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Cheryl Atkinson, Administrator
Office of Workforce Security
Employment & Training Administration
U.S. Department of Labor
200 Constitution Avenue, N.W., Rm. S-4231
Washington, D.C. 20210

Dear Ms. Atkinson:

We are writing to oppose the proposed repeal of the regulations which allow the states to provide unemployment benefits to workers who take a leave to care for a newborn or newly-adopted child. (67 Fed. Reg. 72122, December 4, 2002). For the reasons described below, the decision to abandon the Birth and Adoption Unemployment Compensation (BAA-UC) regulations, after they were fully promulgated by your agency as recently as June 2000 (65 Fed.Reg. 37210), should be reconsidered and reversed.

- **By repealing the regulations (20 CFR Part 604), the Administration is substituting its judgment -- “that the BAA-UC experiment is poor policy” -- with the discretion that the federal unemployment laws vest with the states to expand their eligibility rules.**

Individual states are in a key position to evaluate the needs of the changing workforce and the UI system, including the critical role of working women and caregivers in today’s society. Instead, the U.S. Department of Labor would entirely preempt them for doing so without allowing sufficient time or debate for even one state to test the BAA-UC regulations. As the Social Security Board concluded when the unemployment insurance system was first created, state eligibility rules should “go further and adopt wider coverage” than the federal law in order to promote innovation and experimentation. United States Social Security Board, *The Federal-State Program for Unemployment Compensation*, 5, 9 (1936). The Administration’s action thus removes a key policy option from the states at the same time that they are struggling to fill the gaps in the UI program and respond to the growing demand for a more family-friendly program.

- **In order to justify repeal of the regulations, the Administration mischaracterizes the trust solvency situation in the states and the funding impact of the BAA-UC initiative.**

The agency argues at length that the repeal of the BAA-UC program is necessary to protect the solvency of the state unemployment trust funds. Indeed, the initiative to repeal the regulations is referred to as the “Trust Fund Integrity Rule.” This suggestion is clearly overstated, especially considering that no state has yet adopted the program.

More importantly, it lumps together all the states, including those states with abundant trust fund reserves, and erroneously treats each one as if the BAA-UC program would render its trust fund insolvent. Thus, the Administration position – citing the “sudden and rapid decline in fund balances” (67 Fed. Reg. at 721123) – is another example of the agency’s willingness to preempt the judgment and experience of the states. Equally important, the Administration’s overstatements may produce a chilling effect on other expansions of UI benefits by the states, not just the BAA-UC program.

In fact, the funding situation in the vast majority of the states is not in jeopardy, comparing favorably to the solvency of the state trust funds before the recession began. As of September 2002, 22 states had sufficient reserves to pay benefits for at least one year at peak recession levels. 34 states had enough reserves to pay benefits at peak recession levels for at least 9 months (the state average was 8.3 months of recession-level funding). That is not significantly short of the one-year standard that applies before a recession begins, not 19 months after the recession started. Moreover, this solvency measure (the “average high cost multiple”) assumes that the states are not taking in any additional revenue. However, the states are actually accumulating significant reserves which are projected to total \$28 billion in 2003.

Before the recession began (in September 2000), the average state had 10.9 months of recession-level funding. That is only about two and a half months of funding more than the September 2002 average state level – a level of reserves that most observers would agree is more than adequate this long after a recession was declared. 10 states had limited reserves (that is, less than six months of recession-level funding) as of September 2002. 10 states also had more than 1.5 years of funding to pay benefits at peak levels, which compares with 12 states in September 2000. Finally, only two states have so far taken federal loans to cover the cost of paying their unemployment benefits. That compares with 33 states that borrowed from the federal government during the recession of 1980-84 and 24 states during the 1974-76 recession. Thus, with the exception of a limited minority of states, the UI funding situation is exceptionally well positioned to handle the demand for benefits.

The decision to raise the specter of a UI funding crisis is even less compelling in light of the Labor Department’s failure to take any action during the past decade with regard to those states that intentionally maintained insolvent trust funds in order to reward employers. For example, Texas and New York -- the only two states that are currently borrowing from the federal government -- both had less than four months of reserves in 2000, well before the recession began. Even after taking federal loans (combined, these states also depleted \$900 million of the federal Reed Act funding), these states continue to defend the wisdom of their “pay as you go” financing policies.

