

DEPARTMENT OF LABOR**Employment and Training
Administration****20 CFR Part 604**

RIN 1205-AB21

**Birth and Adoption Unemployment
Compensation****AGENCY:** Employment and Training
Administration, Labor.**ACTION:** Notice of proposed rulemaking.

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

DATES: DOL invites written comments on this proposal. Comments are to be submitted by January 18, 2000.

ADDRESSES: Submit written comments to Grace A. Kilbane, Director, Unemployment Insurance Service, Employment and Training Administration (ETA), U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-4231, Washington, DC 20210. Prior to issuance of this Notice of Proposed Rulemaking, the DOL received correspondence on the subject matter of the proposal. This correspondence, along with correspondence received in response to the Notice of Proposed Rulemaking, will be made part of the rulemaking record and will be considered in the development of a final rule.

FOR MORE INFORMATION CONTACT: Gerard Hildebrand, Unemployment Insurance Service, ETA, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-4231, Washington, DC 20210. Telephone: (202) 219-5200 ext. 391 (this is not a toll-free number); facsimile: (202) 219-8506.

SUPPLEMENTARY INFORMATION:**I. Background***A. General Overview***(1) Need for Birth and Adoption Leave**

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

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

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

In response to the President's May 24, 1999, Executive Memorandum, the DOL is exercising its authority to interpret Federal UC statutes, and, in particular the statutes' longstanding "able and available" requirements, by implementing an experimental program to examine the use of the UC program as a means for providing partial wage replacement to employees who desire to take approved leave or otherwise leave their employment following the birth or placement for adoption of a child.

(2) The Federal-State UC System

The Federal-State UC program is administered as a partnership of the Federal government and the States. States collect State UC taxes used to pay compensation while the Federal government collects taxes, used for grants for State UC administration, under the Federal Unemployment Tax

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

(3) Ability To Work and Availability for Work

The DOL has the authority and responsibility to interpret the provisions of Federal UC law such as the "able and available" requirements. Although no explicit able and available requirements are stated in Federal law, the DOL and its predecessors (the Social Security Board and the Federal Security Agency) interpreted four provisions of Federal UC law as requiring that claimants be able to and available for work. Two of these provisions at section 3304(a)(4), FUTA, and section 303(a)(5), SSA, limit with-drawals, with specific exceptions, from a State's unemployment fund to the payment of "compensation." Section 3306(h), FUTA, defines "compensation" as "cash benefits payable to individuals with respect to their unemployment." The able and available requirements provide a test of a claimant's "unemployment."

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

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

In response to practical economic and societal concerns, the DOL has previously, as discussed below, exercised its authority to interpret Federal UC statutes regarding the able and available requirements to address several specific areas: training, illness, jury duty and temporary layoffs. Under its authority to interpret Federal UC law and consistent with its broad oversight responsibility, the DOL interprets the Federal able and available requirements to include a voluntary experimental program for examining the use of the UC program to provide partial wage replacement to employees who take approved leave or otherwise leave employment to be with their newborns or newly-adopted children. This experiment recognizes the impact of women in the workforce and responds to the dramatic societal and economic changes resulting from the large number of families where both parents work. It should allow parents of newborns and newly-adopted children to strengthen their availability for work by providing them with the time and financial support to address several vital needs that accompany the introduction of a new child into the family. The program would allow such parents to provide the initial care that the child will need, to form a strong emotional bond with the child, and to establish a secure system of child care that, once in place, will promote the parents' long-term attachment to the workforce.

(4) Minimal Tests of the Able and Available Requirements

Consistent with DOL interpretations, some States have imposed minimal tests of the able and available requirements for specific situations, provided the claimant has demonstrated an attachment to the labor force.

Approved Training. Prior to incorporating the training provision into the Federal laws, the DOL encouraged States to treat individuals in training approved by the State agency as meeting the able and available requirements since such training represents the most effective step available to the individual to return to work. The DOL cautioned that State agencies should only approve short-term training that would make individuals job ready. In 1970, Congress, recognizing the importance of training in remedying unemployment, made this training provision mandatory for all States. (Section 3304 (a)(8), FUTA.) The Federal able and available requirements are preserved because individuals who fail to attend training, except by specific waiver, are held to be unavailable for work and ineligible for UC.

