



UNITED STATES
DEPARTMENT of LABOR

GRACE A. KILBANE

Director, Unemployment Insurance Service

200 Constitution Ave., NW
Room S4231
Washington, DC 20210

Phone: 202-219-7831
Fax: 202-219-8506
E-Mail: Kilbaneg@dola.gov

John Frazier, DOL
693-0051

Chuck Marr, NEC

Mark McClellan, Treas
Gus Fauscher, Treas

Becky Blank, CEA
Bert Huang, CEA

Emil Parker, HHS

Barry White, OMB
Larry Matlack, OMB
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Paid-Leave Plan for the Birth or Adoption of a Newborn

Thanks to the Family Medical Leave Act, signed into law by President Clinton on February 5, 1993, millions of Americans can take unpaid leave from their jobs (up to 12 weeks per year) to care for an infant after birth or adoption -- and know that a job will be waiting for them when they return. But many of those workers are unable to take the full amount of FMLA-protected time they need, because they simply can't afford to go that long without a paycheck. And other workers who, although not protected by FMLA, have access to unpaid leave can face the same dilemma.

To address this obstacle, the Administration could propose the creation of a New Parent Paid Leave Plan, to provide eligible parents with partial wage replacement for up to six weeks. Careful consideration needs to be given as to whether this program would cause employers to cut their benefit plans, or decide not to offer new benefits. / *

Design elements of a workable program would include:

Income eligibility: Eligibility to receive funds would be tied to income. The simplest approach would be to set a family income cap -- only parents with family earnings below a set amount would be eligible to receive new-parent paid leave. An alternative but more complicated approach would be to vary the benefit amount by family income.

Pros: - Assists the families that are most likely to face a financial barrier to taking family leave for a newborn/adopted infant.

- Limiting eligibility to workers protected by the FMLA would exclude those most likely to benefit from such a program.

Workforce attachment:

1. Prior to receiving benefit: New parent paid leave would be available to those qualifying parents who are authorized to work in the U.S. and have been in the workforce --- part time or full time -- for each of the fifty-two weeks prior to giving birth/adopting.

Pros: - Funds available to all working parents, regardless of FMLA coverage
 - Links eligibility to connection to the workplace and to the concept of wage replacement.
 - One year requirement demonstrates pre-pregnancy workforce participation.

- Minimum standard for amount of time in the workforce reflects FMLA concept and excludes from eligibility those whose workforce participation was minimal.

- If UI administers the program, they will have access to employment information for all UI-covered workers

Cons: - If UI administers the program, an alternative method of confirming eligibility would be necessary for non-UI covered workers (e.g., self-employed, independent contractors, etc.) -- for example, proof of receipt of wages during the time period. This would add cost to the proposal.

- If UI administers the program, it may be simpler if the eligibility requirement is the same as for UI - work in roughly 20 of the preceding 52 weeks. (Note, however, that states have discretion to have additional UI qualifying requirements.)

Note: If data indicates that workers most likely to need paid leave have generally worked for less than one year, we should change the one-year requirement as appropriate.

2. After receiving benefit: Workers could receive benefits regardless of whether they intend to return to their job, or whether they in fact return.

Pros: - Eligibility based on return to employment or the workforce would require a penalty/recovery scheme for those who -- for whatever reason -- fail to return to work in a timely manner.

- Commission data indicates that lower income workers, the ones most likely to need wage-replacement, are the least likely to return to work following the birth or adoption of an infant.

Cons: - Parents who voluntarily leave their jobs to care for newborn/adopted infants have presumably decided they are not financially dependent upon their wage, and therefore do not need a wage replacement benefit. (The lower any income requirement is set, the less this problem exists -- fewer eligible parents will be financially able to quit their job.)

Benefit duration and timing: Benefits would be available **only** for the first six weeks following birth/adoption. A worker with access to employer-paid leave who also wanted to participate in federal paid leave would have to use the federal benefit before using employer-paid leave.

Pros: - Simpler to administer
 - Minimizes disincentives on employers who might otherwise provide benefits or more generous benefits.

Cons: - To the extent that an employer benefit plan limits post-pregnancy use of sick leave to a period immediately following birth, female workers with accumulated paid sick leave who give birth may not be able to use paid sick leave after six weeks.

- May not cover time at home for newborn babies/mothers who have extended hospital stays.

Administration/Implementation: The program would be administered, and the benefits paid, through the state UI system. State participation would not be mandatory.

Pros: - State employment security agencies (SESAs) have experience in making payments as agents of the Federal government in the case of other programs, such as Trade Readjustment Allowances. In FY 98 there are about 40,000 TRA recipients collecting about \$230M in benefits at an administrative cost of about \$5 M per year, which would provide an order of magnitude in evaluating this proposal.

- States are able to perform these functions under agreement with a Federal agency assuming suitable arrangements can be made to meet the cost of administering this separate payment system.

Cons: - To the extent that SESAs are asked to make eligibility determinations that differ from those under the UI system, staff training and administrative costs would rise substantially.

- Since the costs of the benefits would be coming from a fund other than the State trust fund (unless Federal law is amended), it may be expensive for the States to establish the alternative procedures necessary to make the payments.

- States are currently underfunded for UI administration costs and would not be able to embark on a new program without some funding guarantees.

Benefit amount: Simplest approach would be to set one benefit amount available to all eligible workers: \$200 per week (based on UI average benefit of \$190.19, which represents 35% of the average weekly wage). Alternatives could include having one or two benefit levels, keyed to income ranges.

or
income
level

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PROPOSALS TO ASSIST PARENTS OF NEWLY BORN OR ADOPTED INFANTS

1. Expand FMLA Leave Period From Three to Six Months

Under current law, private employers of 50 or more employees must provide up to 12 workweeks of unpaid, job-protected leave a year to "eligible" employees for qualifying family and medical reasons, including care of a newborn, newly adopted child, or newly placed foster child. Employees are "eligible" if they have worked for the employer for at least 12 months and for at least 1,250 hours over the previous 12 months, and if the employer has at least 50 employees working within 75 miles of the employee's worksite.

Expanding the law in this way would allow the approximately 12 million workers who take leave in a given year to take a longer period of FMLA protected leave if they need it. About 100,000 to 400,000 leave takers who use the maximum amount of time (85 plus days in the survey by the Family and Medical Leave Commission) would be most likely need to take extra time off.

Pros: - Guaranteeing FMLA covered and eligible working parents up to six month of job-protected leave would give them additional time to bond with their newborns and to make adequate child care arrangements for when they return to work.

- Such an expansion of FMLA would benefit all covered and eligible workers, not just new parents.

Cons: - This will not help workers who currently cannot afford to take even the full 12 weeks of job-protected leave. According to the Commission's survey, about 65 percent of those who wanted to take leave to care for their newborn, foster or adopted child said they did not take leave because they could not afford to do so.

- This would do nothing to help parents who are not now FMLA covered and eligible. According to the Commission, about one-half of workers are not covered and eligible for FMLA leave. (The number of covered and eligible parents is likely lower because younger workers have shorter average job tenure.)

