

National Employment Law Project

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Re: Comments in Support of the Proposed BAA-UC Regulations (64 Fed. Reg. 67971, dated December 3, 1999)

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Cathy Wilkinson

Low-Wage Worker Activist

Dear Ms. Kilbane:

We are writing to express our strong support for the proposed regulations authorizing the states to provide unemployment benefits to accommodate workers taking a family leave. The Birth & Adoption Unemployment Compensation (BAA-UC) program represents a critical step forward for low-wage workers and their families who have been denied the benefits of the unemployment system and access to paid family leave.

The National Employment Law Project (NELP) is a non-profit research and advocacy organization that specializes in issues of special concern to the working poor and the unemployed. For the past 30 years, NELP has worked extensively with Legal Services attorneys and advocates in the states who, on a daily basis, represent workers seeking to enforce their rights to unemployment benefits and other workforce development programs. NELP also provides extensive technical assistance to advocacy organizations and policy makers in the states to promote unemployment insurance policy reforms benefitting low-wage, women and part-time workers. NELP staff have thus provided extensive assistance in support of the growing number of state campaigns seeking to broaden access to the unemployment system, including the first BAA-UC initiatives proposed in Vermont, Massachusetts and Washington. NELP staff have also authored a number of published articles and reports on the UI system, including a popular resource guide entitled, *Women, Low-Wage Workers and the Unemployment Compensation System: State Legislative Models for Change* (Revised 1997).

I. Building Public Support at the Federal Level for State Policies Promoting a More Equitable UI System

First, we wish to commend the U.S. Department of Labor (DOL) for its leadership in promoting this exciting new UI reform, and we urge DOL to continue to play an active role working with the states to broaden access to the UI system. As the federal Advisory Council on Unemployment Compensation (ACUC) recommended in 1996, DOL should actively partner with the states to promote policies that create a more equitable UI system.¹ As many more states take on the issue of UI reform, the conditions exist for DOL to play a critical role promoting a broad range of necessary UI reforms and to raise the public profile of the UI program.

Over the past several decades, access to the UI system has declined to unacceptably low levels due largely to the failure of the UI system to keep pace with the changing needs of today's workforce. Nationally, the proportion of the unemployed receiving unemployment benefits has dropped from an average of 49% in the 1950s, and over 75% during the 1974-75 recession, to just 35% in the 1990s. As documented by the ACUC and the National Commission on Employment Policy, low-wage, part-time and women workers are the hardest hit by this lack of access to the UI system.² A recent study authored by NELP and the Institute for Women's Policy Research (IWPR) illustrates how these negative trends impact individual groups of workers at the state level.³ In Texas, only 21% of unemployed women workers received UI. The rate for part-time workers was 8.5% and only 18.4% for low-wage workers, despite the significant labor force attachment of both these groups.

At the same time that these workers are having a harder time accessing the UI system, UI funding in the states has improved remarkably due to the sustained low levels of unemployment. Specifically, since the end of the last recession, state trust fund reserves increased by 85%. According to the standard measure of trust fund solvency, most states are now well positioned to

¹ According the ACUC, "To preserve the national interests in the UI system, the federal government should take an active role : . . . assuring that all workers with a given level of attachment to the workforce are eligible for a minimum level of benefits." Advisory Council on Unemployment Compensation, *Defining Federal and State Roles in Unemployment Insurance* (January 1996) at 9.

² Advisory Council on Unemployment Compensation, *Unemployment Insurance in the United States: Benefits, Financing, Coverage* (February 1995), at 16; National Commission on Employment Policy, Institute for Women's Policy Research, *Unemployment Insurance: Barriers to Access for Women and Part-Time Workers* (September 1995).

