Daniel I. Werfel
10/15/99 10:40:33 AM
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Record Type: Record

To: Debra J. Bond/OMB/EOP@EOP, Carole Kitti/OMB/EOP@EOP, Nicole R. Rabner/WHO/EOP@EOP

cc: Larry R. Matlack/OMB/EOP@EOP, John F. Morrall III/OMB/EOP@EOP, Stuart Shapiro/OMB/EOP@EOP
Subject: more on progress on BAA-UC regs

I agree with Nicole that to the extent we can use the momentum gained to resolve all issues, we should. Below are DOL's latest proposals on the 2 policy issues.
--------------------- Forwarded by Daniel I. Werfel/OMB/EOP on 10/15/99 10:39 AM ---------------------------

Bergman Terry <bergman-terry@dol.gov>
10/15/99 10:26:34 AM

Record Type: Record

To: Daniel I. Werfel/OMB/EOP

cc: Carole Kitti/OMB/EOP
Subject: more on progress on BAA-UC regs

As I indicated in my conversation this morning, we have our UI staff working on a document which reflects both our September 17 response and subsequent conversations about language. We believe this should facilitate the finalizing of language for the NPRM and will get you something as early today as possible.

On the two policy questions still on the table, we have looked at the legislative schedule of the States, and assuming that the interested legsilatures will work off the NPRM, we believe that a 45-day comment period is possible. We suggest the use of 45 days with some language that the shorter comment period is to facilitate the consideration of State laws in legislatures in their next sessions. The interaction of the 60 day period and the holiday season would not provide states with any certainty on the final rule and would pose a problem.

On the other issue we have discussed, we continue to have problems with any model legislation provision which includes a solvency trigger and firmly beleive that states should -- and will -- look at solvency before adopting this program. We cannot see how adding an additional state to the cost estimate has any relevance to this argument (in fact, it seems to run counter to the position that states with questionable solvency will adopt the program) and the UI staff beleives that the current cost estimate is our best assessment of expected behavior of the States. In fact, if we go to 60 days, we may argue that WA and MD should be dropped from the calculations, since they will not reasonably have the benefit of a final rule prior to adjournment.

However, we do believe that additional language on solvency is prudent and I have made some changes to the Commentary Q and A which we suggested in our Sept 17 response.

Q. Will these regulations undermine fund solvency?

A. No. Experience shows that The Department expects that States will not enact changes without assessing the effect on its unemployment fund's solvency. 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 Unemployment Compensation program.

Alternatively, we could use language suggested by OMB in recent conversations --

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

A. No. The DOL has no authority to impose a solvency standard on the States. However, the DOL believes prudent decision makers in State will examine the State's solvency position and projected taxes and benefit payments under current programs prior to a decision to adopt BAA-UC legislation. Adoption of BAA-UC should not jeopardize the ability of a State to pay benefits to those eligible under current law.

Neither of these have legal force, but neither does a provision in model legislation. Either, or some combination of the two, would reflect our belief -- and state practice -- in assessing solvency prior to adopting new provisions. If you want to try some combination of these, I will run any language by our UI folks and I'm sure we can agree on something.

As I mentioned, Grace, Jerry and I are on the Hill this morning, but we have staff working on the document...we may need to discuss some type of concurrent review by our attorneys and OMB if we are to have a chance of finalizing today.

Daniel I. Werfel
10/05/99 12:51:16 PM

Record Type: Record

To: Nicole R. Rabner/WHO/EOP@EOP
cc: See the distribution list at the bottom of this message
bcc:
Subject: Re: UI-BAA NPRM

Nicole, in response to your email below:

There are basically 4 issues that need to be resolved at this point.

1) Providing non-binding parameters in the rule that show a Federal preference how these systems could be set up. DOL seemed willing to make some movement here but asked that we define specifically what parameters we would like to see in there. To this end, OMB staff have been working to do a red-line strikeout of the rule that would show the changes we would recommend. We should be able to get this to you by COB today and hopefully we can forward to DOL shortly thereafter.

2) 30 day vs. 60 day comment period. We still maintain that this should go out for 60 days, and we are waiting for DOL to provide us with any compelling evidence as to why they need to do 30.

3) Cost estimates. DOL's estimates the cost of this rule at approximately $50 - 70 million. However, DOL does not include New York in their estimate even though NY is one of 5 states (Mass, Vt, Md., Wash.) where draft legislation has been proposed. Oddly, instead of including NY, DOL includes New Hampshire and Delaware who do not have draft legilsation but who DOL says is a good representation of the rest of the states that may develop legislation. We have taken issue with their refusal to include NY and their inclusion of these 2 (very small) states to represent the rest of the nation. At this point DOL has agreed to drop NH and Del. from the analysis but we remain at a stalemate over NY. Inclusion of NY pushes the cost estimate over $100 million and causes it be called a "major" rule. DOL does not want this rule to be construed by the Hill and the public as expensive and thus is concerned about the "major" distinction. We are concerned that a cost analysis without NY would seem misleading, and the Administration would get flack for not providing objective analysis.

4) Solvency provision. The redline strikeout we will send you later will contain a solvency provision. This saves us from the New York problem because under this provision, NY would not be able to avail themsleves of this program because of their solvency problems.

Thats it, unless someone on the "cc" list corrects me. What I propose is that we send you the redline by COB today and then discuss it quickly and ship it to DOL. Once they have it, we can see whether some of these 4 issues go away because they are in agreement. If any issues remain, it would most definitely be time to elevate. How does this strategy sound to you?

Nicole R. Rabner

Nicole R. Rabner

10/05/99 12:28:48 PM

Record Type: Record

To: Daniel I. Werfel/OMB/EOP@EOP

cc:

Subject: UI-BAA NPRM

Where are we on the NPRM? I saw DOL's reaction to the OMB passback, most of which I thought was eminently reasonable. Do we need to meet to discuss -- perhaps to winnow down a list of issues and meet at a higher level (i.e. Chow) to make final? Let me know what your thoughts are.

Message Copied To:

Larry R. Matlack/OMB/EOP@EOP
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DEPARTMENT OF LABOR **4510-30**

Employment and Training Administration

20 CFR Part 604

RIN 1205-AB21

Birth and Adoption Unemployment Compensation

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice of Proposed Rulemaking.

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

DATES: DOL invites written comments on this proposal. Comments are to be submitted by *[insert date ~~30~~ 60 days after date of publication in the Federal Register]*.

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

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

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

SUPPLEMENTARY INFORMATION:

I. Background

A. General Overview

(1) *Need for Birth and Adoption Leave*

On May 23, 1999, the President directed the Secretary of Labor to issue a regulation allowing unemployment fund moneys to be used to ~~offer compensation to new mothers and fathers to be with their newborns or newly-adopted children~~ provide income support to mothers and fathers on leave following the birth or adoption of a child. In discussing the importance of providing ~~compensation~~ income support, the President stated: "[T]hose first weeks of life are critical to the bonding of parents and children, and they can have long-term positive developments for the children. No parent should have to miss them." The President also noted that, "We can do this in a way that preserves the soundness of the unemployment insurance system and continues to promote economic growth."