In conspicuous contrast to its position with regard to the BAA-UC regulations, the Labor Department has taken no position challenging “pay as you go” financing and other policies that are the

dominant cause of insolvent state trust funds and prevent states like Texas and New York from expanding unemployment benefits when additional relief is most needed. See Baldwin, *Beyond Boom and Bust: Financing Unemployment Insurance in a Changing Economy* (National Employment Law Project, April 2001) (describing the financing policies of the past decade and finding that UI taxes as a percentage of total payrolls in 2000 were lower than at any time in the history of the UI program). This double standard undermines the credibility of the Administration's position with regard to the BAA-UC regulations.

- **The proposal to repeal the BAA-UC regulations represents a major shift in its legal interpretation of the limits of the federal UI law which exceeds the agency's authority.**

With the BAA-UC regulations, the narrow legal question was whether the federal unemployment insurance laws (Federal Unemployment Tax Act and the Social Security Act) imposed an "able and available" (A&A) requirement on the states that would prevent them from making exceptions for workers taking a temporary leave to care for child.

As the Labor Department concluded in 2000, the precedent exists for federal law to allow workers on taking a temporary family leave to be exempt from having to look for work while collecting unemployment benefits. For example, before adopted as national policy by Congress in 1976, many states allowed workers to collect UI benefits without searching for work when they participated in approved job training. Workers are also permitted to collect unemployment without searching for work provided they are expected to be recalled to their job within a specific period of time.

In June 2000, the agency explained its reasoning as follows: "While the A&A requirements are a test of unemployment measuring an individual's attachment to the workforce, our interpretation recognizes that people can still be attached to the workforce even though there are situations and circumstances affecting their lives, like illness, jury duty, approved training, or temporary layoffs that affect their ability to meet the stricter interpretation of the A&A requirements." 65 Fed. Reg. at 37213. Extending this rule to cover families taking a temporary leave to care for a child, the agency stated, "it is important to allow a flexible demonstration of availability and in which attachment to the workforce can be demonstrated, and indeed strengthened, without requiring current demonstration of availability." *Id.*

While entirely abandoning this persuasive position, the Labor Department also introduces a dangerous new interpretation that could limit state rights to establish basic UI eligibility rules. Specifically, the Labor Department rejects its prior position on the grounds that workers collecting BAA-UC "have initiated their separation from the workforce and it is their personal situation, rather than the lack of available work, that has removed them from the labor market." 67 Fed. Reg. at 72122. Thus, the Labor Department opens the door for the federal agency to intervene in other areas where the states may see fit to expand eligibility. This occurs at a time when the system is already failing to reach many working women and other unemployed workers who have fallen through the gaps of the UI system. Because there is no "able and available" requirement anywhere in the text of the federal UI law, we believe the new interpretation thus exceeds the agency's authority.

The radical shift in the agency's position also undermines the Labor Department's credibility in defending its rules and regulations. *INS v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1221 n.30 (1987) ("An agency's interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (Quoting *Watt v. Alaska*, 101 S.Ct. 1673, 1681 (1976)).

- **The BAA-UC regulations correctly recognize that the UI program has to evolve to meet the demands of the changing workforce, which should be encouraged when such policies improve attachment to the labor market.**

In support of the regulations, the Labor Department referenced a number of studies which document that compensated family leave produces stronger labor force attachment, thus promoting a major goal of the UI program. Since 2000, additional research has bolstered these findings. According to a recent California study authored by Professors Dube and Kaplan (of the University of Chicago and University of California, Berkeley, respectively), “leave-takers receiving pay are more likely to return to work even accounting for demographic and leave types.” *Paid Family Leave in California* (June 19, 2002), at 42. Specifically, 35,000 California workers did not but would have returned to their jobs in 2001 had they been receiving paid family leave, costing employers about \$1,100 for each terminated employee. *Id.* Thus, as the Labor Department concluded in 2000, it is clear that the temporary income support provided by BAA-UC is good policy that promotes the fundamental goal of the UI program.

Conclusion

The BAA-UC program is not a policy that could, or should be, adopted by all states. Indeed, as the experience of the past two years has indicated, funding questions and other considerations have properly played a key role when the states have debated the program. However, for some states, especially those with abundant trust funds reserves, the BAA-UC program may represent an innovative option to promote a more family-friendly workplace and a more family-friendly UI program. With its proposal to repeal the BAA-UC regulations, the Labor Department has undermined those states that see the need to expand the UI program in the judgment properly invested in them by federal law.

Accordingly, we oppose the proposed repeal of the BAA-UC regulations, and urge the Labor Department to reconsider its position.

Sincerely,

Maurice Emsellem
Public Policy Director