³ National Employment Law Project, Institute for Women's Policy Research, *The Texas Unemployment Insurance System: Barriers to Access for Low-Wage, Part-Time & Women Workers* (February 1999).

handle UI expansions, including the BAA-UC program. The solvency standard, known as the “average high cost multiple” (AHCM), measures the number of years that a state can pay UI benefits at peak recessionary levels. The recommended AHCM is 1.0, meaning that the state can afford to pay at least one year of benefits during a severe recession without taking in additional revenues. Since the 1992 recession, the AHCM has increased by 49% nationally, averaging .94 in 1998 (the 1999 figures will be released shortly). As of the end of 1998, 33 states were above the solvency standard, and the number is expected to continue to increase absent a severe economic downturn.⁴

Meanwhile, as the condition of the state trust funds improve, employer tax cuts have drained the UI trust funds of billions of dollars that could be directed to expand access to UI benefits. Employers’ aggressive lobbying for state UI tax cuts has occurred at the same time that businesses are experiencing record profits. According to a tally prepared by NELP in July 1999, at least 15 states have cut UI taxes dramatically over the last few years.⁵ As a result, the average rate of employer contributions to the UI system, as a percentage of the taxable wages, has dropped from 2.51% in 1993 to 1.92% in 1998. In dollar terms, employers thus paid an estimated \$5 billion less into the UI system in 1998 alone, taking into account the decrease in the average rate of contributions since 1992.⁶ These tax breaks far exceed the costs of even the most ambitious UI reform agendas. For example, in comparison to the \$5 billion in tax cuts, DOL estimates that the BAA-UC program would cost only \$68 million if adopted by most of the states where it has been proposed.

Thus, many state legislatures are now faced with a clear choice in the Year 2000. Should they update their UI programs to serve the needs of the changing workforce or undermine the integrity of the program by providing tax relief to employers during a period of corporate prosperity? As a result of the conditions described above, a movement has taken hold in the states taking the path of reform to expand access to the UI program. Just in the past few years, states as politically diverse as Wisconsin, California, Texas, New Hampshire, Florida, Massachusetts, Georgia, Washington, North Carolina, New Jersey and Connecticut, have enacted or are now actively debating broad UI reforms specifically intended to reach more low-wage and women workers.⁷ For example, Governor Thompson of Wisconsin recently signed a

⁴ National Employment Law Project, “Expanding Unemployment Insurance for Workers on Family & Medical Leave: Question & Answer,” Table 3 (Revised January 2000).

⁵ National Employment Law Project, “Unemployment Insurance Tax Cuts on the Rise: A Summary of Recent State Experiences” (Revised July 1999).

⁶ National Employment Law Project, “Expanding Unemployment Insurance for Workers on Family & Medical Leave: Question & Answer,” at 6-7 (Revised January 2000).

⁷ See, e.g., “Jobless Insurance Ready to Take Friendly Turn,” *Milwaukee Journal Sentinel*, October 24, 1999; “Labor Seeks to Broaden Unemployment Eligibility,” *The Wall Street Journal*

comprehensive package of UI reforms that included the “movable base period,” broader coverage for workers who leave their jobs due to a wide range of family circumstances, and creation of a study commission to consider options to expand UI for part-time workers. The BAA-UC initiatives, first proposed in Vermont, Massachusetts and Washington, are part of this larger movement to make the UI system more accessible to low-wage and women workers.

This unprecedented level of state activity, fostered by the favorable funding opportunities, has created the ideal climate for DOL to actively support UI state initiatives. As in the case of the BAA-UC initiative, DOL can play a significant role publicizing these many successful state reforms, not just with state administrators and other key “stakeholders” but also with the broader public at large. Indeed, although not without its critics, the BAA-UC initiative has successfully generated an unprecedented public debate that has begun to address the many misperceptions about the limits of the UI program and spark discussion about the need for broader UI reform.⁸ The lack of public understanding of the UI system likely contributes to the fact that so many laid-off workers who qualify for UI still do not apply for benefits.⁹ A campaign to build public understanding about the UI system will therefore help increase the UI “take up” rate and build broader support for UI reform. *We thus urge DOL to build on its experience with the BAA-UC initiative and take on the challenge of elevating the public profile of the UI system and encouraging reform in the states.*

II. The BAA-UC Program Serves the Fundamental Purposes of the UI Program

The BAA-UC program will serve the fundamental purposes of the UI system to maintain and increase attachment to the labor market, especially for low-wage working families.