Illness. Eleven States allow an individual who initially meets the able and available requirements, but then becomes ill, to receive UC payments without interruption, provided that no suitable work is offered and refused. The DOL approved such State laws in an effort to deter disqualification for UC where a claimant was not "able and available" for perhaps one day, or even one hour, out of a week. Two States, Alaska and Massachusetts, cap the number of weeks ill claimants can collect UC at six weeks and three weeks, respectively; the other States have no statutory limitations. The Federal able and available requirements are preserved because claimants must initially demonstrate their ability to and availability for work before the illness and must be held ineligible if they refuse an offer of suitable work.

Similarly, under the Federal-State Extended Unemployment Compensation Act of 1970 (EB) (26 U.S.C. 3304, note), an ill individual may receive UC only if no suitable work is rejected. The EB program provides additional weeks of compensation to individuals who have exhausted their rights to regular compensation during times of high unemployment and contains a specific "work search" requirement. This work search requirement is suspended for EB claimants who are hospitalized for an emergency or life-threatening condition (20 CFR 615.8 (g)(3)(i)(B)). This suspension is permitted only if the State law contains a similar provision to those explained above, which must be consistent with the Federal able and available requirements.

Jury Duty. The DOL accepts that States may pay UC to individuals serving on jury duty consistent with the Federal availability requirement. This is reasonable because individuals are compelled under the threat of contempt of court by the judicial branch of the government to go on jury duty, and attendance at jury duty may be taken as evidence that the employee would otherwise be available for work. It would be inconsistent for the State to compel jury service and at the same time disqualify unemployed persons from UC for complying. Most employment is not considered an excuse for avoiding jury duty, and unemployment would also likely not be an excuse from jury duty. Indeed, EB claimants are exempt from the work search provision while on jury duty (20 CFR 615.8(g)(3)(i)(A)).

Temporary Layoffs. In a temporary layoff, the employer is unable to provide work for a short period of time, but both the employer and the employee have the expectation that the employee will

return to work on a specific date. When the employer recalls the employee, the employee must accept or be denied UC. In these cases, the availability requirement is essentially limited to the employer who laid off the employee. This recognizes that such employees are frequently career employees who would likely quit a new job to return to their former employer when the layoff ends; therefore, other employers would not likely hire such employees.

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

(1) Able and Available Requirements for BAA-UC

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

As the number of mothers in the workforce and families with both parents working rises, the need to test this interpretation increases, and collecting data under the BAA-UC program to test the existence and magnitude of this group's connection to the work force, is increasingly important. Indeed, much in the same way that providing training to laid-off employees enhances their connection to the workforce by making them more marketable, the DOL wants to test whether providing parents with BAA-UC at a point during the first year of a newborn's life, or after placement for adoption, will help 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 accompanying changes in lifestyle before returning to work.

The initial time period during which a new child is introduced into a home, and how that child's care will be assimilated into the working lives of the parents, is critical. It is during this period that secure emotional bonds are formed between children and their parents. It is also during this period that a system of child care, which will foster the parents' availability for work, can be firmly established. These requirements are universal when any working family has a new child. Addressing these needs is fundamental to helping families flourish and is also connected to

sustaining a stable workforce. Where parents continue to work after the arrival of children, they often need the opportunity to bond with their child as well as arrange a system of care that will allow the parents to continue, and indeed strengthen, their attachment to the workforce.

For all the above reasons, the DOL believes that these parents are an appropriate focus of an experimental extension to the able and available requirements. Thus, this expanded interpretation of the Federal able and available requirements applies only to experimental BAA-UC and does not extend to any other facet of the Federal-State UC program. BAA-UC is an experiment being conducted within the regular UC program.

(2) Experimental versus Permanent Program

This proposed rule will give the State agencies that administer the UC program the opportunity to provide UC, under an experimental program, to parents who take approved leave or otherwise leave their employment to be with a newborn or newly-adopted child. The DOL chose to proceed with an experimental rather than a permanent program in order to compile the necessary information to evaluate the following prior to any implementation of a permanent program: whether individuals compensated for birth and adoption leave are more likely to return to employment, and, therefore, are more available than those who are uncompensated; the effects on employers whose employees take such compensated leave; the effects on employers throughout a State who bear the BAA-UC costs; and the effects on the State's unemployment fund. The DOL anticipates that creating this experimental program, which States can voluntarily choose to put into practice, will give States the necessary latitude to develop innovative programs permitting the DOL to measure employees' connections to the workforce after availing themselves of BAA-UC, as compared to individuals who take unpaid leave or none at all.