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

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

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

(2) The Federal-State UC System

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

(3) Ability to Work and Availability for Work

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

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

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

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

In response to practical economic and societal concerns, the DOL has previously, as discussed below, exercised its authority to interpret Federal UC statutes regarding the able and available requirements to address several specific areas: training, illness, jury duty and temporary layoffs. Under its authority to interpret Federal UC law and consistent with its broad oversight responsibility, the DOL interprets the Federal able and available requirements to include a voluntary experimental program for examining the use of the UC program to provide ~~compensation~~ income support to workers who take ~~approved~~ leave ~~or otherwise leave employment~~ to be with their newborns or newly-adopted children. This experiment recognizes the impact of women in the workforce and responds to the dramatic societal and economic changes resulting from the large number of families where both parents work. 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) Statutory Exceptions*~~

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

~~*Temporary Disability.* Section 3304(a)(4)(A), FUTA, and section 303(a)(5), SSA, provide for using unemployment fund moneys for the non-UC purpose of insuring against loss of employment due to temporary disability and, therefore, temporary~~

~~unavailability. These amendments were added to permit a State to use employee, but not employer, contributions in its unemployment fund for such purposes.~~

~~*Self-Employment Assistance.* The Federal UC laws create an exception to the Federal availability requirement for individuals in the Self-Employment Assistance (SEA) program. These individuals are seeking to establish their own businesses and need not be available for other work. Since the SEA program assists individuals to become self-employed, it furthers the purpose of the UC program of returning people to work. The FUTA provides an explicit exception to the Federal availability requirement whereby "State requirements relating to availability for work, active search for work, and refusal to accept work are not applicable to such individuals." (Section 3306(t)(2)(A), FUTA.)~~

(~~5~~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 Extended Benefits (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 worker would otherwise be available for work. It would be inconsistent for the State to compel jury service and at the same time disqualify unemployed persons from UC for complying. Most employment is not considered an excuse for avoiding jury duty, and unemployment would also likely not be an excuse from jury duty. Indeed, EB claimants are exempt from the work search provision while on jury duty (20 CFR 615.8(g)(3)(i)(A)).

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

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

(1) Able and Available Requirements for BAA-UC

The DOL previously exercised its authority to interpret the able and available requirements in ~~other~~ 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 families with both parents working rises, collecting data under the BAA-UC program to test the existence and magnitude of such a connection is increasingly important. Indeed, much in the same way that providing training to laid-off workers enhances their connection to the workforce by making them more marketable, the DOL wants to born's life, or after placement for adoption, will help workers maintain their connection to the workforce by allowing them time to bond with their children and to develop stable childcare systems while adjusting to the accompanying changes in lifestyle before returning to work. The expanded interpretation of the Federal able and available requirements applies only to experimental BAA-UC and does not extend to any other facet of the Federal-State UC program.~~

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 workers enhances their connection to the workforce by making them more marketable, the DOL wants to test whether providing parents with BAA-UC at a point during the first year of a newborn's life, or after placement for adoption, will help workers maintain or even promote their connection to the workforce by allowing them time to bond with their children and to develop stable childcare systems while adjusting to the accompanying changes in lifestyle before returning to work.

The 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 ~~pay~~ provide income support, under an experimental program, ~~UC~~ to parents who take leave from their employment ~~after the birth or placement for adoption of a~~ 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 ~~because the limited nature of an experimental program will tend to lessen any potential negative effects to the Federal-State UC program or economy while compiling information that allows the DOL~~ to evaluate the following prior to implementation of a permanent program: whether individuals compensated for birth and adoption leave are more likely to return to employment ~~in the long run~~, and, therefore, are more available than those who are uncompensated; the effects on employers whose employees take such compensated leave; ~~and~~ the effects on employers throughout a State who bear the BAA-UC costs; and the effects on the State's UC trust 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 workers' 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 newborn and newly adopted children who wish to take leave will increase their attachment to the workforce. ~~There is some evidence to suggest that providing UC to the parents of newborns and newly-adopted children and others who wish to take family or medical leave will, in the long run, increase their attachment to the workforce. The BAA-UC experimental program is intended to test this proposition.~~ ~~Initially, in~~ In order to gain information on the impact of adapting the UC program to address the needs of such workers, the DOL is defining the experimental program to cover the parents of newborns and newly-adopted children. This class of workers with these parental responsibilities is a small, easily-defined group that can be used to test whether compensating their absence from employment will assist them to maintain, or even improve upon, their connection to the workforce by enabling them to better meet their parental responsibilities. The DOL believes that authorizing States to provide unemployment compensation for parents of newborns and newly-adopted children will produce valuable information for evaluating the program~~, while simultaneously limiting the potential for any negative impact on the UC program and the economy until~~

~~the data can be properly analyżed~~. This information may also serve as a basis for further expanding coverage to assist a broader group of workers to better balance work and family needs.

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

(4) Experimental Program Time Frame and Evaluation

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

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

The Federal evaluation methodology has not yet been ~~established~~ completed. Because States will have broad latitude in developing BAA-UC experimental programs, the ~~evaluation methodology must be designed to accommodate the resulting diversity of programs. The evaluation design will proceed after an adequate foundation can be formed based on State-developed BAA-UC programs.~~ Department anticipates using a case study evaluation design. Some of the issues that may be addresses in the evaluation include: whether workforce attachment for this population changed; whether workers faced barriers to taking advantage of BAA-UC; and, if yes, 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 ~~appropriate~~ 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

~~As part of the Administration's regulatory reform effort, the DOL is proposing a streamlined rule to give States wide latitude in developing BAA-UC experimental programs. These proposed regulations will be the minimum requirements necessary to comport with Federal UC law.~~ DOL is proposing a rule which is not overly prescriptive. This is consistent with the general structure of the UC program whereby 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. A commentary on the model legislation and policy issues to aid States in the development of methods provided for under the proposed rule is also appended (Appendix B) for comment. Both appendices are subject to change based upon comments. They will be issued in final form as a program letter and will not appear in the Code of Federal Regulations.

Description of the Regulation

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

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

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

Subpart C discusses BAA-UC eligibility requirements.

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

Subpart A–General Provisions

Subpart A discusses the purpose and scope of the regulation and defines critical terms. The purpose of the regulation is to establish the opportunity for the State agencies that administer the UC program to ~~pay~~ provide income support, under an experimental program, ~~UC~~ to parents who take leave from their employment ~~after the birth or placement for adoption of a~~ 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 ~~compensation~~ income support to parents who leave their employment to be with their newborns or newly-adopted children. This group was identified by the President as the focal group for the experiment with possible expansion, if warranted, after the experiment has been evaluated. State participation is completely voluntary.