As stated in the proposed regulations, the goal of the BAA-UC program is to “help employees maintain or even promote their connection to the workforce by allowing them time to bond with their children and to develop stable child care systems while adjusting to the

(Florida Edition), June 3, 1998; “Texas Ranks Low in Benefits for the Unemployed,” *Dallas Morning News*, April 14, 1999; “Safety Net Repair: Hole in Jobless Benefits Needs Mending,” *The Sacramento Bee*, September 25, 1997; “Revamping Jobless Benefits Could Ease Welfare Burden,” *The Sacramento Bee*, September 7, 1998.

⁸ For example, the *New York Times* editorial (“Paid Leave for Parents,” dated December 1, 1999) supporting the proposed regulations goes on to note that “Although unemployment insurance is traditionally seen as helping only those who have been involuntarily laid off and immediately available for work, many states have granted benefits to workers who not in that narrow category.”

⁹ U.S. Department of Labor, Employment and Training Administration, *The Decline in Unemployment Insurance Claims Activity in The 1980s* (1991).

accompanying changes in lifestyle before returning to work.” 64 Fed. Reg. at 67974. Saul Blaustein, in his treatise on the history of the UI system, emphasizes the key role that unemployment benefits play in maintaining a skilled and productive workforce. According to Blaustein, “The compensation tends to preserve the workforce intact, with its particular skills, training, and experience, until it can be recalled While this support of workforce retention may somewhat restrict the mobility of labor, it is of value to the employer, as well as to the worker and the community.”¹⁰

As described so well in President Clinton’s speech on May 23, 1999, large numbers of working families cannot take advantage of the 12 weeks of job-protected leave provided by Family & Medical Leave Act of 1993 because they do not have the financial means to support their families while on unpaid leave. As the report of the Commission on Family and Medical Leave found, the absence of paid family leave has had a devastating impact on low-income families in particular.¹¹ For example, 21% of those families with incomes of less than \$20,000 a year reported having to resort to public assistance given the absence of paid leave. The benefits provided by BAA-UC program will help keep these low-income families from falling into poverty and drifting further from the labor market. See *California Dept. of Human Develop. v. Java*, 402 U.S. 121, 132 (1974) (unemployment benefits are necessary to “maintain the recipient at subsistence levels, without the necessity of his turning to welfare or private charity.”).

In fact, years of research in the United States and abroad demonstrates empirically the value of family leave policies to workers and their employers. According to the comments of Professor Janet C. Gornick (dated January 14, 2000) submitted in support of the BAA-UC regulations, “paid family leave benefits for new parents strengthen women’s labor market attachment, in both the short-and long-term.” Specifically, the studies show that access to maternity benefits is strongly associated with new mothers’ probability of returning to work within six months of giving birth. Women with access to paid leave were also found to work later into pregnancy and to start working sooner once the infant was at least two months old. In addition, Canada has successfully offered benefits through its UI system for many years, covering qualified employees unable to work “due to maternity” (since 1971) and “due to parental caring” (since 1990).

The BAA-UC program thus represents the logical next step in the evolution of the UI system to accommodate the changing circumstances of today’s working families. As documented by the successful Canadian experience and the empirical research on paid family leave policies, the BAA-UC program will reap significant benefits for workers, their families and employers

¹⁰ Saul Blaustein, *Unemployment Insurance in the United States: The First Half Century* (W.E. Upjohn Institute: 1993), at 63.

¹¹ Commission on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* (1996), at Table 5.R.

thereby serving the essential goals of the UI system.

III. The Labor Department Properly Exercised its Authority to Interpret Federal Law by Ruling that States are Permitted to Enact BAA-UC Legislation

The states have the authority to enact the BAA-UC program consistent with the intent of the federal unemployment laws. When Congress enacted the federal unemployment laws as part of the Social Security Act in 1935, it declined to decide most of the basic eligibility rules for the states. With regard to the BAA-UC program specifically, the only question left for DOL to decide was whether these same federal laws precluded the states from exempting workers on family leave from having to be “able and available” for work.