2. Lower FMLA's 50-employee Coverage Threshold

Under current law, *private sector* employers are not covered by the FMLA unless they employ 50 or more employees during 20 or more calendar workweeks in either the current or preceding calendar year. (Public agencies are covered by FMLA regardless of size -- but employees must still meet the eligibility requirements, including working at a worksite where 50 employees are employed within 75 miles.)

The employee coverage threshold could be dropped from 50 to 25, or to some point between those numbers, and could be accomplished in one step or several. Another approach would be to drop it to some point between 50 and 25, and establish a commission to study the impact and recommend whether a further lowering of the threshold would be warranted.

The best approach would be to drop the threshold immediately to 25, in conjunction with a paid-leave plan (see separate paper).

Pros: - Accomplishes two goals: giving more people FMLA protections, and providing partial-wage replacement for new parents, including those still not protected by FMLA.

Cons: - Likely to meet with strong opposition.

- To the extent we might be able to win support for one but not both proposals, combining expansion and a paid-leave proposals could unite in opposition those who might agree with one of the options but oppose the other.

3. Use the Unemployment Insurance (UI) Program to Provide Partial Wage Replacement for New Parents

Option 1: Encourage States to amend their UI laws to permit payment of benefits to individuals who, having left their jobs (and, temporarily, the workforce) for compelling personal reasons, such as adoption of an infant, are unable to find employment when they are able to return to work. Such benefits would only be available when the individual is again able and willing to work. The laws of 14 States (AK, CA, HI, NB, NV, NY, OR, PA, PR, RI, SC, UT, VA, VI) currently recognize some compelling personal reasons for leaving work. However, none of these laws specifically reference leaving work for reasons connected to family or medical leave.

Pros: - States should recognize compelling personal reasons for leaving work in order to modernize the UI program to reflect current work realities.
- Expands participation rates in the UI program, thus increasing its

ability to provide wage replacement to workers while they are unemployed as well as increasing its economic stabilizing effect.

Cons: - States view Federal recommendations in the areas of eligibility and disqualification as an infringement on their rights and responsibilities.

- The UI program is employer-financed. Employers would oppose financing benefits to those who leave work voluntarily for non-work-connected reasons.

Option 2 : Amend Federal law to allow States to use UI Trust Fund balances to finance leave taken for family and medical leave reasons.

Pros: - Would give States specific authority to recognize family and medical leave needs, at State discretion.

- Would utilize an existing system that does a good job of paying benefits.

Cons: - Paying benefits to individuals who are not able to work and available for work, as in the case of family and medical leave, is completely contrary to the basic purpose and law of the UI program; i.e., to pay benefits to individuals with respect to their unemployment while they are temporarily unemployed and searching for work.

- Would require legislative change to allow UI eligibility of individuals on FMLA leave, who are not able to work and available for work as required under the current UI law.

- If the authorization is applied only to "healthy" balances, UI benefits paid due to family and medical leave will only apply when State trust funds are building up in good economic time. The benefits would not be available during recessionary periods.

- The UI program is employer-financed. Employers will strongly object to using funds generated for UI purposes to be used to finance benefits to individuals who have withdrawn from the labor force and are unable or unavailable for work, even if only temporarily.

- 23 States currently have solvency levels below the point that they should be prepared for a recession.

- ETA opposes this option. (DOL is on record as opposing State enactment of such a proposal.)

FMLA PAID LEAVE OPTION: COST ESTIMATES

	(1) all take 6 wks	(2) all take 4 wks*	(3) 89% ** take 6 wks	(4) 89% take 4 wks
assumptions				
number of women w/newborns	3,378,000	3,378,000	3,378,000	3,378,000
est. of women in workforce giving birth	1,834,000	1,834,000	1,834,000	1,834,000
54.3% LFPR of all women w/youngest child less 1 year old)				
ass those not meeting workforce attachment requirement				
1. 33% ineligible	1,228,780	1,228,780	1,228,780	1,228,780
2. 20% ineligible	1,467,200	1,467,200	1,467,200	1,467,200
ass those not taking leave (columns (3) and (4))				
1. 33% ineligible	1,228,780	1,228,780	1,093,614	1,093,614
2. 20% ineligible	1,467,200	1,467,200	1,305,808	1,305,808

eligibility thresholds for family income and workforce attachment

33% ineligible				
1. \$36,626 (median income of primary families w/child < age 6)	\$737,268,000	\$491,512,000	\$656,168,520	\$437,445,680
2. \$50,000 (62.6% of families with children < age 6 earn less)	\$923,059,536	\$615,373,024	\$821,522,987	\$547,681,991
3. \$60,000 (71.8% of families with children < age 6 earn less)	\$1,058,716,848	\$705,811,232	\$942,257,995	\$628,171,996
4. no income threshold	\$1,474,536,000	\$983,024,000	\$1,312,337,040	\$874,891,360
20% ineligible				
1. \$36,626 (median income of primary families w/child < age 6)	\$880,320,000	\$586,880,000	\$783,484,800	\$522,323,200
2. \$50,000 (62.6% of families with children < age 6 earn less)	\$1,102,160,640	\$734,773,760	\$980,922,970	\$653,948,646
3. \$60,000 (71.8% of families with children < age 6 earn less)	\$1,264,139,520	\$842,759,680	\$1,125,084,173	\$750,056,115
4. no income threshold	\$1,760,640,000	\$1,173,760,000	\$1,566,969,600	\$1,044,646,400

FMLA ADMINISTRATIVE COSTS

1st year (start-up + change in base yr)	\$113 million	\$113 million	\$113 million	\$113 million
annual operating costs	\$162-193 million	\$162-193 million	\$162-193 million	\$162-193 million

data from FMLA Commission T. 5E leave takers at non-covered worksites: care for newborn, etc.

upper bound: $(.371 * 1 \text{ wk}) + (.092 * 2 \text{ wk}) + (.109 * 4 \text{ wk}) + (.429 * 12 \text{ wk}) = 6.139 \text{ weeks}$

lower bound: $(.371 * 1 \text{ wk}) + (.092 * 2 \text{ wk}) + (.109 * 3 \text{ wk}) + (.229 * 4 \text{ wk}) + (.2 * 12 \text{ wk}) = 4.198 \text{ weeks}$

data from FMLA Commission: total leave takers for care of newborn/adopted/foster as percent of leave takers + leave needers

December 2, 1997

DRAFT**COST ESTIMATE FOR FMLA OPTIONS****1. PAID LEAVE FOR 6 WEEKS OF NEWBORN/ADOPTION/FOSTER CARE**

Objective: Cost for a maximum of 6 weeks maternity or child care benefit (i.e., federal income replacement) at \$200 a week for mothers or fathers with workforce attachment. (See first column of attached table.)

- a. Number of women¹ with newborns in a given year: 3,378,000 [from 1996 CPS]
Excludes some adoptions/foster care.

Maximum program cost for all newborn providers: $3,378,000 \times \$1200 =$
\$4,053,600,000.

- b. Assume that 1,834,000 mothers will return to work. [Based on 54.3% LFPR of all women with youngest child less than 1 year old.]

This is a proxy for working women who give birth and would be eligible for this benefit. Note that this number does not include those that worked prior to giving birth but (without this new incentive) did not return to work within a year.

- c. Assume maximum 33% will be ineligible for benefit because they did not work full-time previous year. [Per February 1996 tenure data for 16-44 year old women.]