(3) Experimental Program Limitations

The purpose of the able and available requirements is to assure sufficient attachment to the workforce. The BAA-UC experimental program is designed to test the proposition that providing UC to the parents of newborns and newly-adopted children who wish to take approved leave or otherwise leave their employment will increase their attachment to the workforce. In order to gain information on the impact of

adapting the UC program to address the needs of such employees, the DOL is defining the experimental program to cover the parents of newborns and newly-adopted children. The DOL believes that authorizing States to provide unemployment compensation for parents of newborns and newly-adopted children will produce valuable information for evaluating the program. This information may also serve as a basis for further expanding coverage to assist a broader group of employees to better balance work and family needs. The class of employees covered by this proposed rule is a small, easily-defined group that can be used to test whether compensating absences from employment will assist individuals to maintain, or even improve upon, their connection to the workforce by enabling them to better meet their parental and family needs.

(4) Experimental Program Time Frame and Evaluation

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

The DOL will begin collecting administrative data immediately upon implementation of a BAA-UC program. As States gain experience with their programs, the DOL will evaluate each State individually. A comprehensive evaluation will be performed when at least four States have implemented legislation and operated a BAA-UC program for a minimum of three years.

The Federal evaluation methodology has not yet been completed. Because States will have broad latitude in developing BAA-UC experimental programs, the DOL may use a case study evaluation design. Some of the issues that may be addressed in the evaluation include: whether workforce attachment for this population changed; whether employees faced barriers to taking advantage of BAA-UC; and, if so, what can be done to break down these barriers. Though not required by these regulations, it is anticipated that each State will include, as part of its system development, an evaluation component. Once decisions have been made regarding the Federal evaluation process and how the relevant information will be collected, complete information collection instructions will be issued and, if subject to the Paperwork

Reduction Act, published for public comment in the **Federal Register**.

C. Rule Format

In keeping with the Administration's commitment to writing regulations in plain English, the substance and format of this Proposed Rule is presented in a question-and-answer format so that the regulations will be clear and easy to understand. In addition, the DOL has attempted to anticipate and address issues that may arise during this effort.

II. Explanation

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

In accordance with the May 24, 1999, Executive Memorandum, BAA-UC model State legislation has been developed and is appended (Appendix A) for comment. This model legislation is optional and is provided for the convenience of States that choose to implement a BAA-UC program. A commentary on the model legislation and policy issues to aid States in the development of methods provided for under the proposed rule is also appended (Appendix B) for comment. Both appendices are subject to change based upon comments. They will be issued in final form in the **Federal Register** as a program letter and will not appear in the Code of Federal Regulations.

Description of the Regulation

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

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

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

Subpart C discusses BAA-UC eligibility requirements.

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

Subpart A—General Provisions

Subpart A discusses the purpose and scope of the regulation and defines critical terms. The purpose of the regulation is to establish the opportunity for the State agencies that administer the UC program to provide UC, under an experimental program, to parents who take approved leave or otherwise leave employment to be with a newborn or newly-adopted child. This proposal will permit interested States to

experiment with methods for allowing this use of the UC program.

The scope of the BAA-UC experiment extends to all State UC programs that provide UC to parents who take approved leave or otherwise leave their employment to be with their newborns or newly-adopted children. This group was identified by the President as the focal group for the experiment with possible expansion, if warranted, after the experiment has been evaluated. State participation is completely voluntary.

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

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

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

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

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

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

Placement—The adoption process can be lengthy with completion occurring long after a child has been placed with a family. Consequently, for BAA-UC comparability between parents of newborns and parents of newly-adopted children, “placement” for BAA-UC purposes will be the time a parent becomes legally responsible for a child pending adoption.

Subpart B—Federal UC Requirements

Subpart B discusses how the Federal UC requirements apply to BAA-UC. Beyond the proposed interpretation of the able and available requirements, this

regulation does not change Federal UC requirements. Under its authority to interpret the statutes it administers, the DOL is interpreting the Federal able and available requirements to include BAA-UC. This interpretation will give States the opportunity to experiment with, and demonstrate methods of, providing BAA-UC to parents of newborns and newly-adopted children. The experiment will provide compensation only during the periods when parents take approved leave or otherwise leave employment following the birth or placement for adoption of their child. This interpretation of the Federal able and available requirements applies only for purposes of this experiment.