As DOL observes in the proposed regulations, “no explicit able and available requirements are stated in Federal law.” 64 Fed. Reg. at 67971. However, on prior occasions, DOL has interpreted provisions of the federal law to require that claimants be “able and available” for work while also recognizing the authority of the states to make exceptions in particular circumstances. 64 Fed. Reg. at 67972. *We believe DOL has properly exercised its authority to interpret federal law in this case. However, for the reasons described below, we also believe the federal law can and should be interpreted more broadly in the case of the BAA-UC program to provide states with significantly more discretion to enact exceptions to their work-search rules.*

A. The Plain Wording of the Applicable Federal Statutes does not Require States to Adopt Any Particular Availability Requirement, thus the BAA-UC Regulations Should Provide States with Greater Latitude in Defining State Availability Rules

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). Indeed, the only reference to the availability rules specifically is found in the draft state bills that were prepared by the Committee on Economic Security to accompany the Social Security Act. However, as the Social Security Board concluded in 1936, the draft bills were never intended to constrain the states.

According to the Social Security Board, which was authorized to review state laws to determine compliance with the Social Security Act:

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).

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.¹²

DOL, in the proposed regulations, interprets other selected provisions of federal law to conclude that states must maintain an able and available requirement. 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.” According to the proposed regulations, “The able and available requirements provide a test of a claimant’s ‘unemployment’” as the term is interpreted by DOL under these federal laws. 64 Fed. Reg. at 67972.

In the final regulations, we would urge DOL to adopt a less restrictive interpretation of these federal laws. These references to “unemployment” in the federal law should not be interpreted to impose a work-search requirement on the states. Indeed, the reference to “unemployment” in the federal law supports the view that states should be allowed more leeway to legislate in this area since it is clear that states already have the authority to define the parameters of the term “unemployment” for eligibility purposes. Without having to obtain DOL approval, states routinely expand their definition of “unemployment” to cover many workers who are temporarily separated from their jobs as in the case of workers on family leave. *Given that the states have the authority to define the scope of the term “unemployment,” it follows that the states should be entitled to greater latitude to define the limits of the able and available rules assuming that DOL’s authority in this area is based in Sections 3304(a)(4) and 3306(h) of the federal law.*

B. The Early History of the Unemployment Laws Also Demonstrates that Availability Requirements Were Intended to be Defined by the States

¹² See Raymond C. Atkinson, *The Federal Role in Unemployment Compensation Administration* 30 (1941).

A review of the legislative history of FUTA and the SSA and contemporaneous commentary by those responsible for enforcing the newly-enacted laws also demonstrates that states were intended to possess discretion in defining their able and available requirements. In the end, 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, 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).

C. State Precedents Have Broadly Defined Availability For Work to Expand UI Eligibility Absent Authority Provided by Federal Regulation

As documented by the proposed regulations, numerous states have enacted UI laws that create broad exceptions to the availability requirement, thus establishing ample precedent in support of the proposed BAA-UC regulations.

It is significant, however, that federal regulations were not considered necessary when the states proposed or enacted these laws that exempt workers from the work-search requirements. *Similarly here, to the extent that a reinterpretation of the 'able and 'available' requirement must precede any action by the states (as is the position stated in the proposed regulations), DOL need not undertake formal rulemaking under the Administrative Procedures Act (5 U.S.C. Section 553(b)).* As is far more common, DOL could have clarified its reinterpretation of the federal law in this area by means of an Unemployment Insurance Program Letter (UIPL) or any other agency action not

rising to the level of formal rulemaking.¹³

1. Analogous State Laws

a. Workers on Recall Status

The precedents in UI state laws that are the most directly analogous to the BAA-UC program are the recall statutes authorizing workers who are temporarily laid-off from their jobs to be exempted from the state's availability rules. These statutes, which exist in seven states (Arkansas, Delaware, Michigan, Missouri, New Mexico, Ohio and South Dakota), vary significantly in scope.¹⁴ These states have logically concluded that it is poor public policy to force workers to search for work or be available for work when they are only temporarily separated from their jobs. Some state statutes, including the Michigan law, 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 clearly illustrate the key role that unemployment benefits play in maintaining attachment to the workforce for those workers who are temporarily separated from their jobs.

