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To: John Spotila/OMB/EOP@EOP, Barbara Chow/OMB/EOP@EOP
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Subject: Need for Policy Level Meeting on Birth and Adoption Unemployment Compensation

Following discussions between OIRA, EIML, WH staff and DOL on the draft proposed rule on Birth and Adoption Unemployment Compensation (BAA-UC), we have two remaining issues that may need to be settled at the policy level:

- Period for Public Comment. DOL has requested 30 days; OMB staff has proposed 60 days.
- Language on Solvency. OMB staff has proposed a specific solvency provision in the model legislation, which DOL strongly objects to. DOL has agreed to add a discussion of solvency to the Q's and A's in the Commentary on Model State Legislation.

Analysis on each of these issues is provided below. Please let us know if you want to pursue these issues and we will set up a policy level meeting next week to resolve. The meeting would include Geri Palast (Assistant Secretary for the Office of Congressional and Intergovernmental Affairs) and Grace Kilbane (Director of the Unemployment Insurance Service) from DOL.

Public Comment

Consistent with Executive Order 12866, most NPRMs allow for a 60 day public comment period. We have asked DOL to provide compelling evidence for cutting the 60 days to 30 days. None has been provided to date.

When we first raised this issue, DOL stated that a 30 day time frame was needed if we were going to get the rule out before the end of the calendar year. At that time, DOL could not provide a compelling rationale for publishing within this time-frame (i.e. there is no statutory deadline). Now, even if we agreed to a 30 day comment period, it is likely we would not get the rule published by 12/31/99.

In light of the importance of this issue, and the attention it has received on the Hill (see letter to POTUS from Goodling and Ballenger), we believe it critical to allow for the full 60 day comment period. If any compromise is offered we would recommend 45 days.

Solvency

EIML has been emphasizing the need for a solvency provision in the NPRM. While DOL does not have the authority to put such a requirement in the regulation, they can exhort the States to take solvency into account in their decision whether or not to adopt this program.

We proposed to DOL an explicit solvency provision in the model State legislation. The provision we added would suspend any BAA-UC program adopted by a State when that State's Average High Cost Multiple (AHCM, a DOL measure of ability to pay recession-level benefits) is greater than 0.9. This level would exclude New York, which DOL has wanted to exclude from the cost estimates because they believe New York wants to do this through its temporary disability program, not UI.

As expected, DOL opposes such an explicit provision. They presented several objections:

- DOL does not want to encourage States to exclude UI claimants when States are facing solvency problems. This could send a signal to the States about their core UI programs. DOL would much prefer that States revisit their tax structures, instead of restricting benefits as States have done in the past when there were solvency concerns.
- Use of an AHCM of 0.9 would look like a new standard for solvency. This would undercut the Administration's efforts (e.g., the UI solvency incentive proposed in the Budgets for FYs 1999 and 2000) to press States toward an AHCM of 1.0. However, use of a 1.0 level in the EIML solvency provision would eliminate Maryland and possibly Massachusetts, which DOL does not want to do.
- The AHCM is a lagging indicator and may not capture steps that States are taking to improve their solvency.

Based on other discussions with DOL staff, they clearly support improved solvency. However, in terms of the NPRM, they would hope that a State's solvency debate takes place before a BAA-UC program is designed and adopted, not to use solvency to suspend the program after it is adopted. Furthermore, the provision under question is only in the model legislation; DOL has no authority to impose solvency requirements in the regulation.

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Employment and Training Administration

20 CFR Part 604

RIN 1205-AB21

Birth and Adoption Unemployment Compensation

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice of Proposed Rulemaking.

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

DATES: DOL invites written comments on this proposal. Comments are to be submitted by *[insert date 45 days after date of publication in the Federal Register]*.

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

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

FOR MORE INFORMATION CONTACT: Gerard Hildebrand, Unemployment Insurance Service, ETA, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-4231, Washington, DC 20210. Telephone: (202) 219-5200 ext. 391 (this is not a toll-free number); facsimile: (202) 219-8506.

SUPPLEMENTARY INFORMATION:

I. Background

A. General Overview

(1) *Need for Birth and Adoption Leave*

On May 23, 1999, the President directed the Secretary of Labor to issue a regulation allowing unemployment fund moneys to be used to provide partial wage replacement to mothers and fathers on leave following the birth or adoption of a child. In discussing the importance of providing partial wage replacement, the President stated: "[T]hose first weeks of life are critical to the bonding of parents and children, and they can have long-term positive developments for the children. No parent should have to

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

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

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

In response to the President’s May 24, 1999, Executive Memorandum, the DOL is exercising its authority to interpret Federal UC statutes, and, in particular the statutes’ longstanding “able and available” requirements, by implementing an experimental program to examine the use of the UC program as a means for providing partial wage replacement to employees who desire to take approved leave or otherwise leave their employment following the birth or placement for adoption of a child.

(2) The Federal-State UC System

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

(3) Ability to Work and Availability for Work

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

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

The other two provisions found in section 3304(a)(1), FUTA, and section 303(a)(2), SSA, require that compensation "be paid through public employment offices."

The requirement that UC is to be paid through the public employment system (the purpose of which is to find people jobs) ties the payment of UC to an individual's search for employment and to his or her ability to work and availability for work.

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

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

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

(4) Minimal Tests of the Able and Available Requirements

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

Approved Training. Prior to incorporating the training provision into the Federal laws, the DOL encouraged States to treat individuals in training approved by the State agency as meeting the able and available requirements since such training represents the most effective step available to the individual to return to work. The DOL cautioned that

State agencies should only approve short-term training that would make individuals job ready. In 1970, Congress, recognizing the importance of training in remedying unemployment, made this training provision mandatory for all States. (Section 3304 (a)(8), FUTA.) The Federal able and available requirements are preserved because individuals who fail to attend training, except by specific waiver, are held to be unavailable for work and ineligible for UC.

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

Similarly, under the Federal-State Extended Unemployment Compensation Act of 1970 (EB)(26 U.S.C. 3304, note), an ill individual may receive UC only if no suitable work is rejected. The EB program provides additional weeks of compensation to individuals who have exhausted their rights to regular compensation during times of high

unemployment and contains a specific "work search" requirement. This work search requirement is suspended for EB claimants who are hospitalized for an emergency or life-threatening condition (20 CFR 615.8 (g)(3)(i)(B)). This suspension is permitted only if the State law contains a similar provision to those explained above, which must be consistent with the Federal able and available requirements.