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

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

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

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

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

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

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

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.

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

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, <u>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</u>, 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. In all cases, all other eligibility requirements must be met. For example, deductible income under the regular UC program must also be deducted under the BAA-UC program.

The purpose of BAA-UC is to provide support to new parents on "leave" from employment to be with their newborns or newly-adopted children. The term "leave" implies that the individual will return to the last employer after a designated period. However, f~~F~~or experimental purposes, the DOL will allow States to pay BAA-UC to parents who otherwise leave employment for this purpose or who do not return to employment after approved leave. This will generate data for evaluating how providing compensation affects the connection of these individuals to the workforce. ~~Also,~~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. ~~Consequently, States may make BAA-UC available to individuals who otherwise leave their jobs to be with their newborns or newly-adopted children.~~

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

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

~~Just as under the current UC program, there are no Federal requirements for BAA-UC concerning monetary eligibility, the amount of compensation, or duration. States have full authority and responsibility to make these decisions. States may use the same monetary eligibility requirements and compensation levels used for other claimants or may establish different criteria and compensation levels for BAA-UC.~~

~~States also have full authority and responsibility for determining whether BAA-UC will be socialized among employers (also called "noncharging").~~

~~Drafting Information~~

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

Executive Order 12866

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

However, the proposed rule is not considered and "economically significant" rule b ~~does not require an assessment of anticipated monetary costs and benefits~~ because it will not have an annual effect on the economy of $100 million or more,. ~~The DOL has also determined that the rule, as proposed~~, will ~~have~~ not adversely ~~material~~ impact ~~upon~~ a specific sector of the economy, and that it ~~does~~ 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 will be approximately $ ___ million. The DOL does not know how many States will enact experimental BAA-UC programs. The estimate of the annual aggregate BAA-UC cost of $ ____ million is based on legislative activity and expresses interest by a small number of States. T~~t~~he cost depends upon such factors as the extent to which BAA-UC affects parents' incentives to increase their leave duration and the percentage of leave-takers applying for BAA-UC. The derivation of this estimate begins with the 1997-98 Current Population Survey containing the annual U.S. average number of women in the labor force with a child under one-year old. After this number is disaggregated by State, the likely proportion of leave-takers for newborns and newly-adopted children is determined based on percentages provided in a report by the Commission on Family and Medical Leave, titled *A Workable Balance: Report to Congress on Family and Medical Leave Policies* (April 30, 1996). Other factors used in determining the cost estimate include the percent of leave-takers with employer-paid leave, monetary eligibility rates, and average weekly UC payments.

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

Paperwork Reduction Act

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

Executive Order 12612

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

Executive Order 12988

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

Unfunded Mandates Reform Act of 1995 and Executive Order 12875

This proposed rule has been reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 et seq.) and Executive Order 12875. The DOL has determined that this proposal does not include any Federal mandate that may result in increased expenditures by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. ~~Accordingly, no budgetary impact statement has been prepared.~~

The States have full discretion to decide whether or not to enact a BAA-UC program. See the section titled "Executive Order 12866" for further information on the BAA-UC cost estimate. ~~Based on legislative activity and expressed interest, the DOL~~

~~anticipates that a relatively small number of States will enact experimental BAA-UC programs and, on this basis, estimates that the annual aggregate BAA-UC cost to the States will be between $50 and $87 million. Within this range,~~

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

Subpart B–Federal Unemployment Compensation Program Requirements

Subpart C–Eligibility

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).

§604.23. Should BAA-UC recipients be included in the total numbers of workers that received unemployment compensation?

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

§604.2 What is the scope of the regulation?

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

§604.3 What definitions apply to the regulation?

The following definitions apply to this regulation:

(a) *Approved Leave* means a specific period of time, agreed to by both the employee and employer, during which an employee is temporarily separated from employment and after which the employee will return to work ~~with~~ 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 BAA-UC, does this regulation change the Federal requirements for the unemployment compensation program?

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

Subpart C–Eligibility

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

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

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

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

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

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

~~States may condition eligibility on whether a claimant returns to work after taking leave and may declare an overpayment upon failure of the claimant to return to work. As with regular unemployment compensation, payments of Birth and Adoption unemploy-~~

~~ment compensation must be made as soon as administratively feasible and may not be withheld pending a claimant's return to work.~~

§604.223. Should BAA-UC recipients be included in the total number of workers who received unemployed compensation?

No. BAA-UC recipients should not be included. The inclusion of such recipients would distort the unemployment statistics.

Appendix A

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

Model State Legislation

Section ___. Birth and Adoption Unemployment Compensation.

(a)(1) 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.

(2) An individual is not required to exhaust employer-provided leave prior to applying for compensation under this program.

(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) Any compensation paid under this section shall be consistent with the weekly benefit amount provided to regular UC recipients.

(g) Two years following enactment of this legislation, the States shall issue a report that evaluates the effectiveness of the BAA-UC program.

(h) This section shall not be in effect in any calendar year if the Average High Cost Multiple calculated by the Department of Labor for the State falls below 0.90 for the preceding twelve-month period ending September 30..

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

Appendix B

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. Model State Legislation is provided for the convenience of States that wish to implement a BAA-UC program. However, implementation of BAA-UC will require some legislation on the part of every State seeking to adopt the program.

~~Must the States use the Model State Legislation?~~

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

~~May a State pay UC for other types of family or medical leave?~~ 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 ~~The Department of Labor's (DOL) interpretation of the "able and available" requirements pertains only to the BAA-UC experiment~~ for parents taking approved leave or who otherwise leave employment to be with their newborns or newly-adopted children. Permitting payment of UC for other types of family leave or care would be inconsistent with this experimental program.

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

No. The Department believes that such a provision would be very difficult to enforce. In addition, BAA-UC is designed to provide the time and financial support to address the needs that accompany the introduction of a new child into the family.

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

No. The DOL has no authority to impose a solvency standard on the States. However, the DOL believes prudent decision makers in State will examine the State's solvency position and projected taxes and benefit payments under current programs prior to a decision to adopt BAA-UC legislation. Adoption of BAA-UC should not jeopardize the ability of a State to pay benefits to those eligible under current law. The Model State Legislation includes a provision that will suspend the availability of the BAA-UC program in any year in which that State's solvency falls below a specified level.

Monetary Qualifications and Benefits

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

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

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

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

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

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

~~income are, or should be, deductible. For example, some leave payments which are not normally deductible under State law may cover costs of birth and adoption leave.~~

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

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

Period of Eligibility

When may BAA-UC benefits begin?