Subpart C—BAA-UC Eligibility

Subpart C discusses the BAA-UC eligibility requirements. Although implementation of BAA-UC is entirely at State discretion and States have wide latitude in BAA-UC program development, certain eligibility parameters apply. For example, only parents of newborns or newly-adopted children are included in the experiment. Also, because all Federal UC law requirements must be met and the insurance nature of the UC program must be maintained, the introduction of eligibility factors that are inconsistent with Federal UC law requirements is not permitted under BAA-UC programs. The introduction of eligibility factors unrelated to the fact or cause of unemployment, such as industry, employer size or whether the spouse of a UC recipient also receives (or has received) UC, is inconsistent with Federal law. Specifically, in a 1964 conformity decision involving the State of South Dakota, the Secretary of Labor held that Federal law prohibits the introduction of any eligibility test unrelated to the fact or cause of the individual's unemployment. (See Secretary of Labor's Decision of September 25, 1964, *In the Matter of the Hearing to the South Dakota Department of Employment Security Pursuant to Section 3304(a) of the Internal Revenue Code of 1954*, transmitted by Unemployment Insurance Program Letter No. 787, October 2, 1964.) Therefore, all individuals covered under a State's UC law must be covered for BAA-UC.

For BAA-UC purposes, the first compensable week is the week in which birth or placement for adoption takes place. States are free to determine whether to prorate the weekly compensation amount based on the day of the birth or placement for adoption or whether to fully compensate for that

week. Weeks preceding the week of the birth or placement and weeks following the end of the one-year period are not compensable.

The purpose of BAA-UC is to provide support to new parents on “leave” from employment to be with their newborns or newly-adopted children. The term “leave” implies that the individual will return to the last employer after a designated period. However, for experimental purposes, the DOL will allow States to pay BAA-UC to parents who otherwise leave employment for this purpose. This will generate data for evaluating how providing compensation affects the connection of these individuals to the workforce. The DOL's view is that limiting BAA-UC to only those individuals who are assured of job retention could be seen as unfairly excluding parents from BAA-UC who are denied leave by their employers.

Executive Order 12866

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

However, the proposed rule is not considered an “economically significant” rule because it will not have an annual effect on the economy of \$100 million or more, will not adversely impact a specific sector of the economy, and will not materially alter the budgeting impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof.

The Department estimates that the possible annual aggregate BAA-UC cost could range from zero to approximately \$68 million. The regulation is permissive, and the DOL does not know how many States will choose to enact experimental BAA-UC programs. The estimate of the annual aggregate BAA-UC cost of \$68 million is based on the expressed interest of a small number of States. The cost depends upon such factors as the extent to which BAA-UC affects parents' incentives to increase their leave duration and the percentage of leave-takers applying for BAA-UC. The derivation of this estimate begins

with 1997–98 Current Population Survey data showing the annual U.S. average number of women in the labor force with a child under one-year old. After this number is disaggregated by State, the likely proportion of leave-takers for newborns and newly-adopted children is determined based on percentages provided in a report by the Commission on Family and Medical Leave, titled *A Workable Balance: Report to Congress on Family and Medical Leave Policies* (April 30, 1996). Other factors used in determining the cost estimate include the percent of leave-takers with employer-paid leave, monetary eligibility rates, and average weekly UC payments.

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

Paperwork Reduction Act

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

Executive Order 12612

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

Executive Order 12988

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

Unfunded Mandates Reform Act of 1995 and Executive Order 12875

This proposed rule has been reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*) and Executive Order 12875. The DOL has determined that this proposal does not include any Federal mandate that may result in increased expenditures by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year.

The States have full discretion to decide whether or not to enact a BAA–UC program. See the section entitled “Executive Order 12866” for further information on the BAA–UC cost estimate.

Regulatory Flexibility Act

This proposed rule will not have a significant economic impact on a substantial number of small entities. The proposal affects States and State agencies, which are not within the definition of “small entity” under 5 U.S.C. 601(6). Moreover, States have complete discretion in deciding whether or not they will enact a program permitted under this proposed regulation. Under 5 U.S.C. 605(b), the Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect. Accordingly, no regulatory flexibility analysis is required.

Small Business Regulatory Enforcement Fairness Act

This proposed rule is not a “major rule” as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. Chapter 8). This proposed rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based entities to compete with foreign-based entities in domestic and export markets.