Jury Duty. The DOL accepts that States may pay UC to individuals serving on jury duty consistent with the Federal availability requirement. This is reasonable because 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)).

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.

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

(1) Able and Available Requirements for BAA-UC

The DOL previously exercised its authority to interpret the able and available requirements in the areas of training, illness, jury duty, and temporary layoffs. Based on this precedent, the DOL's experimental BAA-UC program is designed to test whether expansion of its interpretation of the able and available requirements would promote a continued connection to the workforce in parents who receive such payments.

As the number of mothers in the workforce and families with both parents working rises, the need to test this interpretation increases, and collecting data under the BAA-UC program to test the existence and magnitude of this group's connection to the work force, is increasingly important. Indeed, much in the same way that providing training to laid-off employees enhances their connection to the workforce by making them more marketable, the DOL wants to test whether providing parents with BAA-UC at a point during the first year of a newborn's life, or after placement for adoption, will help employees maintain or even promote their connection to the workforce by allowing them time to bond with their children and to develop stable child care systems while adjusting to the accompanying changes in lifestyle before returning to work.

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

For all the above reasons, the DOL believes that these parents are an appropriate focus of an experimental extension to the able and available requirements. Thus, this expanded interpretation of the Federal able and available requirements applies only to experimental BAA-UC and does not extend to any other facet of the Federal-State UC program. BAA-UC is an experiment being conducted within the regular UC program.

(2) Experimental versus Permanent Program

This proposed rule will give the State agencies that administer the UC program the opportunity to provide UC, under an experimental program, to parents who take approved leave or otherwise leave their employment to be with a newborn or newly-adopted child. The DOL chose to proceed with an experimental rather than a permanent

program in order to compile the necessary information to evaluate the following prior to any implementation of a permanent program: whether individuals compensated for birth and adoption leave are more likely to return to employment, and, therefore, are more available than those who are uncompensated; the effects on employers whose employees take such compensated leave; the effects on employers throughout a State who bear the BAA-UC costs; and the effects on the State's unemployment fund. The DOL anticipates that creating this experimental program, which States can voluntarily choose to put into practice, will give States the necessary latitude to develop innovative programs permitting the DOL to measure employees' connections to the workforce after availing themselves of BAA-UC, as compared to individuals who take unpaid leave or none at all.

(3) Experimental Program Limitations

The purpose of the able and available requirements is to assure sufficient attachment to the workforce. The BAA-UC experimental program is designed to test the proposition that providing UC to the parents of newborns and newly-adopted children who wish to take approved leave or otherwise leave their employment will increase their attachment to the workforce. In order to gain information on the impact of adapting the UC program to address the needs of such employees, the DOL is defining the experimental program to cover the parents of newborns and newly-adopted children. The DOL believes that authorizing States to provide unemployment compensation for parents of newborns and newly-adopted children will produce valuable information for evaluating the program. This information may also serve as a basis for further expanding coverage

to assist a broader group of employees to better balance work and family needs. The class of employees covered by this proposed rule is a small, easily-defined group that can be used to test whether compensating absences from employment will assist individuals to maintain, or even improve upon, their connection to the workforce by enabling them to better meet their parental and family needs.

(4) Experimental Program Time Frame and Evaluation

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

The DOL will begin collecting administrative data immediately upon implementation of a BAA-UC program. As States gain experience with their programs, the DOL will evaluate each State individually. A comprehensive evaluation will be performed when at least four States have implemented legislation and operated a BAA-UC program for a minimum of three years.

The Federal evaluation methodology has not yet been completed. Because States will have broad latitude in developing BAA-UC experimental programs, the DOL may use a case study evaluation design. Some of the issues that may be addressed in the

evaluation include: whether workforce attachment for this population changed; whether employees faced barriers to taking advantage of BAA-UC; and, if so, what can be done to break down these barriers. Though not required by these regulations, it is anticipated that each State will include, as part of its system development, an evaluation component.

Once decisions have been made regarding the Federal evaluation process and how the relevant information will be collected, complete information collection instructions will be issued and, if subject to the Paperwork Reduction Act, published for public comment in the Federal Register.

C. Rule Format

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

II. Explanation

DOL is proposing a rule which is not overly prescriptive. This is consistent with the general structure of the UC program under which States have wide latitude in designing their programs.

In accordance with the May 24, 1999, Executive Memorandum, BAA-UC model State legislation has been developed and is appended (Appendix A) for comment. This

model legislation is optional and is provided for the convenience of States that choose to implement a BAA-UC program. A commentary on the model legislation and policy issues to aid States in the development of methods provided for under the proposed rule is also appended (Appendix B) for comment. Both appendices are subject to change based upon comments. They will be issued in final form in the Federal Register as a program letter and will not appear in the Code of Federal Regulations.

Description of the Regulation

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

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

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

Subpart C discusses BAA-UC eligibility requirements.

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

Subpart A—General Provisions

Subpart A discusses the purpose and scope of the regulation and defines critical terms. The purpose of the regulation is to establish the opportunity for the State agencies that administer the UC program to provide UC, under an experimental program, to parents who take approved leave or otherwise leave employment to be with a newborn or

newly-adopted child. This proposal will permit interested States to experiment with methods for allowing this use of the UC program.

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

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

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

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

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

Newly-adopted children—Adoptive parents are included in the experiment. Because adopted children may not be newborns, and a comparable measurement period is necessary for all parents included in the BAA-UC experiment, “newly-adopted” refers to

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

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

Placement—The adoption process can be lengthy with completion occurring long after a child has been placed with a family. Consequently, for BAA-UC comparability between parents of newborns and parents of newly-adopted children, “placement” for BAA-UC purposes will be the time a parent becomes legally responsible for a child pending adoption.

Subpart B—Federal UC Requirements

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

birth or placement for adoption of their child. This interpretation of the Federal able and available requirements applies only for purposes of this experiment.

Subpart C-BAA-UC Eligibility

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

For BAA-UC purposes, the first compensable week is the week in which birth or placement for adoption takes place. States are free to determine whether to prorate the weekly compensation amount based on the day of the birth or placement for adoption or whether to fully compensate for that week. Weeks preceding the week of the birth or placement and weeks following the end of the one-year period are not compensable.

The purpose of BAA-UC is to provide support to new parents on "leave" from employment to be with their newborns or newly-adopted children. The term "leave" implies that the individual will return to the last employer after a designated period. However, for experimental purposes, the DOL will allow States to pay BAA-UC to parents who otherwise leave employment for this purpose. This will generate data for evaluating how providing compensation affects the connection of these individuals to the workforce. The DOL's view is that limiting BAA-UC to only those individuals who are assured of job retention could be seen as unfairly excluding parents from BAA-UC who are denied leave by their employers.