Under Section 604.21 of the proposed regulations, parents may receive BAA-UC only during the one-year period commencing with the week in which the child is born or placed for adoption. For example, an individual taking leave in the 51st week following birth or placement for adoption, would be eligible for BAA-UC only for weeks 51 and 52. Periods preceding the week of birth or placement for adoption are not compensable. States are free to reduce the one-year period. ~~For example, a State may choose to limit receipt of BAA-UC to the first 12 weeks following birth or placement.~~

How many weeks of BAA-UC may individuals receive?

~~States are free to determine this.~~ The Model State Legislation ~~establishes~~ 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 (i.e., BAA-UC does not guarantee job retention;~~ not all approved FMLA leave may be compensable under the BAA-UC program~~ BAA-UC only covers leave resulting from birth or adoption).

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 ~~are free to determine whether to compensate this week and, if they do, whether the individual will receive the full weekly amount of BAA-UC~~ or ~~whether to~~ prorate the weekly amount to reflect only periods following birth or adoption. If the amount is prorated, the State may pay the remaining balance for the last partial week if the individual is still on leave.

Must the individual serve a waiting period?

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

When is a child considered "placed" for adoption?

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

Other Eligibility Issues

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

The answer to both questions is "yes." States implementing BAA-UC must allow both parents, if otherwise eligible, to receive BAA-UC concurrently or consecutively. A State may not prohibit payment of BAA-UC simply because the other parent is taking leave for the same purpose. A State law which does so is inconsistent with Federal law because the eligibility of one parent will be determined based on whether the other parent is receiving UC. Specifically, in a 1964 conformity decision involving the State of South Dakota, the

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

Must BAA-UC apply to individuals employed by all ~~covered~~ employers 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, therefore, limit BAA-UC based on employer size. ~~Issues concerning size of firm requirements may arise because the FMLA does not cover individuals employed by employers with fewer than 50 employees and there may be a desire to parallel the FMLA provisions. However, paralleling the FMLA in this case would not be consistent with Federal UC law~~.

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

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

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

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

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

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

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

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

Individuals may only receive Disaster Unemployment Assistance (DUA) when their unemployment is caused by a disaster as provided in 20 CFR Part 625. However, if they meet their State's Birth and Adoption UC provisions, then they will satisfy the availability requirement at §625.4(g), and so may qualify for DUA. For example, an individual who is unemployed due to a major disaster may later give birth. If this individual satisfies the BAA-UC requirements in the State's law, she may receive DUA.

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

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

Financing costs of Birth and Adoption UC

~~Must~~ Should BAA-UC costs be socialized among employers?

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

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

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

Administrative Costs

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

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

Reporting

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

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

What are the reporting requirements?

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

Attachment 2

Experience Rating and Noncharged Benefits

Experience Rating

Section 3303(a)(1) of the Federal Unemployment Tax Act (FUTA) requires, as a condition of the additional tax credit[1] against the Federal Unemployment Tax, that no reduced rate of contributions (i.e., State unemployment tax)[2] be permitted "except on the basis of his [the employer's] experience with respect to unemployment or other factors bearing a direct relation to unemployment risk . . . ."

Thus, FUTA limits the conditions under which States may reduce an employer's contribution to the State's unemployment fund, that is, the fund from which it pays unemployment benefits. The limitation is that the reduction must be on the basis of the employer's "experience with respect to unemployment or other factors bearing a direct relation to unemployment risk . . . ."

Experience rating has three purposes. The first is to ensure the fair allocation of the costs of unemployment benefits among employers in the system. Under an approved experience rating system, employers who experience greater unemployment among their workers will generally be assigned higher contribution rates, thereby contributing more to the system. The second purpose of experience rating is to promote employment stability by giving employers an incentive to reduce worker turnover. Insofar as employers can control their business operations, they can reduce layoffs and lower their contribution rates. A third important purpose of experience rating is to encourage employers to participate in the benefit payment and appeals process, thus helping to ensure benefits are paid only to claimants entitled to receive them.

Noncharged Benefits

Most State experience rating systems base the reduction of an employer's unemployment

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[1]There are two credits against the Federal Unemployment Tax, for which almost all private sector employers are liable. The tax equals 6.2 percent of the first $7,000 in wages for each covered employee. The "normal" credit equals the amount of the employer's contribution to the State unemployment fund, up to 5.4 percent of the 6.2 percent tax. These contributions finance the payment of benefits from the State's unemployment fund. If an employer's contribution is less than 5.4 percent, the "additional" credit equals the difference between the amount of that contribution and 5.4 percent. Thus, the two credits together total 5.4 percent against the 6.2 percent tax. The net .8 percent tax covers the administrative costs of the Federal and State governments.

[2]That is, reduced from the "standard" rate of 5.4 percent.

contribution upon how much benefits are "charged" to that employer, that is, the amount of unemployment benefits for which the employer is deemed responsible. Thus, an employer will be able to reduce its unemployment contributions to the extent to which it can limit the amount of unemployment for which it is responsible.

However, all benefits paid on the basis of service for an employer are not necessarily charged to that employer. This may occur where the employer is not considered responsible for the claimant's unemployment. Thus, the benefits paid to the former worker will not affect the amount of the employer's unemployment contributions. Some examples of noncharged benefits are payments to workers in approved training, erroneous benefit payments that are not recovered, and payments to workers who voluntarily quit to follow a spouse to new employment. The costs of these benefits are distributed to all employers.

Non-charging benefits for individuals on family leave

An employee's unemployment resulting from leave for birth or adoption may reasonably be considered to be unrelated to the employer's "experience with respect to unemployment or other factors bearing a direct relation to unemployment risk . . . ." This is because the leave was initiated by the employee, not the employer. ETA could, therefore, take the position that a State may noncharge benefits paid to such individuals.

However, ETA might be unable to successfully require States to noncharge benefits paid to individuals on leave for these purposes. Although ETA has in the past told States that they may not noncharge benefits on certain bases, ETA has never required that States noncharge benefits under any conditions. This is because the FUTA experience rating provisions limit the bases under which a State may **reduce** the unemployment contributions of its employers. FUTA does not, however, limit the circumstances under which a State may **increase** these contributions. Thus, since the charging of benefits will tend to increase an employer's unemployment contributions, there appears to be no basis in FUTA for ETA to require non-charging.

However, it is likely that no State providing unemployment benefits for birth or adoption leave would charge these benefits. Legislation considered so far would noncharge family leave benefits. The Massachusetts and Vermont bills specifically provide for non-charging. Maryland and Washington each noncharge benefits paid to individuals voluntarily leaving work for good cause, which likely would result in non-charging family leave benefits.

Attachment 3

Insert on page 23 of the NPRM in place of first full paragraph:

The States have full discretion to decide whether or not to enact a BAA-UC program. The annual aggregate BAA-UC cost to the States is estimated to be between $53 and $88 million. Several of the factors within the estimate are somewhat uncertain, so ranges were used for these factors, resulting in a range in the overall estimate. The extent to which parents increase their leave duration and the percent of leave-takers that actually apply for BAA-UC are two examples of these range factors.