Lots of potential bias problems here. Younger women more likely to give birth and less likely to be attached. However, the tenure data is not just for those employed, but for those employed with their current employer for a year. (Work experience data does not have this problem. It could be examined at a later date.) The 1.8 million women who returned to work are more likely than most to have been previously attached to the workforce (because returned early, likely to have health benefits attached to job and wouldn't want to quit during a pregnancy, etc). Therefore, it may also be useful to assume a lower percent being ineligible -- 20% has been arbitrarily chosen for this purpose.

¹ The number of women/mothers is used to estimate costs because only one parent of a newborn would be eligible for paid leave and women/mothers are more likely to take leave than men/fathers.

Using these bounds implies there would be between **1,228,780 and 1,467,200** potential leave takers who would pass the workforce attachment requirement.

- d. Without means testing, this implies a cost of between **\$1,474,536,000 and \$1,760,640,000** (at \$200 x 6 weeks = \$1200 for each mother). These costs are for benefits only, i.e., without program/administrative costs
- e. How many of these women would meet an income eligibility cut? (The test would be on family income, not the income of the leave taker.)

Median income for primary families with children under 3 is \$36,626. If the population was ½ below and ½ above, then the cost would be half -- between **\$737,268,000 and \$880,320,000**. However, the actual cost is likely higher since most of the women who would be in the workforce full-time for at least a year would be over this mean (i.e., the lower part of the distribution would be cut off by the workforce attachment criterion).

See the table for costs at family income thresholds of \$50,000 and \$60,000.

- f. To the extent that families would choose to use their firms' paid leave over the \$200 a week benefit provided by the government (they need to use the federal benefit first or forfeit it), this would reduce the number of users and, therefore, costs. However, this reduction may not be significant (and cannot be reliably estimated).

→ Only a very small number of employees receive paid family leave (2 to 3%), although most receive paid vacation (88 to 97%) and paid sick leave (50 to 65%) that could be used during the first six weeks after having a child. (Mothers would likely be the only ones who could use paid sick leave.) The number who choose paid company leave over federal wage replacement would be reduced by the percent that would be allowed to take off enough leave (i.e. those covered and eligible for FMLA) to use the reduced federal benefit first and then use company provided paid leave. (Note that since many low income women are disqualified by the workforce attachment test, those that are least likely to be eligible for extended leave are also eliminated.)

However, data from the 1995 survey by the Commission on Family and Medical Leave would indicate that a good portion of mothers and fathers do not receive sufficient paid leave from their companies and thus would likely take advantage of the federal leave program. About 65% of all child care "leave needers" (as defined and surveyed by the Commission) say the reason for not taking leave is that they can not afford to do so. Yet, for those covered by the FMLA, the Commission reports 46% get fully paid child care leave (23% get partially paid

leave); for those not working at covered worksites, the percent getting paid leave drops to 37% (16% get partially paid leave).²

- g. Related to the discussion above is the possibility that some eligible mothers/fathers will not take time off to care for newborn/adopted/foster child. Based on data from the Commission (the percent "leave takers" who took leave to care for a child as a percent of "leave takers" plus "leave needers"), it was estimated 11% would not use the leave (or 89% of eligible workers would). This assumes the provision of a partial wage replacement will have no effect on the behavior of the 11%. See columns 3 and 4 of attached table.
- h. Based on data from the Commission (T. 5E), weighted averages were constructed for the number of weeks "leave takers" at non-covered worksites take off to care for newborn/adopted/foster children. The upper bound is 6.1 weeks (same as maximum allowable) and the lower bound is 4.2 weeks. See columns 2 and 4 of attached table for cost estimates which assume an average leave of 4 weeks.
- i. For all of these variations, ETA estimates administrative costs would be about \$162 to \$193 million per year. In addition, there would be startup costs of approximately \$113 million (to change the UI base period and to create a benefit payment system).

Bottom line: Under these assumptions, total costs (administrative and benefit) would range from around \$600 million if the higher ineligibility rate is assumed and the benefits were used for four weeks by parents who met the 1 year work-force attachment and \$36,626 family income tests -- to almost \$2 billion if there was no income test, all eligible parents took the full 6 weeks, and the lower 20% ineligibility rate is used. These costs do not include the estimated \$113 million for start-up.

Note: This estimate is very suspect. Mixed and matched data sources of various years which do not neatly correspond to the proposed groupings have been used. In total, it is unclear to the direction or size of these biases.

2. EXPAND FMLA LEAVE PERIOD FROM THREE TO SIX MONTHS

No benefit cost involved.

² Of interest is the Commission finding that of all low-income leave takers, 21% are receiving public assistance.

This proposal extends the maximum benefit received under FMLA. All covered and eligible individuals could potentially benefit from such an expansion. The size of the group that is likely to benefit can be estimated from looking at the FMLA employee survey leave takers who took more than 12 weeks of leave. Most likely to benefit would be the 10% - 20% of leave takers who took more than 12 weeks of leave (according to data from the 1995 survey by the Commission on Family and Medical Leave). The Commission estimated that between 1 and 2 million took FMLA during their survey period -- thus the number of "long leave" takers is estimated at 100,000 to 400,000 a year.

3. LOWER FMLA'S 50-EMPLOYEE COVERAGE THRESHOLD

No benefit cost involved.

If one assumes a 83% eligibility rate and decreases the threshold to firms 25 and larger (see note below), then this would increase the number of employees covered and eligible by about 10 million. BLS has provided information to NEC on the impact of thresholds between 25 and 50.

Note the source is ES 202 data, whose estimates would not include employees covered by FMLA who work in establishments with less than 25 employees but within 75 miles of other establishments owned by the same firm that in total employ more than 25 workers.

4. USE THE UI PROGRAM TO PROVIDE PARTIAL WAGE REPLACEMENT

It is not known how many states would amend their laws under either of these two UI options. Therefore, the number of potential recipients is unknown. In any event, the maximum pool of recipients will range from 1.2 to 1.5 million. (See discussion 1a. to 1d. above.)

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210**FAX COVER SHEET****OFFICE OF THE ADMINISTRATOR**
WAGE AND HOUR DIVISION**FAX NUMBER (202)219-4753**
COMMERCIAL (202)693-0051TO: Nicole RabnerDATE: 12/2/98FAX NUMBER: 456-9412PAGES: 12
(include cover sheet)

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FROM: Kathy Curran

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NUMBER: ~~459~~**COMMENTS/INSTRUCTIONS:**Sorry it took so long - here's our draft
discussion - let's talk.K.

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DRAFT 12/1/98, 3:20 p.m.

Federal Support for State Paid Parental Leave Initiatives

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

Several state governments are exploring strategies to provide wage replacement for parents who have access to and want to take leave to care for a newborn or newly adopted infant but cannot afford to do so. The Administration could assist states in this effort, and encourage more states to consider their own paid leave initiatives, through a federally funded grant program. The funds could be used by states to support research and development activities; to subsidize benefits in a pilot or demonstration program; to underwrite the administrative and implementation costs of starting up a state-funded benefit program; and to evaluate the success of state initiatives.

Supporting these initiatives would not only benefit the working citizens of the individual states, but would also allow us to explore, through the "laboratory of the states," which approaches to paid parental leave work best and which approaches provide the most promising models for a nation-wide paid leave plan.