Executive Order 12866

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

However, the proposed rule is not considered an "economically significant" rule because it will not have an annual effect on the economy of \$100 million or more, will not adversely impact a specific sector of the economy, and will not materially alter the budgeting impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof.

The Department estimates that the possible annual aggregate BAA-UC cost could range from zero to approximately \$68 million. The regulation is permissive, and the DOL does not know how many States will choose to enact experimental BAA-UC programs. The estimate of the annual aggregate BAA-UC cost of \$68 million is based on the expressed interest of a small number of States. The cost depends upon such factors as the extent to which BAA-UC affects parents' incentives to increase their leave duration and the percentage of leave-takers applying for BAA-UC. The derivation of this estimate begins with 1997-98 Current Population Survey data showing the annual U.S. average number of women in the labor force with a child under one-year old. After this number is disaggregated by State, the likely proportion of leave-takers for newborns and newly-adopted children is determined based on percentages provided in a report by the Commission on Family and Medical Leave, titled *A Workable Balance: Report to Congress on Family and Medical Leave Policies* (April 30, 1996). Other factors used in determining the cost estimate include the percent of leave-takers with employer-paid leave, monetary eligibility rates, and average weekly UC payments.

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

Paperwork Reduction Act

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

Executive Order 12612

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

Executive Order 12988

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

Unfunded Mandates Reform Act of 1995 and Executive Order 12875

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

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

Regulatory Flexibility Act

This proposed rule will not have a significant economic impact on a substantial number of small entities. The proposal affects States and State agencies, which are not within the definition of "small entity" under 5 U.S.C. 601(6). Moreover, States have

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

Small Business Regulatory Enforcement Fairness Act

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

Effect on Family Life

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

List of Subjects in 20 CFR Part 604

Employment and Training Administration, Labor, and Unemployment Compensation.

Catalogue of Federal Domestic Assistance Number

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

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

ALEXIS M. HERMAN

Secretary of Labor

Words of Issuance

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

Part 604—REGULATIONS FOR BIRTH AND ADOPTION UNEMPLOYMENT
COMPENSATION

Subpart A—General Provisions

Sec.

§604.1 What is the purpose of this regulation?

§604.2 What is the scope of this regulation?

§604.3 What definitions apply to this regulation?

Subpart B—Federal Unemployment Compensation Program Requirements

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

Subpart C—Eligibility

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

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

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

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

Subpart A—General Provisions

§604.1 What is the purpose of this regulation?

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

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

§604.2 What is the scope of the regulation?

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

§604.3 What definitions apply to the regulation?

The following definitions apply to this regulation:

(a) *Approved Leave* means a specific period of time, agreed to by both the employee and employer, 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) *DOL* means the United States Department of Labor.

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

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

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

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

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

Subpart B—Federal Unemployment Compensation Program Requirements

§604.10 Beyond the interpretation of the able and available requirement 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 DOL interprets the Federal able and available requirements to include experimental Birth and Adoption unemployment compensation. The regulation applies only to parents who take approved leave or otherwise leave employment to be with their newborns or newly-adopted children.

Subpart C—Eligibility

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

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

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

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

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

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

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

Model State Legislation

Section _____. Birth and Adoption Unemployment Compensation.

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

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

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

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

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

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

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

(f) 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 the Birth and Adoption unemployment compensation program.

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

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

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

General

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

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

Does this regulation enable a State to pay UC for other types of family or medical leave?

No. This regulation enables a State to pay UC to parents on approved leave or who otherwise leave employment to be with their newborns or newly-adopted children.

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

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

No. BAA-UC is designed to provide partial wage replacement to parents of 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.

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

No. The DOL expects that a State will not enact changes without assessing the effect on the solvency of its unemployment fund. Each State has the responsibility to assess the cost to the State's unemployment fund whenever coverage, benefit expansions, or tax changes are considered within the State's UC program. Consequently, DOL expects prudent decision makers in a State to examine the State's solvency position and projected taxes and benefit payments under current law before deciding to enact BAA-UC legislation.

Monetary Qualifications and Benefits

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.

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.

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

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

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

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

Period of Eligibility

When may BAA-UC benefits begin?

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

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. Since the Family and Medical Leave Act of 1993 (FMLA) allows up to 12 weeks of unpaid leave for such events, States may wish to have an identical amount. States may also relate the duration of leave to the individual's weekly amount of UC. For example, for each birth or adoption, an individual may receive an amount equal to 12 times the individual's weekly UC.

To prevent confusion between FMLA and BAA-UC, States should inform potential BAA-UC beneficiaries of the dissimilarities between the two programs (for example, BAA-UC does not guarantee job retention).

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.

Must the individual serve a waiting period?

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

When is a child considered "placed" for adoption?

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

Other Eligibility Issues

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

The answer to both questions is "yes." States implementing BAA-UC must allow both parents, if otherwise eligible, to receive BAA-UC concurrently or consecutively. A State may not prohibit payment of BAA-UC simply because the other parent is taking leave for the same purpose. A State law which does so is inconsistent with Federal law because the eligibility of one parent will be determined based on whether the other parent is receiving UC. Specifically, in a 1964 conformity decision involving the State of South Dakota, the Secretary of Labor held that Federal law prohibits the introduction of any eligibility test unrelated to the fact or cause of the individual's unemployment. (See Secretary of Labor's Decision of September 25, 1964, In the Matter of the Hearing to the South Dakota Department of Employment Security Pursuant to Section 3304(a) of the Internal Revenue Code of 1954, transmitted by Unemployment Insurance Program Letter No. 787, October 2, 1964.) The recipient status of the other parent is unrelated to the fact

or cause of an individual's unemployment. Thus, both parents may receive BAA-UC, whether concurrently or consecutively. Similarly, States may not limit use of BAA-UC to the "primary" parent.

Must BAA-UC apply to individuals employed by all 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.

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 DOL believes that all parents should be treated identically for UC purposes when they take time away from employment to be with their newborn or newly-adopted child. As such, their eligibility for BAA-UC should not be based on whether an employer is required to grant the leave, but on the parent's reason for wanting to take the leave.