Based on legislative activity and expressed interest, four States were initially included in the estimate: Massachusetts, Vermont, Maryland, and Washington. These four States' Average High Cost Multiples (AHCM) were either at or above the US average of 0.94 in 1998. (The AHCM is DOL's standard measurement of fund adequacy.) Because of their relatively high AHCM's, solvency may not be an overriding concern for these States when deciding whether to adopt the program. With the exception of Maryland, these States also have high Recipiency Rates. To account for possible future interest, New Hampshire and Delaware were also included. Although they have not introduced legislation, these two States share some of the same characteristics as the above four States. They are both located near one of the already-interested States, they both have Democratic governors, and their AHCM's are among the highest in the country. Although legislation has also been introduced in New York, the State's AHCM for 1998 was the lowest of any State, and therefore it was not considered likely to adopt the program.

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

Birth rate data was then combined with data on self-employment by age to achieve the proportion of these employed women who are likely to be covered by UI. Specifically, the article "Characteristics of Self-employed Women in the United States" in the March 1994 BLS Monthly Labor Review provided a breakdown [Table 4] of self-employment rates by age in five and ten year increments. The April 1999 *National Vital Statistics Report* [Vol. 47, No. 18] provides a breakdown of birth rates by age in five year increments up to age 50. The number of births to women over fifty was too small to compute an age-specific birth rate. The average self-employment rate for women under age 50 was weighted by the product of birth rates and number of employed women. The source of the number of employed women by age was BLS's

Employment and Earnings report, published in January of 1999. Table 3 of this report provides the employment status of women by age in five year increments. 95% of employed women with children under one-year old were not self-employed, and thus would be covered under the UI system.

The next part of the estimate determines the percentage of covered employed women with children under one-year old who would actually take leave to care for the newborn or newly-adopted child. 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) was used, hereafter referenced as the "FMLA study." Two main features of this proposal are different from those in the FMLA study. On one hand, this proposal has a broader scope, because those who work for companies with fewer than 50 employees will be able to receive UI benefits under this proposal, whereas they would not be covered under the FMLA. On the other hand, this proposal is more limited because it only provides benefits to those taking leave to care for a newborn or newly adopted child. The FMLA study provides some categorized data that was manipulated to account for these two factors. The proportion of women who would take leave was calculated by taking the weighted average of women leave takers for newborn or adopted child care between FMLA-covered and non-covered respondents, and dividing that by total women who had the potential to take leave for newborn care (leave takers + non-leave takers for newborn or adopted child care). 97% would take leave under existing conditions. Furthermore, to account for added leave taking because of the UI benefit the high-range percentage was increased by 1% to 98%.

The ratio of men to women was then applied to calculate the number of men who would take leave. This ratio was interpolated from the FMLA study. Tables 5.B and 5.C provide the percentages of men and women who took leave for the care of a newborn, adopted or foster child. These percentages, weighted by covered/non-covered worksites were used to calculate the total number of men (numerator) and women (denominator) leave takers to care for a newborn, foster, or adopted child. The ratio from the FMLA study, 82%, was used as the low range for this factor. This already assumed a small increase in leave takers because it was applied to the number of women leave-takers adjusted for the UI incentive. The high range, 84%, assumed an additional 2% of men would take leave due to the incentive. The result was the total number of UI-covered leave takers in the State.

The leave-takers were then divided between those receiving full benefits from UI and those receiving partial benefits. Tables 5.O and 5.P in the FMLA study show the percentages of leave takers at covered and non-covered work sites who are fully paid, partially paid, and unpaid under FMLA. Those receiving full payments would not be eligible for UI. Those unpaid would receive full UI benefits, and those partially paid would receive partial benefits from UI. Weighting the averages between covered and non-covered, 35% are unpaid in the FMLA study and 21% are partially paid. It was then assumed that 5-10% of those 44% currently in the fully paid category would be shifted to either the partial or unpaid category by employers because of the alternative payments from UI. Based on several studies on UI takeup rates, it was assumed that 60-70% of those eligible would actually apply for UI. Each State's average monetary eligibility rate for the past 3 years was then multiplied by the number applying in order to get a final estimate for UI recipients for newborn or newly fostered/adopted care.

Table 5.D and 5.E of the FMLA study provide details about the lengths of leave at covered and non-covered worksites. First, the weighted averages of the weekly durations for the care of a new child was calculated between covered and non-covered worksites. Then the weighted average of these weekly durations resulted in an average duration of 4.4 weeks. If the State has a waiting week for UI, that week was subtracted. Then, a small number of weeks was added to account for the fact that UI payments provide an incentive to increase leave duration. There are several studies that examine the relationship between increased takeup rates and the average duration of UI claims. In chapter 7 of Unemployment Insurance in the United States, Paul T. Decker summarizes these studies and concludes that "the lengthening in average unemployment spells is likely to be in the range of 0.5 weeks to 1.5 weeks for every 10 percentage-point increase in replacement rates."[p.296] Since BAA-UC would increase replacement rates by 50 percentage points (i.e. from zero to about 50%), that range would translate to 2.5 weeks to 7.5 weeks. Reducing those estimates by the ratio of average leave duration to overall average UI duration yields a range of additional weeks of 0.8 to 2.4 for unpaid leave takers. Partially paid workers were assumed to have an initial duration of half (2.2 weeks) that of unpaid leave-takers, and also to increase their duration by half of the range of unpaid workers: 0.4 weeks to 1.2 weeks.

The final factor in the estimates was the average weekly benefit amount (AWBA). The last 12 month average of each State's AWBA as of March 1999 was the starting point. Then, the proportion of men to women was again employed to adjust this benefit amount. In the regular UI system, the proportion of men to women is about 57 to 43, whereas in the FMLA study's sample of leave takers for newborn care the ratio was around 45 to 55. Because of this difference, and because of the lower average benefit amount for women compared to men, each AWBA was adjusted down by 2%. The AWBA was multiplied by weeks of benefits to give the final estimated benefit cost.

This estimate represents the initial annual impact on State trust funds. Over time, it is assumed that this impact would be shifted to employers in the form of higher UI taxes, either through automatic or legislated tax increases. How quickly the impact is shifted depends on whether the costs are charged to individual employers or noncharged, how responsive the State's tax system is, and whether or not a specific tax increase is enacted to finance BAA-UC.

Administrative costs were not included in the cost estimate. It was assumed that ongoing costs due to increased workloads would be funded through the normal contingency funding process just as are increased workloads due to any other cause. One-time implementation costs may be also be funded if contingency funds are available. If not, the State would have to absorb the cost by shifting resources from other activities. It is unlikely that implementation costs will exceed $1 million per state.