b. Workers participating in approved 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. Nevertheless, by 1966, twenty-two states had enacted provisions exempting unemployed workers in training or retraining programs from availability requirements if otherwise eligible.¹⁵ These states chose this policy based on their view of "unemployment insurance as part of a comprehensive labor market

¹³ UIPL No. 1-96 (October 5, 1996) (although they are not subject to formal rulemaking, UIPL No. 1096 was specifically issued to "advise States that these directives do, in fact, have legal effect.").

¹⁴ See Ark. Stat. Ann. sec. 11-10-507 (3)(E); 19 Del. C. sec. 3314(3)(1997); MSA sec. 17.531 (1998), sec. 28(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.

¹⁵ See William Haber & Merrill G. Murray, *Unemployment Insurance in the American Economy* 114 (1966).

program.”¹⁶

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 BAA-UC program. 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 BAA-UC program.

c. Other Relevant State Exceptions

States are currently allowed to exempt disabled workers from availability requirements if the disability or illness arises after the worker applies for benefits. In addition, states continue to pay benefits to workers who are serving jury duty. In both these circumstances, the claimant’s minimal unavailability for work does not lessen his or her continuing attachment to the labor market.

D. State BAA-UC Programs Properly Expand Coverage Beyond the Federal Laws, Thus Supporting the Federal Goal of Experimentation

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 fund 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 laws that lower the floor, 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

¹⁶ *Id.*

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

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.

The BAA-UC program illustrates the value and necessity of state experimentation that seeks to expand coverage beyond what is provided by the federal laws. In the states where the BAA-UC program was originally proposed, Massachusetts and Vermont, the unemployment insurance programs are among the most worker-friendly in the nation. Faced with years of reserves in their UI trust funds and aggressive campaigns by the business community to drastically cut UI taxes, bold proposals were developed in these states to expand unemployment benefits to meet a significant unmet need -- helping workers taking family leave remain attached to the labor market. *Thus, this creative new proposal, first recommended by the National Commission on Family & Medical Leave¹⁸ and adopted in Canada, appropriately*

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).

¹⁸ Specifically, the Commission recommended that "States should consider voluntarily extending unemployment compensation qualifications to employees on family and medical leave .

emerged out of states with a long history of successful experimentation in expanding access to the UI system.

IV. Strengthen the Regulations by Abandoning the “Experimental” Restrictions of the Program and Permitting the States to Adopt Other Forms of Leave Not Limited to Leave to Care for the Birth or Adoption of a Child

As described above, we strongly support the Labor Department’s decision authorizing the states to move forward with this innovative new program. *However, consistent with the agency’s authority to interpret the federal unemployment laws, we urge DOL to remove the limits in the proposed regulations confining the program to the status of an “experiment” rather than a permanent program and prohibiting the states from providing benefits to workers taking leave for compelling reasons other than the birth or adoption of a child.*

According to the proposed regulations, the rationale for limiting the program to those workers taking a leave to care for a newborn or adopted child was to target a “small, easily-defined group that can be used to test whether compensating absences from employment would assist individuals to maintain, or even improve upon, their connection to the workforce by enabling them to better meet their parental and family needs.” 64 Fed. Reg. at 67974. According to DOL, information collected on the experiences of the states that implement the program “may also serve as a basis for further expanding coverage to assist a broader group of employees to better balance work and family needs.” 64 Fed. Reg. at 67974. However, a comprehensive evaluation will not be performed until at least four States have implemented the program and operated a BAA-UC program for at least three years.