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

Yes. Although the Model State Legislation does not provide for such a condition because it may result in denials due to the technicality of when the individual requested leave, States may impose it. The basis of such a requirement is that employers should be given sufficient time to accommodate the leaving/absence of the individual. If such a provision is included, the DOL recommends that the notice be required to be given no more than 30 days prior to birth or placement, but only where practicable. The FMLA contains a 30-day requirement or shorter notice period where giving 30-day notice is not practicable; it does not require notice when the necessity to take leave is unforeseeable. (Section 102(e), Family and Medical Leave Act, Pub. L. 103-3 (February 5, 1993).)

May eligibility be conditioned on whether the individual chooses not to return to work?

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

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 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

May BAA-UC costs be socialized among employers?

Yes. States are free to socialize or not socialize costs of BAA-UC. The Model State Legislation socializes costs—also called “noncharging.” An employer may be reluctant to bear all the costs of BAA-UC caused by an employee taking leave since the employer will not have caused the individual’s unemployment. Since noncharging is permitted when the unemployment is caused by the employee, it is permitted in this situation. This position applies to both contributory and reimbursable employers.

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

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

Administrative Costs

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

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

Reporting

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

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

What are the reporting requirements?

The DOL has not yet finalized a methodology for evaluating State BAA-UC programs.

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.

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WAYS AND MEANS

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COMMITTEE ON WAYS AND MEANS

U.S. HOUSE OF REPRESENTATIVES
 WASHINGTON, DC 20515-6348

June 21, 1999

A.L. SINGLETON, CHIEF OF STAFF

JANICE MATS, MINORITY CHIEF COUNSEL

The Honorable William Clinton
 President of the United States
 The White House
 Washington, D.C. 20500

Dear Mr. President:

For six decades, American workers have had the security of knowing that if they lost their job, they could receive unemployment benefits to feed their families and pay their bills. The unemployment trust fund has proved to be an invaluable safety net for millions of workers since 1935.

For this reason, we are writing to express our strong opposition to your effort to raid this fund for purposes other than helping jobless families. Your decision allowing states to use unemployment compensation funds to provide paid family leave benefits pits out-of-work Americans against their neighbors who have jobs. This is simply wrong. It also is a direct violation of a longstanding and successful policy enacted during the administration of Franklin D. Roosevelt.

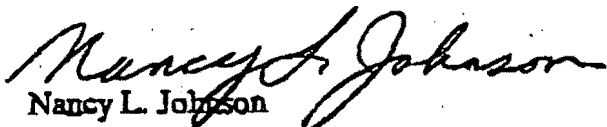
As the Committee on Economic Security said in its 1935 recommendations to Congress, the Unemployment Compensation program is intended to provide "compensation in cash for limited periods when (workers) lose their jobs." The report stated clearly that funds are "payable only for involuntary unemployment."

Your new policy jeopardizes this 64-year-old program by allowing its funds to be drained for other purposes. Instead of circumventing public comment through executive fiat, you should bring legislation before Congress for open and honest discussion.

- 2 -

We hope you will reconsider a policy that clearly endangers the economic security of struggling American families.

Sincerely,



Nancy L. Johnson
Chairman, Subcommittee
on Human Resources



Bill Archer
Chairman

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

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

May 24, 1999

May 24, 1999

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: New Tools to Help Parents Balance Work and Family

Since I became President, my Administration has worked hard to make sure that parents have the tools they need to meet their obligations at home and at work. I am proud that the very first bill I signed into law was the Family and Medical Leave Act (FMLA). Since 1993, the FMLA has allowed millions of Americans to take up to 12 weeks of unpaid leave -- without fear of losing their jobs -- to care for a newborn or adopted child, to attend to their own serious health needs, or to care for a seriously ill parent, son, daughter, or spouse. Too many American workers, however, have been unable to take the leave they need because they simply cannot afford to go without a paycheck.

Therefore, I am taking new steps toward enabling workers to take the leave they need.

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

Second, I direct the Director of the Office of Personnel Management to propose government-wide regulations to allow Federal employees to use up to 12 weeks of accrued sick leave each year to care for a spouse, son, daughter, or parent with a "serious health condition," as that term is defined for the purpose of applying the FMLA. Currently, the amount of sick leave that can be used to care for a family member who is ill

is limited to 13 days each year for most Federal employees. By enabling Federal workers to use the sick leave they have earned, we will eliminate a significant barrier to caring for a family member with a serious health condition. The use of paid sick leave under this policy will be subject to the same conditions as the use of unpaid leave for these purposes under the FMLA. In particular, the same notification and certification requirements that govern the use of unpaid leave to care for a spouse, son, daughter, or parent under the FMLA will apply to Federal employees who use paid sick leave for this purpose. I believe the Federal Government has an important role to play in setting an example for the Nation.

Finally, I direct the Director of the Office of Personnel Management to establish an Interagency Family Friendly Workplace Working Group within 90 days to promote, evaluate, and exchange information on Federal family-friendly workplace initiatives. I also direct the head of each executive department and agency to appoint a family-friendly work/life coordinator to serve as a member of this Working Group. Working Group representatives will be responsible for making sure that Federal employees are aware of the full range of options available to them to meet their personal and family responsibilities (such as alternative work schedules, telecommuting, part-time employment, and job sharing). The coordinators also will provide employees with information about child and elder care resources currently available in their communities, and establish and promote parent support groups, elder care support groups, and on-site nursing mothers' programs.

WILLIAM J. CLINTON

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

November 10, 1999

MEMORANDUM FOR THE CHIEF OF STAFF

THROUGH: Jacob Lew

FROM: Dan Mendelson
Don Arbuckle

SUBJECT: Definition of "Family" in OPM's notice of proposed rulemaking on expanded sick leave

On May 24, 1999, the President issued a memorandum directing OPM to propose government-wide regulations allowing Federal employees to use up to 12 weeks of paid sick leave each year for family care purposes. (Presidential memorandum attached.) OPM is now finalizing a notice of proposed rulemaking (NPRM) for publication in the Federal Register to solicit public comments. This memo, reflecting consensus of OPM, OMB, DPC, OPL, and WHC, recommends that we adopt a permissive definition of "family" in the upcoming NPRM. However, you need to be aware that this may generate criticism and might be seen as contradicting the executive memorandum.

Currently at issue is the definition of "family" used in the regulation. In the area of Federal employee leave policy, two different definitions of family are used. Under current sick leave policy, Federal employees are entitled to use a total of up to 13 days of paid sick leave each year to care for an ill family member. In this instance, "family member" is defined by OPM as any of the following relatives of the employee: spouse, and parents thereof; children, including adopted children and spouses thereof; parents; brothers and sisters, and spouses thereof; and any individual related by blood or *affinity* whose close association with the employee is the equivalent of a family relationship. Under this broad regulatory boundary, agency managers are given discretion for determining who is a "family member" - e.g., domestic partner.

