wage replacement during such leave. The Senate passed a \$1 million pilot program of this proposal as part of an omnibus supplemental appropriations bill (SF3798) that is pending in conference. Another bill (SF2996/HF3605) would provide benefits under a "birth and adoption leave program" financed through unemployment insurance funds.

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

Contact: Marcie Jefferys
Children's Defense Fund-MN
(651) 227-6121

State Senator Jerry Janezich
(651) 296-8017

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

State Senator Ellen Anderson
(651) 296-5537

NEW HAMPSHIRE

The New Hampshire legislature has passed a bill to establish a committee to study a broad range of options for providing benefits to New Hampshire employees who take family and medical leave. The legislation now awaits the governor's signature.

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

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

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NEW JERSEY

The New Jersey legislature will consider at least two family leave income initiatives this session. Bill A2037, introduced in February 2000, would extend unemployment insurance benefits to employees who take leave to care for a newborn or newly adopted child and TDI benefits to employees who take leave to care for an ill parent, child, or spouse. Another bill introduced this legislative session – A1577 – would also extend benefits for leave taken to care for newborn or newly adopted children or ill parents, children or spouses, but would do so solely through the statewide TDI system.

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

Assemblyman Charles Zisa
(201) 996-8040

Mark Watson
CWA, local 1034
(609) 530-0060

NEW YORK

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

Contact: Assemblywoman Catherine Nolan
Attention: Geri Reilly
Counsel for Labor Committee
New York State Assembly
(518) 455-4311

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

VERMONT

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

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

State Senator Cheryl Rivers
(802) 828-2228

State Senate President Peter Shumlin
(802) 828-2228

State Senator Peter Illuzzi
(802) 828-2228

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

WASHINGTON

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

Contact: John Burbank
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State Senator Lisa Brown
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Jeff Johnson
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State Representative Mary Lou Dickerson
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*For more information about the **Campaign for Family Leave Income**, including a list of Advisory Committee members, a round-up of state proposals, and the latest news and research, please see our web site (www.nationalpartnership.org) or contact the National Partnership for Women & Families at 1875 Connecticut Avenue, NW, Suite 710, Washington, D.C. 20009, (202) 986-2600, info@nationalpartnership.org.*

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