Daniel I. Werfel
09/20/99 09:44:28 AM

Record Type: Record

To: See the distribution list at the bottom of this message
cc:
Subject: Re: Comments on Birth and Adoption NPRM

Written responses from DOL on the Birth and Adoption Rule. Please review and let me know by this afternoon whether you feel a staff level meeting is needed to go through some of these with DOL. Thanks.

---------------------- Forwarded by Daniel I. Werfel/OMB/EOP on 09/20/99 09:43 AM ---------------------------

Michael N APFELBAUM <MAPFELBAUM@DOLETA.GOV>
09/17/99 04:35:58 PM

Record Type: Record

To: Daniel I. Werfel/OMB/EOP
cc: See the distribution list at the bottom of this message
Subject: Re: Comments on Birth and Adoption NPRM

Attached is DOL's response to your comments. If you have any questions, please e-mail me or call at 219-7857, Ext.146.

Thanks.

>>> <Daniel_I._Werfel@omb.eop.gov> 09/02 9:22 AM >>>

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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Responses to OMB BAA-UC Issues
09/17/99

Below are OMB/EOP comments on the Birth and Adoption proposed rule with DOL responses. The Questions remain in the format in which they were submitted by OMB, although the specific comments are now numbered. DOL responses are noted as such and are in bold type.

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.

DOL RESPONSE: The President specifically directed that the regulations "enable States to develop innovative ways of using the Unemployment Insurance (UI) system to support parents on leave. . . ." To that end, a set of principles (see Attachment 1) was developed and approved. Please note that the first principle is to give States maximum flexibility. States have this flexibility now, and we think that they will be more responsive to BAA-UC if that flexibility is retained.

DOL has no "preferences" regarding duration, benefit amounts, or other aspects of the BAA-UC program. The model legislation reflects elements present in the four State proposals. Finally, the introduction of other factors in the BAA-UC experiment, such as

means-testing, would be in conflict with Federal UI law (see NPRM page 18).

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?

DOL RESPONSE: The purpose of the discussion regarding those situations of "minimal tests" was not to force BAA-UC into one of the categories, but to show situations, other than the BAA-UC experiment, where DOL has exercised its authority to interpret the able and available requirements. BAA-UC does not fall into any of the previously defined " minimal tests" categories. DOL believes that the "open-ended, permissive regulatory approach" is consistent with principle #1 as approved (see Attachment 1).

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.

DOL RESPONSE: A possible re-draft would be the following:

> **"The purpose of the able and available requirement 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 newborn and newly-adopted children who wish to take leave will, in the long run, increase their attachment to the workforce. Initially, in order to gain information...."**

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.

DOL RESPONSE: We agree that differences exist in what these programs require but believe that, as they are fundamentally different programs, it is entirely appropriate for them to have different requirements. Welfare is based on need, while UI is an insurance program based on employer contributions for coverage of the risk of unemployment.

Principle # 3 states that the rule will maintain the nature of UI as an insurance program (see Attachment 1).

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.

DOL RESPONSE: See Attachment 3; as indicated therein, DOL is including a more detailed analysis in the Preamble to the regulation.

Also, we have no concrete information about the impact of BAA-UC on employer-paid benefits and think that speculation in any particular area outside the basic premise of the rule would be inappropriate, although we do recognize in the cost estimate that a substitution effect may occur. DOL does not currently evaluate the impact of changes in employer taxes or claimant benefits on employer-paid benefits; consequently, doing so for BAA-UC would seem unusual.

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.

DOL RESPONSE: We will clarify, on page 10, paragraph (B)(1), after the last sentence, that "BAA-UC is an experiment being conducted within the regular UC program."

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?

DOL RESPONSE: See response to # 6 (BAA-UC is an experiment being conducted within the Federal law parameters of the regular UI program). However, States have flexibility under the BAA-UC experiment, as currently is the case in UI, to determine eligibility

requirements, benefit amounts and duration. States may also currently set different eligibility criteria for different groups of people. This flexibility is reflected in principle #1 (see Attachment 1) and is noted on page 20 of the draft NPRM:

Just as under the current UC program, there are no Federal requirements for BAA-UC concerning monetary eligibility, the amount of compensation, or duration. States have full authority and responsibility to make these decisions. States may use the same monetary eligibility requirements and compensation levels used for other claimants or may establish different criteria and compensation levels for BAA-UC.

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.

DOL RESPONSE: We will add OMB's suggested language to the first full sentence on page 11, "and the effects on the State's UC trust fund" (see response to #17).

Also, the following question and answer will be added to the "Commentary":

Q. Will these regulations undermine fund solvency?

A. No. Experience shows that States will not enact changes without assessing the effect on its unemployment fund's solvency. 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 Unemployment Compensation program.

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.

DOL RESPONSE: The Federal government has no authority upon which to require noncharging. Experience rating provisions of the FUTA restrict circumstances for reducing employer rates; there are no restrictions for increasing rates. (See Attachment 2 for a thorough explanation of experience rating and noncharging as they relate to BAA-UC. Also, see Attachment 1, principle #1, regarding State flexibility.)

To ensure States are aware of the potential for noncharging BAA-UC payments, the last sentence of the 2nd paragraph on page 20 of the Preamble will begin a new paragraph and

the following language will be added:

can we say we encourage this? Put in model leg

> **States often noncharge UC when the employer is not responsible for the worker's unemployment. Since the employer is not responsible for the unemployment compensated under the BAA-UC program, States may also choose to noncharge BAA-UC payments.**

Finally, we note that States already have identified noncharging as an issue. All of the first four States introducing legislation in this area would noncharge the benefits.

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.

DOL RESPONSE: Research suggests that parental leave is beneficial for early childhood development. In terms of the eligibility period, we selected 1 year to define a newborn because it correlates with the current benefit year under the UI program. Although the President did refer to the "first few weeks of life," that would eliminate a large number of adoptive parents. We also recognize that it may be necessary for parents to make a variety of arrangements that require them to take leave during the first year of their child's life.

adoption – new parents only of newborns?

With respect to benefit duration, we anticipate that States will likely limit benefit duration to twelve weeks. There is no authority in Federal UI law to limit benefit duration.

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.

DOL RESPONSE: Danny Werfel is handling this.
Specific Comments

12) 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.

DOL RESPONSE: The 30-day comment period was chosen because of concerns of members of Congress that States be able to introduce legislation in their next legislative

sessions. For most States, those will begin January 2000.

13) 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?

DOL RESPONSE: After the sentence on page 6, "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," DOL will add:

"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 identify and 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 parents' long-term attachment to the workforce."

14) 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.