By contrast, the Family and Medical Leave Act (FMLA) uses a more restricted definition of family. Under FMLA, Federal employees are entitled to a total of up to 12 workweeks of unpaid leave per year for (i) birth of a child, (ii) adoption/foster care, or (iii) a serious health condition of the employee or his or her spouse, son or daughter, or parent. In implementing FMLA, OPM must use the definition of spouse specified in the Defense of Marriage Act (DOMA). According to the DOMA, "spouse" is an individual in a marriage that is a legal union between one man and one woman.

OPM, OMB, DPC and WH staff believe that the new sick leave policy extending the number of available days an employee can take off for family care should use the same broad definition of family as in current sick leave policy. The broad definition of family would benefit

all types of families and various family members. It is also more consistent with the President's broader sexual orientation non-discrimination policies. Moreover, sticking with the broad definition would send a strong signal that the Administration remains committed to helping all types of families and family members.

There is some potential risk to using the broad definition. It might invite Congress to attempt to pass legislation that will deny or limit any new or existing leave (e.g., prohibiting the now-common practice of using donated leave for any family member). Second, using the broad definition might open a public controversy over the definition of family. Third, the broad definition might be criticized as less consistent with the executive memorandum, which implied specific family members -- spouse, son or daughter, or parent -- as beneficiaries.

While recognizing potential risks, the EOP offices and OPM involved in this discussion agree that the Administration should use the broad definition of family in the upcoming NPRM. We believe that it is a defensible interpretation of the executive memorandum, which builds on current sick leave policy. It is also consistent with the President's broader goal of eliminating "a significant barrier to caring for a family member with a serious health condition," as stated in the executive memorandum. Further, we believe that this approach is consistent with the Administration's non-discrimination policies. Finally, we believe that it is preferable to be proactive in supporting this policy, rather than being in a position where we need to respond to critical comments on a rule containing the more restrictive definition.

Please let us know if you disagree with this assessment.

Attachment

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release

May 24, 1999

May 24, 1999

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: New Tools to Help Parents Balance Work and Family

Since I became President, my Administration has worked hard to make sure that parents have the tools they need to meet their obligations at home and at work. I am proud that the very first bill I signed into law was the Family and Medical Leave Act (FMLA). Since 1993, the FMLA has allowed millions of Americans to take up to 12 weeks of unpaid leave -- without fear of losing their jobs -- to care for a newborn or adopted child, to attend to their own serious health needs, or to care for a seriously ill parent, son, daughter, or spouse. Too many American workers, however, have been unable to take the leave they need because they simply cannot afford to go without a paycheck.

Therefore, I am taking new steps toward enabling workers to take the leave they need.

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

Second, I direct the Director of the Office of Personnel Management to propose government-wide regulations to allow Federal employees to use up to 12 weeks of accrued sick leave each year to care for a spouse, son, daughter, or parent with a "serious health condition," as that term is defined for the purpose of applying the FMLA. Currently, the amount of sick leave that can be used to care for a family member who is ill is limited to 13 days each year for most Federal employees. By enabling Federal workers to use the sick leave they have earned, we will eliminate a significant barrier to caring for a family member with a serious health condition. The use of paid sick leave under this policy will be subject to the same conditions as the use of unpaid leave for these purposes under the FMLA. In particular, the same notification and certification requirements that govern the use of unpaid leave to care for a spouse, son, daughter, or parent under the FMLA will apply to Federal employees who use paid sick leave for this purpose. I believe the Federal Government has an important role to play in setting an example for the Nation.

Finally, I direct the Director of the Office of Personnel Management to establish an Interagency Family Friendly Workplace Working Group within 90 days to promote, evaluate, and exchange information on Federal family-friendly workplace initiatives. I also direct the head of each executive department and agency to appoint a family-friendly work/life coordinator to serve as a member of this Working Group. Working Group representatives will be responsible for making sure that Federal employees are aware of the full range of options available to them to meet their personal and family responsibilities (such as alternative work schedules, telecommuting, part-time employment, and job sharing). The coordinators also will provide employees with information about child and elder care resources currently available in their communities, and establish and promote parent support groups, elder care support groups, and on-site nursing mothers' programs.

WILLIAM J. CLINTON

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Daniel I. Werfel

09/02/99 09:22:02 AM

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

Subject: Comments on Birth and Adoption NPRM - corrected version

Please substitute this version of OMB/EOP comments for the one sent earlier this morning. Sorry for the confusion.

Below are OMB/EOP comments on the Birth and Adoption proposed rule. Please reply at your earliest convenience but not later than 9/14/99.

General Comments:

1) Including Specific Parameters. It is OMB's recollection that when this idea was being discussed in the spring, the interagency group pondered many different design options. The manner in which DOL has drafted this rule does not appear to opt for any of the designs discussed. We understand DOL's interest in not being overly prescriptive to the States because of the great degree of autonomy States currently have in setting the eligibility requirements and benefit structures of their UI programs. Nonetheless, given that DOL stresses that this is an EXPERIMENT for a limited purpose, we believe DOL could be somewhat more prescriptive about the parameters of the experiment. Can DOL redraft the regulation to outline what the Administration would prefer to have in a paid-parental leave program?

For example, given DOL states that this is an "experimental program", it should have parameters such as duration, size (number of participants), benefits, means-tested, exhaustion of benefits, etc. Understanding that we cannot tie states to the Federal government's preferences, but we can ENCOURAGE them to adopt and implement a specific design.

Recommend revising the preamble of the regulation and the model legislation to reflect the Federal government's preferences. Examples will follow in specific comments below.

2) "Able and Available". In terms of DOL's strategy for describing this experiment as consistent (or not inconsistent) with the long-standing DOL interpretations of the "able and available" requirements: DOL describes its past interpretations and "minimal tests" of the able and available requirements (for approved training, illness, jury duty, and temporary layoffs). (pp. 7-9) However, DOL does not explicitly say which of these situations it is extending/adapting to the parental leave situation.

Its possible that DOL's decision to not apply one of the pre-existing situations lead to this very open-ended, permissive regulatory approach (age of newborn, approved leave, workers covered/links to FMLA, discussed below). For example, if DOL used the temporary layoff model, then DOL might reasonably limit the coverage to approved leave (not to any quit). If DOL used the jury-duty model (where lack of availability is due to the courts), then DOL might limit the duration to the period of the unpaid leave entitlement under Federal or State family and medical laws and limit UI to approved leave.