Effect on Family Life

The DOL certifies that this proposed rule has been assessed in accordance with section 654 of Pub. L. 105–277, 112 Stat. 2681, for its effect on family well-being. The DOL concludes that the proposed rule will not adversely affect the well-being of the nation's families. Rather, it should have a positive effect on family well-being by permitting States to enable more parents to take leave from their employment to be with their newborns or newly-adopted children.

List of Subjects in 20 CFR Part 604

Employment and Training Administration, Labor, and Unemployment Compensation.

Catalogue of Federal Domestic Assistance Number

This program is listed in the Catalogue of Federal Domestic Assistance at No. 17.225, Unemployment Insurance.

Signed at Washington, D.C. on November 18, 1999.

Alexis M. Herman,
Secretary of Labor.

Words of Issuance

For the reasons set forth in the preamble, the DOL proposes that Chapter V of Title 20, Code of Federal Regulations, be amended by adding new part 604 to read as follows:

PART 604—REGULATIONS FOR BIRTH AND ADOPTION UNEMPLOYMENT COMPENSATION

Subpart A—General Provisions

Sec.

604.1 What is the purpose of this regulation?

604.2 What is the scope of this regulation?

604.3 What definitions apply to this regulation?

Subpart B—Federal Unemployment Compensation Program Requirements

604.10 Beyond the interpretation of the able and available requirements for Birth and Adoption unemployment compensation, does this regulation change the Federal requirements for the unemployment compensation program?

Subpart C—Eligibility

604.20 Who is covered by Birth and Adoption unemployment compensation?

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

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

Authority: 42 U.S.C. 1302(a); 42 U.S.C. 503(a)(2) and (5); 26 U.S.C. 3304(a)(1) and (4); 26 U.S.C. 3306(h); Secretary's Order No. 4–75 (40 FR 18515); and Secretary's Order No. 14–75 (November 12, 1975).

Subpart A—General Provisions

§ 604.1 What is the purpose of this regulation?

This regulation allows the States to develop and experiment with innovative methods for paying unemployment compensation to parents on approved leave or who otherwise leave employment to be with their

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

§ 604.2 What is the scope of the regulation?

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

§ 604.3 What definitions apply to the regulation?

The following definitions apply to this regulation:

(a) *Approved Leave* means a specific period of time, agreed to by both the employee and employer, during which an employee is temporarily separated from employment and after which the employee will return to work for that employer.

(b) *Birth and Adoption unemployment compensation* means unemployment compensation paid only to parents on approved leave or who otherwise leave employment to be with their newborns or newly-adopted children.

(c) *DOL* means the United States Department of Labor.

(d) *Newborns* means children up to one-year old.

(e) *Newly-adopted children* means children, regardless of age, who have been placed within the previous 12 calendar months with an adoptive parent(s).

(f) *Parents* means mothers and fathers (biological, legal or who have legal custody of a child during the adoption process).

(g) *Placement* means the time a parent becomes legally responsible for a child pending adoption.

(h) *State(s)* means one of the States of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands.

Subpart B—Federal Unemployment Compensation Program Requirements

§ 604.10 Beyond the interpretation of the able and available requirement for Birth and Adoption unemployment compensation, does this regulation change the Federal requirements for the unemployment compensation program?

No. This regulation does not change the Federal unemployment

compensation requirements. Under its authority to interpret Federal unemployment compensation law, the DOL interprets the Federal able and available requirements to include experimental Birth and Adoption unemployment compensation. The regulation applies only to parents who take approved leave or otherwise leave employment to be with their newborns or newly-adopted children.

Subpart C—Eligibility

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

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

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

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

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

States may limit Birth and Adoption unemployment compensation to parents who take approved leave or may extend Birth and Adoption unemployment compensation to parents who otherwise leave employment to be with their newborns or newly-adopted children. However, 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.

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

Appendix A—Model State Legislation

Section _____. Birth and Adoption Unemployment Compensation.

(a) An individual who is on a leave of absence from his or her employer or who left employment to be with the individual's child during the first year of life, or during the first year following placement with the individual for adoption, shall not be denied compensation under Section ____ for voluntarily leaving employment, Section ____ relating to availability for work, Section ____ relating to inability to work, or Section ____ for failure to actively seek work.