DOL RESPONSE: The discussion that follows after paragraph (B)(1), on page 10, should be changed to read as follows:

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

(1) Able and Available Requirements for BAA-UC

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

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 workers enhances their connection to the workforce by making them more marketable, the DOL wants to test whether providing parents with BAA-UC at a point during the first year of a newborn's life, or after placement for adoption, will help workers maintain or even promote their connection to the workforce by allowing them time to bond with their children and to develop stable childcare systems while adjusting to the accompanying changes in lifestyle before returning to work.

The 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 care giving requirements can be identified and met, and 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.

Parents of newborns and newly adopted children are a relatively small and easily identifiable group. An additional factor is that a significant portion of this group are younger workers whose attachment to the workforce may have a greater need to be strengthened than older groups. Research demonstrates that younger workers are also less likely to receive wage replacement for periods of missed work than older workers. (See, A Workable Balance: Report to Congress on Family and Medical Leave Policies (U.S. Department of Labor) Aug. 5, 1998, at 110.)

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."

15) 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 page10:

"...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.

DOL RESPONSE: The response to #14 above, which incorporates OMB's suggestions, addresses these issues.

16) 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?

DOL RESPONSE: Our estimate is that six States may enact legislation during the experimental stage; hence, the Paperwork Reduction Act requirements, which apply only when 10 or more respondents affected, are not applicable and reporting provisions are not included in the NPRM. When States enact legislation, statistics reported for the regular UI program will include all counts related to BAA-UC. To identify only BAA-UC activity, DOL will use its "Quick Response Report" (report used when collections involve fewer than ten States) under the standard reporting requirement authority in section 303(a)(6) of the Social Security Act. This report provides for the collection of up to 12 items of information. It is anticipated that data collected will include among other items, initial claims, weeks claimed, weeks compensated, and benefits paid. The reporting instructions will be issued to States through Regional Offices when a State enacts BAA-UC.

17) 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."

DOL RESPONSE: Suggestion accepted: language will be added.

18) 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.

DOL RESPONSE: The experimental approach would minimize the impact of any *unexpected* consequences. Language in the NPRM will be changed accordingly. The Department further believes that a negative for one stakeholder may be a positive for another (*e.g.*, increased taxes to pay for additional benefits). Also, see response to #5.

19) 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."

DOL RESPONSE: Language will be changed as indicated in response to #3.

20) 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.

DOL RESPONSE: The changes to be made in response to #3 and the discussion in #14 address this issue.

21) 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.

DOL RESPONSE: See response to #s 5 and 18.

Our experience is that individuals who will respond to NPRMs regarding UI are sufficiently knowledgeable that an overview of the UI program is unnecessary.

22) 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).

DOL RESPONSE: This paragraph will be deleted. The issue is addressed in the response to #14.

23) 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"

DOL RESPONSE: We agree. The first line will be deleted and the paragraph will begin with the current second sentence.

24) 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.

DOL RESPONSE: The DOL plans to conduct an evaluation; however, there is no vehicle by which States may set up a control group that will not receive benefits. Federal law prohibits the introduction of any eligibility test unrelated to the fact or cause of an individual's unemployment. Setting up a control group of eligible persons whose claims are denied solely for the purpose of evaluation introduces factors unrelated to the fact or

cause of an individual's unemployment and would, therefore, be in violation of Federal UI law.

25) 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.

DOL RESPONSE: Please see response to #23 above regarding the final rule.

not good enough

The time frame and evaluation criteria were agreed upon earlier. Additionally, an evaluation of an experiment cannot take place until and unless there is some experience to evaluate. Therefore, evaluation cannot take place at the time of implementation.

Evaluation (likely through contracts with vendors) will take place when four States implement the program but data collection will begin upon implementation. Please see response to #16 regarding data collection.

The Model Language provides for a termination date upon expiration of authority from DOL.

26) 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?

DOL RESPONSE: PRA will apply only if a sufficient number of States participate in the experiment to fall within the PRA rules. Therefore, we don't think we should state that the information will be published in the Federal Register when, indeed, it may not be necessary. We will, however, delete "if appropriate" and add "if subject to the Paperwork Reduction Act."

27) 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".)

DOL RESPONSE: Since the rule is an *interpretation* of law, it does not contain any performance-based requirements. Indeed, all performance-based requirements for the regular UI program would apply to BAA-UC. Our characterization used standard language for describing the Federal-State UI program and we would be reluctant to delete it. However, we have no objection to suggesting that the rule not be prescriptive. We will rewrite the paragraph as follows:

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

28) 8p. 14, last paragraph. Suggest publishing the appendices with the final regulation as well (even though they are not codified).

DOL RESPONSE: No. The appendices are aids for the States and are not regulatory. The issuance of such Qs & As and model legislation through Departmental program letters is standard procedure. These program letters are published in the Federal Register.

does this mean no comment by public to this model leg?

Additionally, including the appendices in the final regulation would require a regulatory change if a change is made to either of the appendices. This could limit the Department's ability to deal flexibly with State innovations. It may, for example, be desirable to modify the draft language if States improve on it or address areas which we failed to consider. Certainly additional questions will arise after the regulation becomes final and the State's commence the experiment.

29) 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)

DOL RESPONSE: See response to # 10 above.

30) 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)

DOL RESPONSE: Please see response to # 1 regarding experiment parameters.

States may opt to include individuals who leave employment (not approved leave) in the experiment. We will add "However," to the beginning of the 3rd sentence, 2nd paragraph on page 19 to better state that, for experimental purposes, States may also pay UC to individuals who leave work due to the birth or adoption of a child.

31) 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?

DOL RESPONSE: Yes. State eligibility requirements for UI must be based on the "fact or cause" of the individual's unemployment. See page 18 of the draft rule for an explanation of the Federal requirement. Whether the individual is "on approved leave" or permanently separated relates to the cause of the individual's unemployment. However, the size of the employer is not related to whether an individual is unemployed, nor is the receipt of UC by a spouse.

32) 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.

DOL RESPONSE: We do not think the issue is "prejudged" as the draft only says it " could be seen as unfairly excluding parents." Moreover, rationale is needed to support the Department's position allowing States to pay individuals who actually lose their jobs when caring for newborns/newly adopted children. This flexibility is consistent with Principle #1 (see Attachment 1). Also, the Department believes the mere fact that this is raised in the Preamble will result in comments. The purpose of the NPRM is to solicit comments on the entire content of the proposed rule.

33) 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?

DOL RESPONSE: The establishment of overpayments is routine in the UI program. Overpayments are recouped through repayment by the claimant or through a reduction in benefits during subsequent benefit periods. About 50 percent of established overpayments are recovered. We have no evidence concerning whether BAA-UC overpayments will be more or less likely to be recovered.

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

DOL RESPONSE: Suggestion taken. The section will be deleted.

35) 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.

DOL RESPONSE: See Attachment 3; as indicated therein and suggested in comment #5, DOL is including the more detailed analysis in the preamble to the regulation.

