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DATE:	
TO:	Jon Orszag
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FROM:	Oscar
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Comments: Maurice Emsellem 212-285-3025 x106

Cover leave under UI --
Have to be available for work?
- But # of states have ded this.

VT, Mass, WA, NY, NJ

UI

TDI

Kitty Higgins
Grace Kilbane

Jon —
This is what we discussed.
Jon.

I made a copy.
N

American Federation of Labor and Congress of Industrial Organizations

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

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

(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 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 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
Donna Lenhoff
General Counsel
Women's Legal Defense Fund
1875 Connecticut Avenue, N.W.
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149 State Street
Montpelier, VT 05602

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

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

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

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

- 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

RAYMOND J. UHALDE
Acting Assistant Secretary

Enclosure

FEDERAL ISSUES RAISED IN LEGAL MEMORANDUM

1. <u>The determination of a "voluntary quit" is reserved to the States</u>.

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

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. <u>Workers may maintain an employment relationship while collecting UI</u>.

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.

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.

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

<u>Summary</u>

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 <u>et seq.</u>) and the Employee Retirement Income Security Act (29 U.S.C. §§ 1001 <u>et seq.</u>) 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.

<u>Purpose of the Shared Federal-State Unemployment Law</u>

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, <u>The Development of the Social Security Act</u> (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 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.

I. 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 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(h). From this language, combined with the requirement that funds withdrawn from the federal trust fund "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 renumeration." Id. at 782. See also Terterman v. Appeal Board, 1988 Del.Super. LEXIS 3 (1987) ("the fact that the employer-employee relationship was not completely severed does not 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

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.

BILL AS INTRODUCED S.143
1997 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 funding 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.

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 (1979) (Mich. Stat. Ann. § 17.530 (1998))

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

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

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

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TO: Nicole Rabner **DATE:** 12/2/98

FAX NUMBER: 456-9412 **PAGES:** 12
(include cover sheet)

LOCATION:

FROM: Kathy Curran.

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

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COMMENTS/INSTRUCTIONS:

Sorry it took so long - here's our draft discussion - let's talk.

K.

2
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.

I. 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 injury[1]:

> **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

Do this as part

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 x .028 x $ 200 x 6 weeks = $ 18,929,904

Cost Estimate A-2: 563,390 x .028 x $ 200 x 12 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 x .028 x 200 x 6 weeks = $ 20,388,614

Cost Estimate B-2: 606,804 x .028 x 200 x 12 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 x .028 x $ 200 x 6 weeks = $ 18,269,832

Cost Estimate C-2: 543,745 x .028 x $ 200 x 12 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 x .028 x 200 x 6 weeks = $ 19,671,825

Cost Estimate D-2: 585,471 x .028 x 200 x 12 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.

PAID PARENTAL LEAVE OPTIONS

I. Commission/Working Group

(1) Create a Paid Parental Leave Commission to conduct research necessary to assess existing paid leave proposals and develop additional options if appropriate.

(2) Task the ERISA Advisory Council 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. 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 been unsuccessful in gaining DOL authority to pursue this approach.

III. Federally-Funded, State Administered Paid Parental Leave Proposal. 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 who wanted to participate in federal paid leave would have to use the federal benefit before using employer-paid leave in order to minimize disincentives on employers who might otherwise provide benefits. The simplest benefit amount approach would be to set one amount available to all eligible workers ($200 per week represents close to the U.I. average benefit).

	4 weeks leave	**6 weeks leave**	**8 weeks leave**
ROUGH COST ESTIMATE of $200/week wage replacement for workers below median income, assuming full take-up	$425 million	$637 million	$850 million

** Cost does not include c. $300 million annual U.I. start-up and administrative costs and includes no matching requirement

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 o f 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.

9. Fed gov't as model employer

$50, 100, 250, 500

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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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'MLA PAID LEAVE OPTION: COST ESTIMATES

	(1) all take 4 wks	(2) all take 6 wks	(3) all take 8 wks	(4) all take 12 wks
Jo. of women w/ youngest child < 1 year old (1997 CPS)	3,170,000	3,170,000	3,170,000	3,170,000
:st. 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)				
Vorkforce 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
\ssume 11 percent would not take time off ***				
a. 35% ineligible	1,061,796	1,061,796	1,061,796	1,061,796
b. 10% inelibible	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)**			
:st. 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 35% were on the job for 1 year or less
nd 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

1/04/98

NOV-05-1998 09:22

11/26/97

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11/26/97 3:00 PM

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. While careful consideration needs to be given to the effect of such a program on employer benefit plans, 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

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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. <u>After receiving benefit:</u> 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.)

- <u>Benefit duration and timing:</u> 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.

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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.

File 11/26/97

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POTENTIAL CHANGES FOR FMLA

ADD PAID LEAVE COVERAGE FOR 6 WEEKS OF NEWBORN CARE

Maximum number of women 3,378,000 with newborns in a given year (CPS)
Assume that 1,834,000 will return to work (LFPR of those with <1 year olds)
Assume between 20-33% will be ineligible (tenure data) [will be checking lower bound with work experience data]
Using bounds implies between 1,467,200 and 1,228,780 would make tenure cut and may want leave to take care of infant
Without means testing implies cost of (at $200x6weeks=1200 each mother) = $1,760,640,000 and $1,474,536,000 (w/o administrative costs)
How many of these women would meet an income eligibility cut?
Median income for families with children under 3 -- $36,626. If this was the cut off than ½ of potential above would not qualify so cost would be half -- so between $880,320,000 and $737,268,000.
Add administrative costs of approximately $200,000 ($60m to change UI base period and $140m to add payment system to UI [no basis for this number]) and proposal costs out at $1B.

$800,000? $60,000?

EXTEND COVERAGE FROM 50 TO 25 PERSON ESTABLISHMENTS

EXTEND BENEFITS FROM 12 WEEKS TO 26 WEEKS

assumes all eligible take full 6 wks? DOL looking at cut

Unemp Ins. system

6 wks