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

1. What States are Doing: Initiatives States Have Implemented or are Considering:

Several states have taken or are considering taking steps to address the problem, either as employers themselves or as a state-wide policy. In almost all cases, these efforts are just beginning and could be encouraged and energized by federal support. These state efforts can be broadly categorized into four groups: state-as-employer; direct benefit; insurance model; and research:

We are still awaiting more information on current state efforts in this area.

Nevertheless, most states have not pursued paid leave proposals. We have not determined why there has been only modest interest in this area. Therefore, it is unclear if these proposals would be sufficiently interesting to states to pursue.

State as employer:

We have identified only one state that provides paid parental leave to its own employees. In **Ohio**, state employees can receive up to four weeks of paid parental leave at 70% of base salary.

Direct benefit:

One state currently provides some paid parental leave to low-income workers. Under **Minnesota's At-Home Infant Care Program**, working, low income parents not on welfare can receive up to 75% of the state child care subsidy as wage replacement.

Insurance model:

Several states are exploring whether to use existing state insurance programs as a means to provide working parents with paid leave. Currently, coverage varies among states.

California, New York and New Jersey all have looked into expanding their **Temporary Disability Insurance (TDI)** programs to cover parental leave. TDI plans provide paid leave to employees who must take leave due to a non-work related illness or injury¹:

California: Considered a plan to allow FMLA leave takers to qualify for TDI but tabled it pending additional research.

New Jersey: New Jersey's TDI currently provides women with a pregnancy-related disability benefit up to \$364 weekly (or 2/3 of their earnings) typically for 6 weeks following a normal delivery. A bill was introduced in 1997 to extend TDI coverage for parental leave (birth or adoption) and for leave to care for seriously ill spouse, child or parent. ("Paid Family Leave Act.")

New York has also considered a bill that would allow the use of **workers' compensation disability** benefits to cover FMLA leave.

Two states, **Vermont** and **Massachusetts**, have looked at using the **Unemployment Insurance** system to provide paid parental leave:

Massachusetts is exploring using both UI and TDI for family leave. Two bills are to be introduced in early December 1998. The first would provide unemployment

¹ Work-related illnesses are typically covered by state workers' compensation programs.

benefits for employees who must leave work for family or medical reasons (whether or not covered by FMLA or the state FML law), using monies in the unemployment solvency fund. The second would establish a TDI system in Massachusetts, which will include eligibility for up to 16 weeks of parental leave for the birth, adoption, foster care or placement of a child, and will provide partial wage replacement during the leave period. A Family and Employment Trust Fund would be established to pay the benefit, funded by employer contributions.

Vermont: Proposed legislation would have extended UI benefits to workers taking leave covered by the state family and medical leave law.

In addition, many employees have access to short-term or long-term disability insurance through their employers.

NB: In response to Vermont's request for an opinion on their proposed legislation, the Department of Labor has taken the position that use of UI trust fund monies for this purpose would violate the requirement under the Federal-State UI program that recipients must be involuntarily unemployed, and able and willing to work.

Research:

Maryland: A bill was introduced (when?) to set up a task force to study paid leave. (status/outcome?)

II. How the Federal Government Can Help: Federal Grants to Support/Assist State Initiatives/Demonstration Projects

Purpose and design of the grant program:

The Administration could propose a federal grant program that would assist states in developing or implementing paid leave initiatives or demonstrations by making federal funds available to state grantees for the following purposes:

- To subsidize part or all of the benefit;
- To cover some or all administrative costs of developing and implementing a paid leave program;
- To conduct research and to develop paid leave proposals;
- To evaluate impacts of programs.

States would be invited to submit proposals, and grants would be awarded competitively, with the size and number of awards dependent upon the amount of funding available. (See below for cost discussion.)

If the Administration decides to pursue this proposal, it would be necessary to consider exactly how we wish the program to work, what goals we want to achieve, and how to design an appropriate grant program. Among the issues/options to consider in designing a grant program would be:

- Identify specific policy goals to be served in addition to increasing workers' ability to take new parent leave, if any.
- Whether to make all the grants competitive, or to make a portion of the funding available to any state that applied, for example, for research activities.
- Decide how general or specific the grant criteria should be: should we make funding available to any project proposal that seems promising, and if so, how will we determine which proposals to select; or to develop specific grant criteria--for example:
 - size of population to be served
 - issues to be researched
 - participation of third parties (such as universities) to assist in evaluation activities
 - length or amount of benefit
- Whether to subsidize benefit amounts, for what groups, and in what amounts, for example:
 - subsidize 50%? 25%? 10%? Or a fixed dollar amount.
 - only for recipients under a certain income level?
 - only for recipients with a certain workforce attachment?
- How do we evaluate the success and/or consequences of various approaches to providing parental leave, and if so, by what criteria? For example:
 - at what benefit level/benefit duration are workers are various incomes more likely to take leave?
 - what impact does paid leave have on new parents' return to the

workforce?

- what impact does paid leave have on employer incentives to provide paid leave? unpaid leave (if not FMLA-covered)?
- Would we award grants to state proposals to develop paid leave plans for their own employees?
- Could substate governmental units also apply for grants, and if so, could they apply in their capacity as employers?
- What is the appropriate agency to administer the grant program.

Authority and appropriations:

In addition to new funds for the grants, we would need to have legislative authority for the grant program. It is possible that legislative authority for current DOL programs could be used for awarding grants to certain kinds of proposals. For example, Section 513 of ERISA (29 U.S.C. 1143) gives fairly broad authority to do research, surveys, and studies either by contract or grants related to employee benefit plans. Under this section we might be able to fund a state proposal to use, or explore using, employee benefit plans to provide paid parental leave. We may also be able to find limited authority under JTPA or other ETA programs.

Existing authority is likely to be quite limited, however, and new legislation would likely be necessary to authorize a more flexible and complete grant program.

III. Cost Estimates: Costs, Pros And Cons Of Grant Proposals

All figures are estimates based upon similar experiences. Actual costs may vary greatly. If any option is chosen for further consideration, more refined cost estimates must be developed.

1. Support research and development activities

OPTION I: fund academic, white paper type research focussing on existing paid leave plans: why they work; why there aren't more; impact on other benefits; etc. Could include a conference where papers are presented.

Costs: cost per review-type paper estimated at \$50,000. Additional funds would be necessary for an optional conference.

Pros: very helpful in laying groundwork for widespread provision of paid leave, e.g., there are a number of questions (such as those mentioned above) that should be answered before proposing any widely applicable, costly paid leave program; option works well with Rep. Woolsey's plans

Cons: not newsworthy until findings are made (and then only if at a high profile conference), but could be done in conjunction with #2 and #3 and/or Woolsey's plan

OPTION II: fund state paid leave commission(s)¹ including survey and review of existing paid leave plans (private or state-funded)

Costs: minimum funding for a single state commission including administration, travel and survey/review, assuming meets 6 times in one year: travel \$50,000; administration (2 staff persons) \$125,000; survey/review paper (1) \$50,000. This assumes no payment to commissioners other than per diem and travel cost reimbursements. For a paid executive director assume an additional \$125,000 for salary and benefits.