(b) Section _____, concerning the reduction of the amount of compensation due to receipt of disqualifying income, shall apply to payments under this section. In addition, the following payments shall cause a reduction in the compensation amount:

(1) any payment from the employer resulting from a birth or adoption described in subsection (a); and

(2) any payment resulting from a birth or adoption described in subsection (a) from a disability insurance plan contributed to by an employer, in proportion to the employer's contribution to such plan.

(c) Compensation is payable to an individual under this section for a maximum of 12 weeks with respect to any birth or placement for adoption.

(d) Each employer shall post at each site operated by the employer, in a conspicuous place, accessible to all employees, information relating to the availability of Birth and Adoption unemployment compensation.

(e) Any compensation paid under this section shall not be charged to the account of the individual employer.

(f) Two years following the effective date of this legislation, the commissioner shall issue a report to the governor and the legislature evaluating the effectiveness of the Birth and Adoption unemployment compensation program.

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

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

Appendix B—Commentary on Model State Legislation, Including Policy Issues

General

Must States Implement a Birth and Adoption Unemployment Compensation (BAA-UC) Program?

No. This program is voluntary for the States. However, implementation of BAA-UC will require some legislation on the part of every State seeking to adopt the program. The Model State Legislation is provided for the convenience of States that wish to implement a BAA-UC program.

Does This Regulation Enable a State To Pay UC for Other Types of Family or Medical Leave?

No. This regulation enables a State to pay UC to parents on approved leave or who

otherwise leave employment to be with their newborns or newly-adopted children. Permitting payment of UC for other types of family leave or care would be inconsistent with this experimental program.

Must All Employer-Paid Leave Be Exhausted Before BAA-UC Is Available?

No. BAA-UC is designed to provide partial wage replacement to parents of newborns or newly-adopted children. The Model State Legislation assumes that any wages paid for the period of employer-provided leave will be deducted. However, States need not deduct these wages from BAA-UC.

Does This Regulation Impose Any Solvency Requirements Upon the States Before They Enact BAA-UC?

No. The DOL expects that a State will not enact changes without assessing the effect on the solvency of its unemployment fund. Each State has the responsibility to assess the cost to the State's unemployment fund whenever coverage, benefit expansions, or tax changes are considered within the State's UC program. Consequently, DOL expects prudent decision makers in a State to examine the State's solvency position and projected taxes and benefit payments under current law before deciding to enact BAA-UC legislation.

Monetary Qualifications and Benefits

What Are the Earnings and Employment Requirements for BAA-UC?

States may establish their own requirements. The Model State Legislation assumes that States will use the same earnings and employment criteria that apply to all other individuals.

What Is the Weekly Benefit Amount for Individuals Eligible for BAA-UC?

States may establish their own weekly benefit amounts. The Model State Legislation assumes that individuals eligible for BAA-UC will receive the same weekly benefit amount as other individuals eligible for UC.

How Does the Receipt of Other Income Effect Payment of BAA-UC?

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

How Does the BAA-UC Entitlement Relate to Regular UC Payments?

States are free to determine this. The Model Legislation assumes that BAA-UC counts toward the maximum number of weeks of regular UC.

Period of Eligibility

When May BAA-UC Benefits Begin?

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

How Many Weeks of BAA-UC May Individuals Receive?

States are free to determine this. The Model State Legislation provides a maximum duration of 12 weeks per individual with respect to any one birth or adoption. Since the Family and Medical Leave Act of 1993 (FMLA) allows up to 12 weeks of unpaid leave for such events, States may wish to have an identical amount. States may also relate the duration of leave to the individual's weekly amount of UC. For example, for each birth or adoption, an individual may receive an amount equal to 12 times the individual's weekly UC.

To prevent confusion between FMLA and BAA-UC, States should inform potential BAA-UC beneficiaries of the dissimilarities between the two programs (for example, BAA-UC does not guarantee job retention).

If a Child Is Born in the Middle of the Week or the Placement Occurs in the Middle of the Week, is BAA-UC Payable for This Week?

Under the Model State Legislation, BAA-UC would be payable for this week, assuming all applicable eligibility conditions, such as the deductible income provisions, are met. States may provide the full weekly compensation amount for this week or prorate the weekly amount to reflect only periods following birth or adoption. If the amount is prorated, the State may pay the remaining balance for the last partial week if the individual is still on leave.

Must the Individual Serve a Waiting Period?

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

When Is a Child Considered "Placed" for Adoption?

Under 604.3(g) of the proposed rule, placement occurs at the time a parent becomes legally responsible for a child

pending adoption. State UC agencies should consult the adoption laws of their States to determine precisely when placement occurs.