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

DOL RESPONSE: No additional data collection is required by this rule. Consequently, inclusion of the evaluation component is not appropriate in this NPRM. See response to #16 above.

37) 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."

DOL RESPONSE: Suggestion to delete the sentence is accepted. Attachment 3 will be inserted in the place of the first paragraph.

38) 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.

DOL RESPONSE: DOL's revised estimate is still under $100 million (see Attachment 3). We agree that if the cost estimate exceeds $100 million the section will need to be revised.

39) 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?

DOL RESPONSE: The definition of placement does not parallel the FMLA. The FMLA and BAA-UC are unrelated, therefore, definitions may differ.

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Long-term foster parents who meet all the other qualifying requirements may be eligible

for BAA-UC in a State if they file for adoption. However, nothing in the regulation prevents States from excluding this class. We would expect the experiments to provide information about those groups who benefit most/least from BAA-UC and therefore believe the rule should be as broad as possible.

HHS is reviewing the NPRM. (See item #11.)

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

DOL RESPONSE: Suggestion accepted.

41) 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.

DOL RESPONSE: Please see responses to #1 & #9.

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

DOL RESPONSE: Under most State laws, employers must post information about UI. The value of the experiment may be undermined if individuals are unaware of their rights. Finally, there is concern within the UI system that individuals already fail to file because of lack of knowledge about the system.

43) 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]...

DOL RESPONSE: Suggestion accepted.

44) 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.

DOL RESPONSE: We don't believe this is necessary, but if you can be more specific about which questions, we are willing to consider.

45) 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?

DOL RESPONSE: All States must enact legislation in order to implement BAA-UC. Language will be added to the 2nd question in the Commentary to clarify this issue.

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

DOL RESPONSE: Suggestion taken.

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

DOL RESPONSE: It would be helpful to know what in the rest of the explanation is confusing in order to clarify. The answer was already simplified from standard " boilerplate" used to discuss compensable waiting weeks and Federal reimbursement for extended benefits. We will substitute the term "period" for "week" in the first full sentence of the answer so that it is consistent with the question.

48) 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?

DOL RESPONSE: There is no authority under which concurrent compensation can be disallowed. Our justification is the Secretary of Labor's Decision cited on page 38 of the NPRM.

49) 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.

DOL RESPONSE: "Covered" employers refers to employers covered by the UI program–not FMLA. The question will be modified to read "Must BAA-UC apply to individuals employed by all employers subject to State UI law?"

50) 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.

DOL RESPONSE: The first suggestion will be taken by deleting the second full sentence and modifying the following sentence in the answer to read:

> **No. However, there are compelling reasons for doing so. Although many employers may grant leave, others may not. (Rest same...)**

Regarding the 2nd suggestion, we speak specifically about UCFE, UCX, DUA, EB and trade programs in our answer. There are no other programs. We will replace "benefit" with " unemployment" in the question for clarification.

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

DOL RESPONSE: See response to #14.

Attachment 1

PRINCIPLES FOR "BIRTH AND ADOPTION UC" RULES

1. The rules should be minimal - leaving as much flexibility to States as possible. Reasons:

* The purpose of the rule is to "fence in" the exception to the availability requirement, not regulate every aspect of the program.

* The less DOL regulates, the fewer issues there are that become susceptible to legal challenge. For example, if we limit duration to 12 weeks, somebody could challenge why DOL does not permit payment of 14 weeks.

* States, which might otherwise be indifferent to the rule, could react negatively if DOL regulates eligibility since States view eligibility as exclusively their prerogative.

* The approaches in MD, WA, VT and MA differ significantly. The rule should accommodate the full range of proposals.

* The greater the States' flexibility, the greater the chance of enactment as States can make adjustments to obtain enactment.

2. Take the President's statement at face value. For example, since the purpose is to spend time with new children, the rule will only authorize payment of UC to parents who are taking time off to be with these children.

3. Maintain the nature of UI as an insurance program. Under the rule, parents will be insured for jobless periods they spend with new children. Currently, States may not introduce eligibility factors unrelated to the fact or cause of unemployment, and this principle should be preserved. For example, whether the other spouse is receiving (or has received) parental UI is unrelated to the insured's unemployment as is the household income. These types of provisions would continue to be prohibited.

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FAX TRANSMITTAL

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Date: September 22, 1999 (10:47AM)

Subject: Congressional Letter to POTUS on DOL Regulation on UC and Family Leave

Attached is the incoming letter to which DOL proposes to respond (see LRM CJB105).
Thanks.

210460

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

2181 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6100

July 6, 1999

The Honorable William J. Clinton
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. President:

We write to express our strong opposition to your proposal to use America's unemployment compensation funds to provide paid family leave benefits to employed Americans. We oppose your effort to unilaterally alter laws enacted by Congress and drastically change the unemployment system that provides critically needed funds to sustain millions of unemployed workers.

The unemployment compensation and the family leave laws serve different and incompatible purposes. Unemployment compensation laws protect workers who lose their jobs when an employer no longer has work available. Family leave is for workers who have jobs but choose to take time off for personal medical reasons. We believe burdening the unemployment compensation trust fund with family leave benefits will financially and administratively jeopardize the unemployment compensation system and those whom it sustains.

Historically, Congress has been required to bail out numerous state unemployment compensation systems. From 1973 to 1975, Congress extended loans to 25 states that faced insolvent unemployment insurance funds. From 1980 to 1982, Congress was forced to loan monies to 32 states that were insolvent. At the peak of borrowing in 1983, the federal government extended loans to states totaling $13 billion. After 1989, the situation deteriorated again. In 1990, 1991, and 1992, outlays surpassed unemployment insurance taxes by $3 billion, $10 billion, and $8 billion, respectively.

Currently, 22 states have flunked the solvency test recommended by the Department of Labor. Moreover, the Department of Labor has published a report warning that at current reserve levels 25 to 30 states would need to borrow $20 - $25 billion in order to provide unemployment benefits, if an economic downturn like the 1980-82 recession occurs. During the past two years, Department of Labor officials have been outspoken in expressing concern that states have failed to adequately replenish their unemployment compensation funds, during the present strong economy.

History has demonstrated that unemployment compensation funds are volatile and not as flush as some would have us believe. Even the Department of Labor expresses concern about the continued solvency of state unemployment compensation funds. We believe that a meaningful review must occur before raiding trust funds intended for the safety and well-being of this nation's unemployed. Let us not pit the employed and unemployed workers against one another for monies intended for the unemployed.

We urge you to reconsider your policy or, at the very least, work with Congress to debate legislative proposals in the proper forum. Your effort to unilaterally alter a 64-year-old statute is unsustainable.

Sincerely,

Bill Goodling

BILL GOODLING
Chairman

Cass Ballenger

CASS BALLENGER
Chairman, Subcommittee on Workforce Protections

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