Pros: more newsworthy than option I if can provide sufficient money and chose high profile state(s); could be done in combination with option I to provide solid foundation (politically and factually) for implementing federally or state-funded paid leave programs or expansion of privately funded plans.

Cons: only slightly more newsworthy than option I (and only when findings are released). Research at this price will be relatively superficial, lacking new survey data.

OPTION III: update FMLA Commission national survey work with emphasis on collecting paid parental leave data

Costs: previous work included both an employee and an employer survey.

Either part or both could be updated. Minimum cost of employee survey is \$500,000. Both surveys previously cost \$1,200,000.

Pros: data would allow us to assess for the need for new programs and target programs to people who most need the help, revised surveys would also provide (currently unavailable) data needed to "cost-out" these program; as a side benefit would provide WH with much longed for data on FMLA

Cons: costly compared to previous two options; time consuming (probably 9 month) before results are available.

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

OPTION: state or employer funded paid parental leave (modeled after \$200 a week federally paid leave proposal)

Costs: For all states assume \$113m for start up costs based upon using UI system (ranging from \$250,000 to \$2,500,000 per state). For all states assume yearly operating costs for approximately \$162m - \$193m (\$3m to \$4m per state); benefit costs assuming \$200 standard weekly per person benefit varies from \$425m to \$1.8b (\$9m-\$38m per state) assuming between 4 and 12 weeks of paid leave to *women* with infants. Cost per state total for first year \$14m- \$42m:

Can therefore fund at:

\$50m 1-3.5 states
\$100m 2-7 states
\$250m 6-18 states
\$500m 12-36 states

Pros: provides some real benefits to real people in need; more cost effective way to test concept of paid leave; experience could help with passage of federal legislation or lead to more states and private employers providing paid leave

Cons: possible legal and political obstacles to the federal government providing benefits to a small set of persons through a grant mechanism; may be difficult to specify who is or isn't eligible for benefits (e.g., under a grant, can work force attachment requirements, income thresholds, etc. be specified?); may be difficult to find acceptable benefit delivery system that can process claims quickly. (could not mandate services in UI system or in workers' compensation system.); paid leave benefits (vs. just using federal funds to cover administration) does not lend itself well for a one-time intervention. would states be willing to pay for funding program (i.e. benefit) costs in the out years? state provided benefits may discourage employers from providing similar benefits.

3. Underwrite administrative/implementation costs of starting up a state-funded program

OPTION I: TDI expansion (to add expanded parental leave) in the five jurisdictions that currently have paid leave

Costs: Fund the administrative changes; less than \$10,000,000

Pros: expands benefit coverage when new paid leave programs are started, making a real difference for workers; may have fewer political/legal obstacles as well as less costly than directly funding benefits

Cons: paying for administrative costs may not be sufficient incentive for states to expand TDI; would probably require state legislative changes to include parental leave for men and for adoptions; may require higher premiums for employers and employees; not only not as newsworthy as paying for benefits but may not be newsworthy if seen as only a small change in benefits

OPTION II: TDI startup in non-TDI states

Cost: For all states assume \$113m for start up costs based upon using UI system (ranging from \$250,000 to \$2,500,000 per state). For all states assume yearly operating costs for approximately \$162m - \$193m (\$3m to \$4m per state); future years administrative costs would come from the insurance premiums.

Can therefore fund at:

\$50m 9-10 states

\$100m 17-20 states

\$250m all states

Pros: expands coverage to more states; minimal federal cost; provides new real benefits when paid leave programs are started; state TDI programs are employee/employer tax based and could be funded by states on a continuing basis not just for the period of the grant. this may have fewer political/legal obstacles and longer term impact than directly funding benefits; provides benefits in addition to parental leave benefits (such as illness or injury).

Cons: federally only paying for administration not as newsworthy as providing benefits; may not be sufficient incentive to states to start a TDI program – we have no indication of how many, if any states, would be interested; may need competitive grant process which would be difficult to set up given the varying costs that come with varying state sizes; could not mandate delivery of services through UI system or through workers' compensation system.;

OPTION III: state or employer funded paid parental leave (modeled after \$200 a week federally paid leave program)

Costs: For all states assume \$113m for start up costs based upon using UI system (ranging from \$250,000 to \$2,500,000 per state). For all states assume yearly

operating costs for approximately \$162m - \$193m (\$3m to \$4m per state); future years administrative costs would come from the insurance premiums.

Can therefore fund at:

\$50m 9-10 states

\$100m 17-20 states

\$250m all states

Pros: provides real benefits when new paid leave programs are started; may have fewer political/legal obstacles than #2; less costly than #2

Cons: may still have some of the political/legal obstacles (mentioned earlier) when singling out a few employers/states; not as newsworthy as providing benefits; need to identify source of benefit funds; not likely to be sufficient incentive to states or employers to implement new paid leave plans which require large continuing benefit costs; could not mandate delivery of services through UI system or through workers' compensation system; might discourage private sector provision of paid leave benefits

Paid Parental Leave: the Federal Government as a Model Employer

Set forth below are estimates of what it would cost the federal government as an employer to implement a paid leave plan for parents of newly born or adopted infants, similar to the broader proposal we have been discussing: a paid leave benefit of \$200 available for parents of newly born or adopted infants. The Office of Personnel Management (OPM) calculated the cost of making the benefit available for either six weeks or twelve weeks, for a program with an income cap and a workforce attachment requirement.

To begin the calculations, you need to know how many federal employees are likely to need to take the leave, that is, how many federal employees have newly born or adopted infants, and what portion of those take leave. However, OPM tracks only the types of leave taken by federal employees (i.e., annual or sick leave or leave without pay). OPM has no data on the *reasons* federal employees take leave, nor do they have data on the rate at which federal employees take FMLA leave.

In 1997, approximately 2.8% of the employed female U.S. workforce had children under the age of 1 year. (CPS, 1997) Using that as a *very rough proxy*, we asked OPM to assume that at any given time 2.8% of the workforce (male and female) will have a newly born or adopted infant.

COST ESTIMATES:

The following are the costs of allowing full-time, permanent, executive branch employees to receive a \$200 per week benefit to take leave to care for a newly born or adopted infant, first with an income cap, and then with both an income cap and a workforce attachment requirement:

Income Eligibility Cap, No Workforce Attachment

COST ESTIMATE A: Full-time, permanent, executive branch employees at GS 9 or below: 563,390 employees.

Cost Estimate A-1: $563,390 \times .028 \times \$200 \times 6 \text{ weeks} = \$18,929,904$

Cost Estimate A-2: $563,390 \times .028 \times \$200 \times 12 \text{ weeks} = \$37,859,808$

COST ESTIMATE B: Full-time, permanent, executive branch employees earning \$ 36,626 or less: 606,804 employees.

Cost Estimate B-1: $606,804 \times .028 \times 200 \times 6 \text{ weeks} = \$20,388,614$

Cost Estimate B-2: $606,804 \times .028 \times 200 \times 12 \text{ weeks} = \$40,777,228$

Income Eligibility Cap, With 52 Week Workforce Attachment

COST ESTIMATE C: Full-time, permanent, executive branch employees at GS 9 or below: 563,390 employees.