For the reasons described below, we urge DOL to abandon these overly restrictive and unnecessary limitations on the rights of the states to enact their UI programs. First, while DOL has interpreted federal law to limit the state’s ability to create exemptions to their work-search requirements, the detailed analysis of the federal law and its legislative history provided above (Section IV) strongly supports the conclusion that states have the authority under federal law to waive the work-search rules in appropriate circumstances. DOL’s current position is also inconsistent with the vast support for state experimentation where, as here, “[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. *Thus, it is far more advisable for the federal government to allow the states to make their*

... “Commission on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* (1996) at 199.

own well-reasoned decisions, based on the circumstances in each state, as to how broadly or narrowly they design the program and which leave conditions to cover.

Second, as described above, years of empirical research sufficiently supports the conclusion that paid family leave policies increase attachment to the labor force, thus addressing the stated rationale for DOL's reluctance to expand the BAA-UC program. It is therefore unnecessary to condition the future of the program on an evaluation conducted by the federal government, especially after the states have gone through the taxing experience of enacting their laws. *As Professor Gornick stated in her comments on the proposed regulations, the available research on paid family leave policies is sufficient to justify a federal policy allowing the states to move forward permanently with their BAA-UC programs.* Thus, DOL should "reconsider its position, and issue final regulations that abandon the notion that new policy remain an 'experiment' that must be revisited at an unspecified date in the future for final approval by the federal government." (Professor Gornick's letter in support of the proposed regulations, dated January 14, 2000).

VI. Proposals to Clarify the Regulations, the Question & Answer and the Model Legislation

With the exception of the key limitations described above, DOL has sought to propose a rule that is "not overly prescriptive." 64 Fed. Reg. at 67974. In the interests of clarification, we propose the following changes to the regulations, the Questions & Answer and the model legislation which seek to maximize state flexibility to enact the BAA-UC program.

A. The definition of "approved leave" should be clarified to insure that all workers who qualify for a leave receive the benefits of the BAA-UC program. Section 604.3 defines "approved leave" as leave "agreed to by both the employee and the employer, during which an employee is temporarily separated from employment and after which the employee will return to work for that employer." 64 Fed. Reg. at 67977. This language improperly suggests that "approved leave" is only available where the employer expressly agrees to the unpaid leave, which is not a requirement under most employment laws and contracts.

Therefore, the definition should be clarified to include both statutorily required "covered leave" as well as "approved leave" (with "approved leave" applying to those situations where the employer is not required to offer a leave but does so voluntarily). Alternatively, the regulations should provide that "approved leave" includes any leave that the employer either agreed to or "should have agreed to under federal law, state law, a collective bargaining agreement, or any other employment contract." These revisions would clarify that workers who are *entitled* to an approved leave -- whether actually

agreed to by the employer or not -- will obtain the benefits of the BAA-UC program.

B. Clarify that states may provide supplemental BAA-UC benefits in appropriate circumstances that directly relate to a family leave. According to the proposed regulations, “the intent of Birth and Adoption unemployment compensation is to support all parents who wish to take time from employment to be with their newborns or newly-adopted children.” 64 Fed. Reg. at 67977 (Section 604.22.). However, “other types of family leave or care would be inconsistent with this experimental program.” *Id.* Within these limitations, we urge DOL to defer to the states in cases where they seek to provide supplemental benefits to cover circumstances directly related to the family leave.