Is it correct to assume that DOL ties its rationale most closely to the approved training exceptions where approved "training represents the most effective step available to the individual to return to work." (p. 7)?

In addressing the issue in question 1 above, perhaps DOL could make this connection more explicitly in the reg?

3) Rationale for the Experiment. DOL says that the purpose of the able and available requirements is to assure sufficient attachment to the workforce and claims, "There is some evidence to suggest that providing UC to the parents of newborn and newly-adopted children and others who wish to take family or medical leave will, in the long run, increase their attachment to the workforce" and that the "experimental program is intended to test this proposition." (p. 11)

We are concerned that this argument will be criticized in the absence of strong evidence.

4) Welfare. We are concerned that these policies may create inconsistencies between what we require for mothers on welfare versus those who were lucky enough to have a job. Please discuss.

5) Cost Impact. The possible cost impact is not adequately addressed in this regulation. Based on estimates from the State and from advocates, the specific program design proposed by Massachusetts would cost \$200 million annually. Of course this includes more participants than what is contemplated here. DOL needs to discuss the impact on the trust fund, whether states will have to raise taxes, and the impact on Federal administrative costs. DOL mentions in the Q & A at the back that states can use grants received from the Federal government to pay for administrative costs associated with this program - this will inevitably lead to a drain on the admin. money that states have argued is already insufficient.

Also, DOL should revise to discuss the economic effect this policy could have on workers. DOL should recognize that such a policy may create a substitution effect -- where employers decrease benefits available to workers due to this newly created public benefit.

6) New UI Program. It is difficult to tell whether DOL is creating a new UI program, like EB, or if this would be considered normal UI. DOL's intention should be clarified.

7) Connection to Regular UI. It is not clear if DOL's experiment is simply authorizing another exception to the able and available requirements or if DOL is proposing a new/separate UI program for which State Unemployment Trust Fund money can be used.

DOL's regulations suggest that paid parental leave can be treated as a separate program. In addressing the question of how the BAA-UC entitlement relates to regular UC payments (p. 35), DOL says States are free to determine whether amounts of BAA-UC count (or do not count) toward the maximum amounts or maximum number of weeks of regular UC payable under State law or whether BAA-UC has separate maximums.

This distinction between a separate program and a single UI program could be important because of the question of workers who are not eligible for UI benefits under the standard rules of each State. For example, DOL has been advocating for expanding UI benefits to unemployed part-time workers who are denied benefits in some States because they are looking for part-time work. Would these workers be eligible for paid parental leave?

8) Solvency. The impact of this proposal on individual State Unemployment Trust Fund solvency was not addressed, despite OMB's previous request at an interagency meeting on paid parental leave. We suggest adding this issue to the general discussion as a factor to be considered by each State in determining whether to adopt the experimental program. This should also be covered in a Q&A for the regulation.

9) Experience Rating. DOL leaves it up to the States to decide whether or not to charge the BAA-UC costs to the employer of the individual taking leave, although DOL's model legislation socializes (non-charges) these costs. When the Administration's proposal was crafted, the interagency group was adamant that employers not be charged to avoid creating disincentives for employers to hire young

women. Why not include experience rating in the regulation? Please discuss.

10) Definition of New-Born and New Placement for Adoption. The DOL proposed definition of new-born as up to one year is much too long. The FMLA permits up to 12 weeks of unpaid leave. The President's speech says to "THOSE FIRST WEEKS OF LIFE are critical to the bonding of parents and children." [Emphasis added.] Under the DOL draft, States could give parents the typical 26 weeks of UI benefits and let mother and father take sequential paid leave for full year. Suggest defining "new-born" as 3 months (6 months at most). A much longer period in this UI experiment could threaten any FMLA expansions in other areas.

11) Coordination with other interested agencies. Please ensure that HHS, Treasury, and Commerce are provided with a copy of the proposed rule for review and comment.

Specific Comments

p. 1, 30-day comment period. Is 30 days for the public to comment on such a big policy is too short? Recommend 60 days.

p. 5. DOL needs to expand on its justification for meeting the "able and available" requirement. The argument that the person may be more likely to return to the market is interesting but needs to be expanded. Also, DOL mentions evidence (page 11) that these parents are more likely to return to the workforce if offered compensation. Can we get a copy of the evidence referred to?

p. 10. Same issue as previous comment. The paragraph (B)(1) does not appear strong enough to counter why other areas that states want to provide benefits for are not acceptable. There needs to be a stronger carve out for birth and adoption.

p. 10. Also, we think parent child bonding is of extreme importance. However, we are not convinced that it is a justification for offering UI to parents of newborns. Based on the fact that this rule would allow 12 weeks of leave, what is the evidence that bonding is a potential benefit of this proposal.

In the absence of any evidence on bonding, perhaps a better justification (with appropriate evidence if DOL can produce) would be that payments for time off allow for a better long-term attachment to the work force (and are thus in keeping with the general principle that UI is short-term replacement income to help in facilitating the return to work).

In the event that there is not adequate evidence on bonding,

Suggest the following edits to first full para, 4th sentence on page 10:

"...will help workers maintain their connection to the workforce by allowing them time to develop stable childcare arrangements while adjusting to the accompanying changes in lifestyle so that they may return to work productively."

Other possible rationales to consider:

- Evidence shows that of the population that cut their leave short because they were not fully paid, a large percentage of them were birth and adoption.

- Birth and adoption are reasons for leave easy to verify.

p. 10. DOL references that "collecting data under the BAA-UC program to test the existence and magnitude of such a connection is increasingly important." Can DOL provide us their strategy for collecting data under this program? Will new forms be created, or will existing data sources be relied on?

When will collection begin? Why no specific data collection provisions in this regulation?

p. 11 First full sentence. Wouldn't another evaluation criterion be the effect on the State's UC trust fund?

Suggesting adding to the end of the sentence, "and the effects on the state's UC trust funds."

p. 11, first full sentence. The statement "...proceed with an experimental rather than a permanent program because the limited nature of an experimental program will tend to lessen any potential negative consequences" leads the reader to ask "What negative consequences?" DOL should discuss the potential negative consequences such as substitution of benefits and increased taxes.

p. 11, last para. Suggest adding citations for the claim that "There is some evidence that providing UC to the parents of newborns . . . will in the long run increase their attachment to the workforce."

p. 11, last paragraph. DOL makes the argument in the first section that parents are more likely to return to the workforce if compensated. This argument could equally apply to individuals taking leave for other purposes covered under FMLA. Clearly the decision was to cover birth and adoption not other purposes, but DOL does not provide a reason in the regulation for applying this more liberal definition of "able and available" to other populations. In addition to "bonding" (see comment above), please indicate what reasons there are for limiting it to birth and adoption.

p. 12, first paragraph. DOL states that providing this to only parents will limit the potential negative impact. Again what negative impact? Do you mean substitution effects? Please discuss.

