

**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:** Final rule.

**SUMMARY:** The Department of Labor (Department) is issuing this Final Rule to create an opportunity for State agencies that administer the Unemployment Compensation (UC) program to provide partial wage replacement, on a voluntary, experimental basis, to parents who take approved leave or who otherwise leave employment following the birth or placement for adoption of a child. This regulation permits interested States to experiment with methods for allowing the use of the UC program for this purpose.

**EFFECTIVE DATE:** This Final Rule is effective August 14, 2000.

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**SUPPLEMENTARY INFORMATION:****I. Introduction***A. Overview*

On December 3, 1999, we published for comment in the **Federal Register** a Notice of Proposed Rulemaking (NPRM) proposing to add new part 604 to 20 CFR. Part 604 will permit the State agencies that administer the UC program to provide partial wage replacement, on a voluntary, experimental basis, to parents who take approved leave or who otherwise leave employment following the birth or placement for adoption of a child.

The preamble in the NPRM contained a detailed explanation, by subpart, of each proposed section. Much of the material in the NPRM is repeated in this document to adequately respond to comments and to eliminate the need for readers to refer to the NPRM for context. Where substantive changes to the proposed rule are made, the changes are

discussed in the relevant preamble section of this Final Rule. Technical revisions, however, are not discussed in this preamble. Unless otherwise mentioned, references in this preamble to changes are comparisons between the NPRM and Final Rule.

The NPRM was published with two appendices: Model State Legislation (Appendix A), which is optional draft legislation that States may use as a guide in developing legislation, and a Commentary (Appendix B) in question-and-answer format that provides information on the Model State Legislation and will aid States in making policy decisions. Comments received regarding these appendices are discussed in this preamble. The appendices are attached to this notice in the form of an Unemployment Insurance Program Letter (UIPL). The appendices will not appear in the CFR.

The NPRM invited the public to comment over a 45-day period. We believed this period was ample because of the simple nature of the experiment and the relatively short length of the proposed rule, although we did receive a number of requests for additional time. To accommodate the holiday season, we extended the comment period 15 days, through February 2, 2000. Comments were accepted by mail and electronic media. All comments submitted by this date, including correspondence received prior to publication of the proposed rule, were considered in developing this Final Rule.

*B. Background*

Based on findings from a 1996 study conducted by the Commission on Family and Medical Leave, which indicated that parents were not able to take needed leave because they could not afford it, and in response to the legislative efforts by some States to provide UC to parents, the President directed the Secretary of Labor on May 23, 1999, to propose regulations 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. The President elaborated on this Birth and Adoption UC (BAA-UC) proposal in a May 24, 1999, memorandum to the heads of executive departments stating that "the Department of Labor is to evaluate the effectiveness of using the system for these or related purposes."

Through the BAA-UC experiment, States will be able to provide partial wage replacement to enable some parents, who otherwise would not have taken any leave, to do so. Others, who

took leave but were compelled to return to work prematurely because they could not afford to be off work, may be able to take longer leave periods. We believe this increase in both the incidence and duration of leave-taking will benefit these parents and their children by allowing more time for parent-child bonding and for arranging stable child care. The BAA-UC experiment will test whether enabling these parents to have this time to be with their newborns and newly-adopted children by providing them with partial wage replacement will promote their long-term attachment to the workforce.

*C. The Federal-State UC Program*

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 Department has broad oversight responsibility for the Federal-State UC program, including determining whether a State's 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 Department enforces Federal UC law requirements through the FUTA credit and grant certification processes.

*D. Ability To Work and Availability for Work*

The Department has the authority and responsibility to interpret the provisions of Federal UC law such as the requirements that individuals must be "able to work and available for work" (known as the A&A requirements) to be eligible for UC. Although no explicit A&A requirements are stated in Federal law, the Department and its predecessors (the Social Security Board and the Federal Security Agency) interpreted Federal UC law as requiring participating States to have A&A requirements.

In response to practical economic and societal concerns, we have, on several prior occasions, exercised our authority to interpret Federal UC statutes regarding the A&A requirements to address several specific areas: approved training, illness, jury duty and temporary layoffs.