Cost Estimate C-1: $543,745 \times .028 \times \$ 200 \times 6 \text{ weeks} =$ \$ 18,269,832

Cost Estimate C-2: $543,745 \times .028 \times \$ 200 \times 12 \text{ weeks} =$ \$ 36,539,664

COST ESTIMATE D: Full-time, permanent, executive branch employees earning \$ 36,626 or less: 606,804 employees.

Cost Estimate D-1: $585,471 \times .028 \times 200 \times 6 \text{ weeks} =$ \$ 19,671,825

Cost Estimate D-2: $585,471 \times .028 \times 200 \times 12 \text{ weeks} =$ \$ 39,343,650

Please note that, in addition to the cost implications, any serious consideration of such a proposal would require an analysis of non-cost issues, such as: how the federal workforce would react to providing such benefits only for leave related to new born or adopted children, and the impact on the private workforce of the federal government providing such benefits.

¹ Another option would be to create a national paid leave commission.

U.S. Department of Labor

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

LOCATION: _____

FROM: _____

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

NAME: Kathy C

NUMBER: _____

COMMENT/INSTRUCTIONS:Sorry for weird formatting

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

Staff draft 12/4/98 3:30 pm

Federal Support for State Paid Parental Leave Initiatives

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

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

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

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

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

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

FY 2001 Budgetary Implication:

Total: \$50m

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

- Benefit subsidy (modeled after \$200 a week federally paid leave proposal): cost is based on a \$200 benefit a week per person; benefit cost varies from \$9m-\$38m per state, assuming between 4 and 12 weeks of paid leave to *women* with infants. Benefit costs could be reduced if assume a subsidy of less than \$200 a week.

Sub
state?

- Administrative costs: Start-up of new state (or local level) programs ranging from \$250,000 to \$2,500,000 per state (estimate based upon using UI system for delivery) -- assume first year operating costs of approximately \$3m to \$4m per state.
- Cost per state total for first year, for full (\$200) benefit subsidy and administrative costs: \$13m- \$44m.

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

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

National
NAS
Study?

Preliminary Grant Elements:

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

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

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

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

Pros:

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

and private employers providing paid leave;

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

Cons:

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

Proposal must be accompanied by/reflect:

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

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Paid-Leave Plan for the Birth or Adoption of a Newborn

Thanks to the Family Medical Leave Act, signed into law by President Clinton on February 5, 1993, millions of Americans can take unpaid leave from their jobs (up to 12 weeks per year) to care for an infant after birth or adoption -- and know that a job will be waiting for them when they return. But many of those workers are unable to take the full amount of FMLA-protected time they need, because they simply can't afford to go that long without a paycheck. And other workers who, although not protected by FMLA, have access to unpaid leave can face the same dilemma.

To address this obstacle, the Administration could propose the creation of a New Parent Paid Leave Plan, to provide eligible parents with partial wage replacement for up to six weeks. Careful consideration needs to be given as to whether this program would cause employers to cut their benefit plans, or decide not to offer new benefits. / *

Design elements of a workable program would include:

Income eligibility: Eligibility to receive funds would be tied to income. The simplest approach would be to set a family income cap -- only parents with family earnings below a set amount would be eligible to receive new-parent paid leave. An alternative but more complicated approach would be to vary the benefit amount by family income.

Pros: - Assists the families that are most likely to face a financial barrier to taking family leave for a newborn/adopted infant.

- Limiting eligibility to workers protected by the FMLA would exclude those most likely to benefit from such a program.

Workforce attachment:

1. **Prior to receiving benefit:** New parent paid leave would be available to those qualifying parents who are authorized to work in the U.S. and have been in the workforce --- part time or full time -- for each of the fifty-two weeks prior to giving birth/adopting.

Pros: - Funds available to all working parents, regardless of FMLA coverage
- Links eligibility to connection to the workplace and to the concept of wage replacement.
- One year requirement demonstrates pre-pregnancy workforce participation.

- Minimum standard for amount of time in the workforce reflects FMLA concept and excludes from eligibility those whose workforce participation was minimal.

- If UI administers the program, they will have access to employment information for all UI-covered workers

Cons: - If UI administers the program, an alternative method of confirming eligibility would be necessary for non-UI covered workers (e.g., self-employed, independent contractors, etc.) -- for example, proof of receipt of wages during the time period. This would add cost to the proposal.

- If UI administers the program, it may be simpler if the eligibility requirement is the same as for UI - work in roughly 20 of the preceding 52 weeks. (Note, however, that states have discretion to have additional UI qualifying requirements.)

Note: If data indicates that workers most likely to need paid leave have generally worked for less than one year, we should change the one-year requirement as appropriate.

2. After receiving benefit: Workers could receive benefits regardless of whether they intend to return to their job, or whether they in fact return.

Pros: - Eligibility based on return to employment or the workforce would require a penalty/recovery scheme for those who -- for whatever reason -- fail to return to work in a timely manner.

- Commission data indicates that lower income workers, the ones most likely to need wage-replacement, are the least likely to return to work following the birth or adoption of an infant.

Cons: - Parents who voluntarily leave their jobs to care for newborn/adopted infants have presumably decided they are not financially dependent upon their wage, and therefore do not need a wage replacement benefit. (The lower any income requirement is set, the less this problem exists -- fewer eligible parents will be financially able to quit their job.)

Benefit duration and timing: Benefits would be available **only** for the first six weeks following birth/adoption. A worker with access to employer-paid leave who also wanted to participate in federal paid leave would have to use the federal benefit before using employer-paid leave.

Pros: - Simpler to administer
 - Minimizes disincentives on employers who might otherwise provide benefits or more generous benefits.

Cons: - To the extent that an employer benefit plan limits post-pregnancy use of sick leave to a period immediately following birth, female workers with accumulated paid sick leave who give birth may not be able to use paid sick leave after six weeks.

- May not cover time at home for newborn babies/mothers who have extended hospital stays.

Administration/Implementation: The program would be administered, and the benefits paid, through the state UI system. State participation would not be mandatory.

Pros: - State employment security agencies (SESAs) have experience in making payments as agents of the Federal government in the case of other programs, such as Trade Readjustment Allowances. In FY 98 there are about 40,000 TRA recipients collecting about \$230M in benefits at an administrative cost of about \$5 M per year, which would provide an order of magnitude in evaluating this proposal.

- States are able to perform these functions under agreement with a Federal agency assuming suitable arrangements can be made to meet the cost of administering this separate payment system.

Cons: - To the extent that SESAs are asked to make eligibility determinations that differ from those under the UI system, staff training and administrative costs would rise substantially.

- Since the costs of the benefits would be coming from a fund other than the State trust fund (unless Federal law is amended), it may be expensive for the States to establish the alternative procedures necessary to make the payments.

- States are currently underfunded for UI administration costs and would not be able to embark on a new program without some funding guarantees.

Benefit amount: Simplest approach would be to set one benefit amount available to all eligible workers: \$200 per week (based on UI average benefit of \$190.19, which represents 35% of the average weekly wage). Alternatives could include having one or two benefit levels, keyed to income ranges.