Other Eligibility Issues

May Both Parents Receive BAA-UC? If So, May They Both Receive Such Compensation at the Same Time?

The answer to both questions is "yes." States implementing BAA-UC must allow both parents, if otherwise eligible, to receive BAA-UC concurrently or consecutively. A State may not prohibit payment of BAA-UC simply because the other parent is taking leave for the same purpose. A State law which does so is inconsistent with Federal law because the eligibility of one parent will be determined based on whether the other parent is receiving UC. Specifically, in a 1964 conformity decision involving the State of South Dakota, the Secretary of Labor held that Federal law prohibits the introduction of any eligibility test unrelated to the fact or cause of the individual's unemployment. (See Secretary of Labor's Decision of September 25, 1964, *In the Matter of the Hearing to the South Dakota Department of Employment Security Pursuant to Section 3304(a) of the Internal Revenue Code of 1954*, transmitted by Unemployment Insurance Program Letter No. 787, October 2, 1964.) The recipient status of the other parent is unrelated to the fact or cause of an individual's unemployment. Thus, both parents may receive BAA-UC, whether concurrently or consecutively. Similarly, States may not limit use of BAA-UC to the "primary" parent.

Must BAA-UC Apply to Individuals Employed by All Employers Subject to State UI Law?

Yes. As explained in the previous answer, States may not impose eligibility conditions not related to the fact or cause of the individual's unemployment. Assuming the services are taxable for UC, States may not, for example, limit BAA-UC based on employer size.

May States Provide BAA-UC to Individuals Who Otherwise Leave Employment (Not on Approved Leave) To Be With Their Newborns or Newly-Adopted Children?

Yes. While States are free to determine their own requirements, there are compelling reasons for providing BAA-UC to individuals who otherwise leave employment. Although many employers may grant leave, others may not. The DOL believes that all parents should be treated identically for UC purposes when they take time away from employment to be with their newborn or newly-adopted child. As such, their eligibility for BAA-UC should not be based on whether an employer is required to grant the leave, but on the parent's reason for wanting to take the leave.

May Eligibility Be Conditioned on Whether the Individual Gave Notice to the Employer?

Yes. Although the Model State Legislation does not provide for such a condition because it may result in denials due to the technicality of when the individual requested leave, States may impose it. The basis of such a requirement is that employers should be given sufficient time to accommodate the

leaving/absence of the individual. If such a provision is included, the DOL recommends that the notice be required to be given no more than 30 days prior to birth or placement, but only where practicable. The FMLA contains a 30-day requirement or shorter notice period where giving 30-day notice is not practicable; it does not require notice when the necessity to take leave is unforeseeable. (Section 102(e), Family and Medical Leave Act, Pub. L. 103-3 (February 5, 1993).)

May Eligibility Be Conditioned on Whether the Individual Chooses Not To Return to Work?

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

May An Individual Be Paid BAA-UC Under the Federal-State Extended Benefit Program or Any of the Federally Funded Unemployment Programs?

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

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

requirements in the State's law, she may receive DUA.

Extended Benefit claimants may not receive Birth and Adoption UC since they cannot meet the systematic and sustained work search requirements in 20 CFR 615.8(g).

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

Financing Costs of BAA-UC

May BAA-UC Costs Be Socialized Among Employers?

Yes. States are free to socialize or not socialize costs of BAA-UC. The Model State Legislation socializes costs—also called “noncharging.” An employer may be reluctant to bear all the costs of BAA-UC caused by an employee taking leave since the employer will not have caused the individual's unemployment. Since noncharging is permitted when the unemployment is caused by the employee, it is permitted in this situation. This position applies to both contributory and reimbursable employers.

May BAA-UC Costs Be Paid From a State Fund Other Than the State's Unemployment Fund, for Example, a State's Temporary Disability (TDI) Fund?

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

Administrative Costs

May States Use Administrative Grants Received From the Federal Government To Pay for the Administration of a BAA-UC Program?

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

Reporting

Will States Need To Amend Their Laws To Address any Federal Reporting Requirements Concerning BAA-UC?

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

What Are the Reporting Requirements?

The DOL has not yet finalized a methodology for evaluating State BAA-UC programs. When that methodology is completed, State reporting requirements will be issued in a separate information collection request and, if subject to the Paperwork Reduction Act, published for public comment in the **Federal Register**.

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