This recommendation is based on the Canadian UI system which currently provides different levels of benefits for parents under a range of circumstances that properly fall within the intent of the BAA-UC program. Canada provides a standard 10 weeks of parental leave (Canada also provides 10 weeks of maternity benefits, which can be taken before the arrival of the child) when the leave is taken within one-year of the date from which the new child is born or placed with the family. However, also within the required one-year period, parents can qualify for an additional 5 weeks of benefits to cover a range of medical conditions that may arise after the birth of the child¹⁹ and to cover situations where the adopted child is more than six months of age.²⁰ In addition, Canada provides additional benefits for claimants whose children are hospitalized after birth.²¹

In the interests of promoting state flexibility and experimentation, we believe these and other forms of supplemental benefits should be permitted as an option to the states that enact BAA-UC programs. The key is that these benefits are deemed by the state to relate directly to the claimants’ family leave. Thus, the conditions that are

¹⁹ Specifically, the Canadian law allows for supplemental benefits where “a medical practitioner or the agency that placed the child certifies that the child suffers from a physical, psychological or emotional condition that requires an additional period of parental care.” Employment Insurance, Chap. E-5.6(12)(7)(b).

²⁰ Specifically, the Canadian law provides for supplemental benefits where the child is “six months of age or older at the time of the child’s arrival at the claimant’s home or actual placement with the claimant for the purpose of adoption.” Employment Insurance, Chap. E-5.6(12)(7)(a).

²¹ Specifically, the Canadian law provides: “If a child who is born of the claimant’s pregnancy is hospitalized, the period during which benefits are payable . . . shall be extended by the number of weeks during which the child is hospitalized.” Employment Insurance, Chap. E-5.6(22)(6).

covered to provide supplemental benefits are not strictly speaking “other types of family leave or care.” This is consistent with the BAA-UC provision that allows the claimants to take a leave to care for a newborn or newly-adopted child any time “during the one-year period commencing with the week in which their child is born or placed with them for adoption.” 64 Fed. Reg. at 67978 (Section 604.22). In addition, it is consistent with the provision that the “States are free to determine” the number of weeks that an individual may receive benefits. *Id.* Thus, we urge DOL to clarify in the Question & Answer that supplemental BAA-UC benefits can be provided in appropriate circumstances.

C. Provide additional detail describing how BAA-UC benefits may be socialized (or “noncharged”) among reimbursing employers, including government agencies and non-profit organizations. In certain states, the potential cost of the BAA-UC program is a significant cause of concern to reimbursing employers since they are paying the full amount the successful UI claims. As the Question and Answer points out, the BAA-UC benefits may be socialized to shield reimbursable employers from having to pay the full amount of benefits in each case. 64 Fed. Reg. at 67979. However, the basic options and procedures necessary for states to non-charge benefits in the case of reimbursable employers are not explained in the Question and Answer. *See* UIPL No. 44-93; UIPL No. 21-80. Thus, we recommend that DOL highlight the options for states to establish non-charged benefits for reimbursing employers, and that state representatives be urged to contact DOL for technical assistance to enact such programs.

D. Rephrase the model legislation to indicate more affirmatively that claimants shall be provided BAA-UC under the applicable provisions of state law. The current draft of the model legislation states that claimants taking a family leave “shall not be denied compensation” under the relevant section of the state’s unemployment law. 64 Fed. Reg. at 67977. By wording this provision in the negative, however, it poses the risk that states courts or administrative agencies may narrowly construe the statute to deny BAA-UC benefits to qualified workers.

For example, in *Wimberly v. Labor and Industrial Relations Commission*, 479 U.S. 511 (1987), the U.S. Supreme Court seized on similar language to narrowly construe the federal statute providing that “no person shall be denied [unemployment] compensation . . . solely on the basis of pregnancy or termination of pregnancy.” 26 U.S.C. Section 3304(a)(12). As a result, the Court held that the federal law simply insured that pregnant claimants may not be treated differently from other claimants, not that there was a guarantee of unemployment benefits for pregnant claimants who leave work. Thus, the model BAA-UC statute should be worded in the affirmative [e.g., “compensation shall be provided pursuant to the relevant provisions of state law (followed by cites to the applicable state statutes)”] to guard against any potential misinterpretation of the law.

In conclusion, we commend President Clinton and the Labor Department for creating the opportunity to make paid family leave and unemployment benefits available to more workers, especially the growing numbers of women and low-wage workers who have been working hard without the benefit of these critically important workplace protections.

Sincerely,

Maurice Emsellem
Staff Attorney