Federally-funded Paid FMLA Leave to Care for a Newborn or Newly Adopted Child

2/98

Full funding for all parents who are eligible to take FMLA leave to care for their newborn or newly adopted child for the entire length of their leave is unlikely due to its high cost. However, there are a number of options that would reduce costs to the government by placing limits on the length of paid leave, on the amount of wage replacement, or on who would receive wage replacement. Examples of these options include:

Length of leave: Replace wages only if leave lasts more than X (e.g., three) weeks and only pay for weeks beyond the first X, pay for only the first X weeks of leave;

Amount of wage replacement: Limit the total amount paid to a worker or family in any given year, use a wage replacement formula that provides only a percentage of wages (like UI), or provide a flat weekly dollar amount;

Who is eligible: Limit payments to workers below a certain family income.

Only one option (with some sub-options) has been costed out. The option is paid leave for 6 weeks of care of a newborn (including adoption and foster care) at a flat \$200 a week. It was estimated that the cost to the Federal government would be between \$1.5 billion and \$1.8 billion in benefits only (annual administrative costs are estimated at \$162 to \$193 million). If one applied a "median family income test" to this option (any family above the median of \$36,626 would not be eligible for wage replacement), then the benefit costs to the Federal government would be somewhat more than half of the \$1.5 billion to \$1.8 billion. Other restrictions on availability, and additional assumptions on leave usage, result in total annual costs for this option ranging from \$600 million to almost \$2 billion.¹

Each of the options on paid "parent" leave has its own pros and cons. However, there are some general pros and cons on the concept of Federal wage replacement for workers taking "parent" leave under the FMLA:²

¹ A short paper detailing the costs (and assumptions) was done last December.

² The issues related to how to fund this proposed program or how it would be administered are not discussed here. Each of the options would have its own set of funding and administrative issues. For example, limiting wage replacement to families below certain incomes raises questions on 1) what is the proper income cut-off; 2) should there be a graduated payment scheme (you get more Federal monies if you make less); 3) should payments be made directly by the Federal government to workers, via advances on EITC, etc.; 4) should the cut-off be based on earnings or income; and so forth.

Pros

1. There is a need for paid leave. According to the Commission, among workers who needed leave, the most frequently cited reason for not taking leave (of any type) was that they couldn't afford it.
2. More parents would be able to stay home with their newborn or newly adopted child, or they would be able to stay home longer. Available research suggests that parental bonding during this early stage of development in a child's life is critical to its health and well-being.

Cons

1. Even with limits, most paid leave options have a high price tag. Thus the budget impact may be significant, requiring large program cuts elsewhere.
2. Federally-funded paid leave may lead to a decline in the number of companies who offer their own paid leave plans.³ This negative effect might be reduced under some options such as Federal payments only after 3 weeks of leave have been used.
3. Paid leave will not help workers who are not covered by the FMLA.
4. If paid leave leads to much greater use of FMLA or in much longer leaves, some businesses will claim it will increase their costs (e.g., for maintaining health benefits or paying replacement workers).

³ According to the Commission, 52 percent of leave takers at covered work sites reported they received full wage replacement (which could be in the form of vacation leave, personal leave or sick leave). An additional 22 percent received partial pay during their leave.

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

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PAID PARENTAL LEAVE OPTIONS

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

I. Create a Commission/Working Group:

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

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

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

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

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

Grace

Paid leave

U.I. system: - benefit determination:

(1) cause of separation? involuntary
lay off

good cause - states discretion - also - broad
cd. domestic violence, FMCA - YES.

another good cause reason.

encourage states - this is good cause reason.

consistent

(2) work search requirement

exemptions in place - U

illness, jury duty

(3) Availability

60 yr - interpr. - DOE - narrow det.

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

(1) 1. MA - write - program statement

ready & avail - doesn't apply - state flex

60 yrs holding the line

2. narrow it -

ready & avail still apply - ~~then~~ we deem

if a will not apply for 12 wks.

quickly w/ some

(2) Reg

do it in these ways - pro - control / wall of
con - 6 mo.

forum - put of of financing -

wall off, other pop.

(3) Reg

(4) law

(5) Create a new fund
model legislation

experience
rating

seems the
way to be
met w/c of
FMCA

1 a - oppus 0.6

1.5 - some DOL

2 Reg - 50/yr prob.

4 New fund
model log

5 optus -

pros & cons -
late pm tom -

responses next

DOL - 2 or 4

Treas - fed admin. cost

20% incl / yr.

cc indicators

750 incl / yr - now

us goes up

1/3 on top of current

sep fund -

wk load

reduce sup for FICA

admin cost ↑ by a 1/3

→ wouldn't

18 states
different
funds

substitution effect /

affecting offering of benefits. U.I admin based on

MA: highest maximum

estimates.

paid leave offering -

Optus memo: 3 (1) H. to MA -

intro a rail - met

deemed to be 2 in PM

calm as closely as
pos

(2) do my reg. speedily -

good opp. -
states might
point to this
from another
fund.

(3) too many dangers -

pros &
cons of
each.

May 19, 1999

NOTE TO: NICOLE RADMER
BILL SAMUEL

FROM: GRACE A. KILBANE

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

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

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

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

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

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

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

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

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



STRATEGIC UPDATE

News for UWC Members

APRIL 28, 1999

Ask DOL To Say No to UI Benefits for FMLA Leave

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

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

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

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

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

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

UWC STRATEGIC UPDATE
Published on Fridays for UWC Members
UWC – Strategic Services on Unemployment & Workers' Compensation
1201 New York Avenue, N.W., Suite 750
Washington, D.C. 20005-6143
phone (202) 682-1515 fax (202) 842-2556

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



ASSOCIATED INDUSTRIES OF MASSACHUSETTS

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

99005670

May 5, 1999

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

Re: UI Benefits for FMLA Leave

Dear Secretary Herman:

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

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

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

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

Sincerely,

John Gould
President and
Chief Executive Officer

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

RECEIVED
1999 MAY 11 P 4: 57
EXECUTIVE SECRETARIAT
OFFICE OF THE SECRETARY
DEPARTMENT OF LABOR
WASHINGTON, D.C. 20210

facsimile
TRANSMITTAL

Name: Nicole Rabner

Organization: Office of First Lady

Fax: 456-9412

Phone: _____

From: Bill Samuel

Date: _____

Subject: Paid leave - employer operation

Pages: 1 OF _____

Time: _____

Comments: UWC is the national employer group
regarding UI & representing
major employers

IF YOU HAVE QUESTIONS REGARDING THIS FAX PLEASE CALL: _____

American Federation of Labor and Congress of Industrial Organizations



815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000

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January 22, 1998

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

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

Dear Secretary Herman:

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

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

The Honorable Alexis Herman

- 2 -

January 22, 1998

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

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

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

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

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

The Honorable Alexis Herman

- 3 -

January 22, 1998

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

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

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

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

The Honorable Alexis Herman

- 4 -

January 22, 1998

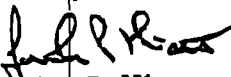
essential should be left to the States to decide." See Senate Committee Report, p. 1326.