Also, it may be a good idea to add in at the beginning of the regulation a brief description of the requirements of the general UI program, workforce attachment, benefit levels, etc.

p. 12, last para. Consistent with comment above, we think parent child bonding is of extreme importance. However, we are not sure that under this regulation there is enough of a justification for offering UI to parents of newborns. In the event that there is not adequate evidence on bonding, suggest deleting para or revising to focus on payments for time off allowing for a better long-term attachment to the work force (if DOL can demonstrate through evidence).

p. 13, first line. Should DOL announce a specific date for publication of the Final Rule? First, perhaps public comment dissuades the issuance of a final rule? Second, if it is included, would it be better to give a more general time-frame, e.g., "soon after the public comment period ends"

p. 13 While DOL may not be ready to announce its evaluation methodology, we should have some idea of where they are going now. If we stick the with "experimental" notion, then each State should abide by the experimental nature of the program; DOL should indicate an expectation that the State will set up an experiment with a treatment group receiving the benefits and a control (or at least comparison group) not.

p. 13. Time Frame and Evaluation section. This section basically says that the rule is going final – regardless of public comment. It should be revised to reflect the fact that this is a proposal and DOL does not know what type of comment it will receive. Also, DOL should begin evaluating the impact of BAA-UC when ONE state implements it. DOL should not wait until four states implement. Given, states will likely implement different programs the evaluations should be thought of as individual case studies. Each tracking the specifics of the different programs.

Recommend adding in some of the issues that DOL will likely look at in an evaluation of such a program instead of leaving it completely vague - leaning on the fact that each program will likely be different. We know some of the areas of interest already.

Also, something should be added to the preamble to stress that due to the experimental nature of the

program, it will end if proven unsuccessful.

p. 14, first line. Won't the evaluation component, when announced, be subject to PRA? Can this be indicated and the words "if appropriate" on line 1 deleted?

p. 14, II. Explanation. Suggest recharacterizing the Administration regulatory reform effort as promoting less prescriptive and more performance based regulations. (In other words, in characterizing the reform effort, we believe this is a more important theme than "wide latitude" and "minimum requirements necessary to comport with Federal law".)

p. 14, last paragraph. Suggest publishing the appendices with the final regulation as well (even though they are not codified).

p. 16, definition of "newborns." Why did DOL pick a year? Is this based on another law? What is the normal standard used to describe a newborn? (See also general comment above)

p. 17, last paragraph. Suggest revising based on parameters that the Administration agrees to. Also, the discussion of "approved leave" versus persons that leave employment for the same reason is very confusing throughout the regulation. In some places it says both types of people are covered - in other sections it does not. (see also general comment above)

p. 17-18. The NPRM enables states to elect to limit BAA-UC to individuals on "approved leave" but does not allow the introduction of eligibility factors such as employer size or whether the spouse of a UC recipient also receives leave -- is this consistent?

p. 19, second para. The sentence beginning "Also, limiting BAA-UC . . ." appears to prejudge the question on allowing compensation for those who don't return to work. Suggest deleting and replacing with a solicitation for comments on the issue.

p. 19, last paragraph. Suggest deleting the concept of "overpayment." What is the likely hood that these persons will be able to repay the UI system for benefits they received? How would the UI system collect the money?

p. 20, drafting information. Not clear what the purpose of this section is. Suggest deleting.

p. 21, (also p.23). Can we see the analysis behind the cost estimate of \$50-87 million? In addition, DOL should agree to make the analysis part of the record and available for comment.

p. 21. Should the PRA section should be revised to include the evaluation component states may use as part of their system development?

p. 23, first full paragraph. Again, we would like DOL to flesh out the basis of the \$50 - \$87 million estimate. Also in the first line on the page, suggest deleting "Accordingly, no budgetary impact statement has been prepared."

p. 24, SBREFA. based on previous comments and DOL's revised economic analysis, this could potentially be a "major" rule and thus this section would need to be revised accordingly.

p. 28. Is the NPRM definition of adoptive placement as "the time a parent becomes legally responsible for a child pending adoption" parallel with the FMLA? Does this mean that a long-term foster parent can take advantage of this program as soon as he files for adoption -- does his "legal responsibility" change at this point? Has DOL consulted with HHS on this provision?

p. 29, Subpart B. Suggest adding "for BAA-UC" after "able and available requirement" in the question heading.

p. 31. Back to the general comment above. Should the model legislation provide the Federal government's preferences or simply tell states their options? Recommend providing the Federal government's preferences and then telling states in the preamble that the specific design of the program is in their discretion.

p. 32. Suggest deleting d from the model legislation.

p. 33. Does the NPRM need to preclude affirmatively other uses of UC (*i.e.* for other FMLA purposes)? Suggest the following change:

Does this regulation enable a State to pay UC for other types of family or medical leave?

No. This regulation enables a state to pay UC for parents taking approved leave or who otherwise leave employment to be with their newborns... [rest unchanged]...

p. 33. Commentary. Suggest incorporating a number of these questions in the preamble because its helpful for the reader to understand what is being proposed in this regulation.

p. 33, commentary. The commentary seems to assume that all states will need to enact legislation in order to implement this regulation? Is this true? Should it be clarified in a Q and A?

p. 36, first paragraph. Second sentence. Suggest adding "of unpaid leave" after "up to 12 weeks."

p. 37, first paragraph. We found this section to be confusing. Can it be drafted in plainer language?

p. 37. Its not clear that DOL has a good justification for allowing parents to be compensated concurrently. What is the justification and can it be better explained in the NPRM?

p. 38, second paragraph. What are "covered employers"? Is DOL referring to FMLA coverage? Suggest not mentioning the FMLA standard; revising the question to ask about "all employers," and deleting the last two sentences.

p. 39. Both of these questions and answers were confusing. On the first question, suggest distancing this answer from FMLA. That is not the point. The answer should reflect that DOL encourages states to treat all parents equally and thus should cover parents that leave employment. On the second question, the question asks about "any federally funded benefit program," but the answer only addresses a couple programs. We assume that BAA-UC benefits would be treated the same as regular UI.

p. 43. Suggest deleting "and if appropriate" from the last sentence.