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

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

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

Sincerely,



Jonathan P. Hiatt
General Counsel
AFL-CIO
815 16th Street, N.W.
Washington, D.C. 20006



Donna Lenhoff
General Counsel
Women's Legal Defense Fund
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009



Ron Pickering
President
Vermont AFL-CIO
149 State Street
Montpelier, VT 05602



Maurice Emsellem
Staff Attorney
National Employment Law Project
55 John Street, 7th Floor
New York, NY 10038

The Honorable Alexis Herman

- 5 -

January 22, 1998

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

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

JUL 23 '97 09:46 FR SEN LEAHY

202 2243479 10 318020000503

P.02/00

U.S. Department of Labor

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

**JUL 17 1997**

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

Dear Senator Leahy:

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

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

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

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

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- 2 -

periods of employment from which compensation is paid to workmen who lose their positions when employment slackens (that is, the worker loses his/her job) and who cannot find other work."

(Emphasis added.) S. Rep. No. 628, 74th Cong. 1st Sess. 11 (1935). The report goes on to say that UI differs from relief "in that payments are made as a matter of right, not on a needs basis, but only while the worker is involuntarily unemployed." Id.

To operate an acceptable UI program a State must, therefore, establish a genuine test to determine if an individual is unemployed due to lack of work. The able and available requirement is a longstanding, accepted test for determining this. Since 1937, issuances by the Department and its predecessor agencies have advised that State laws must contain able and available requirements to conform with Federal law. Section 5000.8 in Part V of the Employment Security Manual states that States must assure that UI will be paid "only to individuals who are unemployed and who are able to work and available for work."

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

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

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

07/23/97 09:42

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JUL 23 '97 09:47 FR SEN LEAHY

202 2243479 TO 01802000000000

P.04/06

- 3 -

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

Sincerely,



RAYMOND J. UHALDE
Acting Assistant Secretary

Enclosure

07/23/97 09:42

TX/RX NO.6176

P.004

FEDERAL ISSUES RAISED IN LEGAL MEMORANDUM

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

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

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

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

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

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

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

JUL 23 '97 09:40 FR SEN LEAHY

CME 229413 TO JUDICIAL BRANCH

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- 2 -

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

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

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

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

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

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

*** TOTAL PAGE.06 ***

07/23/97 09:42

TX/RX NO.6176

P.006

February 26, 1997

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

prepared by

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

Summary

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

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

Purpose of the Shared
Federal-State Unemployment Law

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

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

page 2

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

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

Elements of Federal Compliance Related to the Vermont Unemployment Compensation Bill

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

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

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

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

page 3

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

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

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

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

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

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

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

page 4

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

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

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

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

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

page 5

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

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

No FMLA & ERISA Preemption

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

Policy Considerations In Support of the Vermont Bill

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

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

page 6

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

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

Conclusion

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

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BILL AS INTRODUCED
1997

S.143
Page 1

S.143

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

County

Referred to Committee on

Date:

Subject: Labor, unemployment compensation, family and parental leave

Statement of purpose: This bill proposes to authorize finding of wage replacement benefits for employees taking family or parental leave.

AN ACT RELATING TO UNEMPLOYMENT COMPENSATION AND FAMILY AND PARENTAL LEAVE

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

Sec. 1. FINDINGS AND PURPOSE

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

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02-21-97

09:37

RECEIVED FROM: 8028282424

P.02

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

MEMORANDUM

State UI Laws Exempting Workers on Recall from Work Search

State: Arkansas

Citation: Ark. Stat. Ann §11-10-507 (1997)

Brief: Employee on short-term layoff, expecting recall to a full-time job w/in 8 weeks is not required to register for work or to seek other work.

Provision: An insured worker shall be eligible to receive benefits...
 (3)(E) An individual on short-term layoff who expects to be recalled by his employer to a full-time job and whose employer intends to recall the individual to a full-time job within eight (8) weeks after the initial date of his layoff shall not be required during the layoff to register for work at an Arkansas Employment Security Department office or to seek other work.

State: Michigan

Citation: Mich. Comp. Laws § 421.28 (1978) (Mich. Stat. Ann. § 17.530 (1998))

Brief: Employee on short term layoff, expecting recall w/in 45 days is not required to register for work and be available if employer notifies commission in writing that Employer will take back Employee within 45 days.

Provision (a) ...The requirements that the individual report at an employment office, ... register for work, ...be available to perform suitable full-time work, and ...seek work may be waived by the commission if the individual is laid off and the employer who laid the individual off notified the commission in writing or by computerized data exchange that the layoff is temporary and that the work is expected to be available for the individual within a declared number of days, not to exceed 45 calendar days...
 ...if individual is not recalled within the specified period, the waiver shall cease to be operative with respect to that layoff...
 ...requirement that the individual shall seek work may be waived by the commission where it finds that suitable work is unavailable both in the locality where the individual resides and in those localities in which the individual has earned base period credit weeks...

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

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

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

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

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

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

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

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

Here is a sampling of current state efforts:

California

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

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

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

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

Patricia Shiu
Employment Law Center
(415) 864-8848

Iowa

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

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

Maryland

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

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

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

Massachusetts

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

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

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

Minnesota

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

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

New Jersey

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

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

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

New York

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

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

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

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

Vermont

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

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

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

Washington

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

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

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

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

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

Agenda

Paid Parental Leave and UI

April 28, 1999

I. Opening Remarks (OMB, DOL)

II. Background

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

III. Issues for Discussion

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

IV. Next Steps (OMB)

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 - UI funded and administered

IV. Next Steps (OMB)

THE WHITE HOUSE
WASHINGTON

OFFICE OF THE FIRST LADY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Base:

FTE: 130

Estimate: \$20,975,000

Program Increase:

FTE: -0-

Estimate: +\$10,000,000

strategies to make leave more affordable for their citizens.

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

replace current (d)

Paid Leave Options

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

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

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

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

DRAFT 11/4/98

Impact of Tying Paid Leave Eligibility to UI Eligibility Requirements

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

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

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

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

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

Greater Boston Legal Services

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

March 16, 1999

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

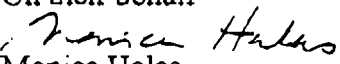
Re: The Massachusetts Unemployment Insurance\Family Leave Recall Bill

Dear Deputy Secretary Higgins:

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

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

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

Sincerely,
The Family Leave Coalition
On their behalf

Monica Halas
Senior Attorney

enc(2)

Greater Boston Legal Services

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

March 15, 1999

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

Dear Grace:

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

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

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

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

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

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

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

Sincerely,

Ann Bookman (MA)

Professor Ann Bookman
Holy Cross College

Maurice Emsellem (MH)

Maurice Emsellem
National Employment Law Project

Monica Halas

Monica Halas
Greater Boston Legal Services

Linda Johnson (MH)

Linda Johnson
Women's Statewide Legislative Network

enc (1)

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

March 15, 1999

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

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

Executive Summary

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

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

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

¹ For further information, please contact Maurice Emsellem, NELP, 212/285-3025, ext. 106, or email: ems:ellem@nelp.org; or Monica Halas, GBLS, 617/371-1234, ext. 621, or email: mhalas@gbis.org.

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

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

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

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

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

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

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

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

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

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Recall.

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

B. Training.

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

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

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

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

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

C. Disability.

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

D. Inverse Seniority Layoff.

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

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

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

IV. Responses to DOL Questions Raised In Prior Correspondence

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

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

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

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

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

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

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

⁷(...continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. Conclusion

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