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Daniel I. Werfel

09/10/99 03:22:07 PM

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cc: Larry R. Matlack/OMB/EOP@EOP, John F. Morrall III/OMB/EOP@EOP, S. A. Noe/OMB/EOP@EOP,
Joseph F. Lackey Jr./OMB/EOP@EOP

Subject: OPM Regulation on Sick Leave

FYI:

OPM has sent a regulation for OMB review that, like the Birth and Adoption Rule, is based on the May 24 POTUS memo/announcement. This regulation allows federal employees to use up to 12 weeks of sick leave (rather than the current 13 hours allowed) to care for sick family members.

Just wanted to let you know. If you want to see a copy of this regulation, let me or Joe Lackey (also in OIRA) know. Thanks.

Message Sent To:

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► **Daniel I. Werfel**
09/09/99 04:08:10 PM
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To: See the distribution list at the bottom of this message
cc: John F. Morrall III/OMB/EOP@EOP, Larry R. Matlack/OMB/EOP@EOP
Subject: Heads Up - OMB Review of DOL Rule on Birth and Adoption

FYI - Based on our internal discussions, I have asked DOC, Treas, and HHS to comment on DOL's proposed rule. Also, the below email provides you with an electronic copy of the Birth and Adoption rule.

----- Forwarded by Daniel I. Werfel/OMB/EOP on 09/09/99 04:05 PM -----

► **Daniel I. Werfel**
09/09/99 04:05:36 PM
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Record Type: Record

To: dcohen1@doc.gov @ inet, LaVarne Burton(HHS)@2052135@fax, Rick Carro(Treas)@6221188@fax
cc: ANNE Vogel <AVOGEL@doleta.gov> @ inet
Subject: Heads Up - OMB Review of DOL Rule on Birth and Adoption

The Department of Labor has submitted the following Notice of Proposed Rulemaking for OMB review under Executive Order 12866 -- Birth and Adoptions Unemployment Compensation.

It is attached below for your convenience. Based on your agencies previous involvement in this issue, we are asking for you to review the rule and provide any comments.

Please provide comments to me no later than COB 9/17/99.

┆  - rule812.wpd

Message Sent To: _____

EXECUTIVE OFFICE OF THE PRESIDENT
Office of Management and Budget
Veterans Affairs/Personnel Division

FAX COVER SHEET

DATE: 5-20

TO: Ruby Shamir

AGENCY: _____

FAX NUMBER: _____

PHONE NUMBER: _____

FROM: Lisa Fairhall

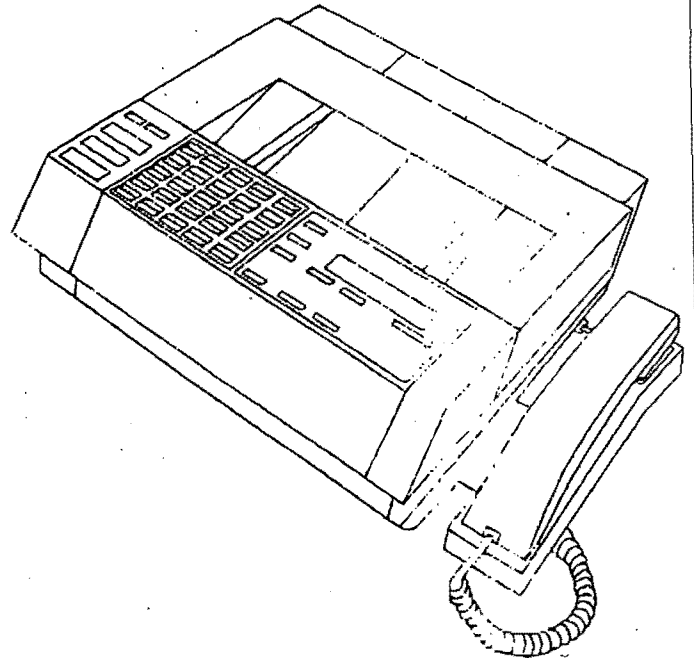
Personnel, Postal and EXOP Branch

PHONE NUMBER: _____

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COMMENTS: _____

Number of Pages (including this page) _____



COST ESTIMATES FOR SICK LEAVE PROPOSAL

OPM's estimate of the additional cost of permitting employees to use 12 weeks of sick leave to care for a spouse, son, daughter, or parent with a serious health condition follows. This new entitlement does not affect the total amount of sick leave an employee may accrue each year.

Estimated Additional Cost for 12 weeks: \$64 million annually

This represents .06% of the total Federal payroll cost for 1999.

These estimates are based on the average salary for the December 1998 Federal civilian workforce worldwide. In addition, since employees are already entitled to use a total of up to 13 days of sick leave for family care or bereavement purposes, these estimates represent the cost of using more than 13 days of sick leave.

This probably overestimates the actual cost because:

1. We assumed that approximately 0.5%* of the workforce that have 5 or more years of Federal service would use the maximum 12 weeks of sick leave. Federal employees accrue 13 days of sick leave each year. Although it is possible for an employee not to use any sick leave for 5 years so that he or she would accumulate 65 days (more than 12 weeks) of sick leave to use for family care purposes, this is highly unlikely.

* The 0.5% estimate is derived from data obtained for OPM's June 1997 report to Congress on the use of sick leave for family care purposes.
2. It is also highly unlikely that employees would have a need to use the full 12 weeks of sick leave to care for a spouse, son, daughter, or parent with a serious health condition. However, it may be possible that the availability of a much larger paid leave benefit would encourage a larger number of employees to take sick leave for family care purposes.
3. The number and types of family members for which employees may use the sick leave is restricted--i.e., spouse, son, daughter, or parent--thereby reducing the extent to which this benefit might be used.
4. The purpose for which the sick leave may be used--i.e., a "serious health condition"--will limit the circumstances in which there will be a need for leave.
5. Employees cannot use the full 12-week entitlement to sick leave more than once every 5 years, since it will take that long to accumulate 12 weeks of leave.

There are cost benefits that may be derived from this proposal, such as lower costs for agencies to replace valuable employees forced to separate from Federal service because of family responsibilities (e.g., training costs for new employees). In addition, employees will have greater incentive to conserve their sick leave, and there will be less strain on the voluntary leave transfer and leave bank programs, since a potential leave recipient will be required to use up to 12 weeks of sick leave for family care before he or she can use donated annual leave.