#### (1) Approved Training

Prior to incorporating the training provision into the Federal laws, we encouraged States to treat individuals in training approved by the State agency as meeting the A&A requirements since such training represents the most effective step available to the individual to return to work. We 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.)

#### (2) Illness

Eleven States allow an individual who initially meets the A&A requirements, but then becomes ill, to receive UC payments without interruption, provided that no suitable work is offered and refused. We approve 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 A&A 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 A&A requirements.

#### (3) Jury Duty

We accept 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)).

#### (4) 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.

#### E. The BAA-UC Experiment

Under its authority to interpret Federal UC law and consistent with its broad oversight responsibility, we interpret the Federal A&A requirements to include this voluntary experiment for examining the use of the UC program to provide partial wage replacement to employees who take approved leave or who otherwise leave employment to be with their newborns or newly-adopted children. This experiment will 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 experiment will test whether this opportunity for 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, will promote the parents' long-term attachment to the workforce.

## II. Comment Overview

### A. Pre-NPRM Publication Correspondence

Approximately 500 pieces of correspondence were received before the NPRM was published in the **Federal Register**. These comments came largely from employers, both for-profit and not-for-profit, and employer associations. We also received comments from members of Congress, State legislators, and private citizens.

The bulk of the pre-NPRM publication correspondence addressed compensation to individuals on leave under the Family and Medical Leave Act (FMLA) without regard to the differences between the FMLA and the Birth and Adoption UC (BAA-UC) experiment. Because the majority of the comments stated opinions regarding compensating employees on leave under the FMLA and because the correspondence preceded the publication of the NPRM, we cannot discern specifically many writers' opinions concerning BAA-UC. (For example, concerns about the costs of wage replacement for employees on leave under the FMLA do not necessarily translate into concerns about the costs of BAA-UC which apply to a different, though partially overlapping, universe of potential recipients.) However, the specific issues (i.e., the reasons that support the opinions) noted in the pre-NPRM publication correspondence are included, as appropriate, with the post-NPRM publication comments.

### B. Post-NPRM Publication Comments

Approximately 3,800 pieces of correspondence were submitted by the close of the comment period. Of those expressing an opinion, the post-NPRM publication correspondence indicated almost equal levels of support for and against BAA-UC. As with the pre-NPRM publication correspondence, the respondents included employers and employer associations, members of Congress, State legislators, State Employment Security Agencies (SESAs), and private citizens. As with the pre-NPRM publication correspondence, much of the post-NPRM correspondence solely addressed the FMLA without distinguishing the FMLA from the BAA-UC experiment. All the timely comments were considered and all correspondence is included in the rulemaking record.

We also received comments that were beyond the realm of both the BAA-UC regulation and the UC program (e.g., prison reform, income tax reform, Federally-mandated vacations, availability of compensatory time in lieu

of overtime pay under the Fair Labor Standards Act, eligibility of BAA-UC recipients for employer-paid benefits). Because these comments exceed the parameters of the UC program and this regulation, they are not addressed herein.

We appreciate the time and attention that respondents gave to reviewing the NPRM. Although some respondents requested that we contact them individually about their comments, the large volume of comments prevented us from doing that and we believe this document adequately responds to their comments.

### III. The Issues

#### A. General Overview

Generally, proponents of BAA-UC commented that BAA-UC is a logical extension of the UC program that would help new parents balance work and family responsibilities, would keep people off welfare, and could be easily and inexpensively administered. Many proponents referred to studies that discussed the positive effects on the workforce attachment of individuals who receive paid parental leave. Conversely, those opposing the rule urged that we withdraw the rule because the costs would be too great, child care and rearing are the personal responsibility of parents and beyond the scope of government, and the BAA-UC initiative runs counter to the intent of both the UC program and the FMLA. Some respondents consider the idea of partial wage replacement for new parents who are not working commendable, but they think that the UC program is the incorrect vehicle for such a benefit.

#### B. Misconceptions About the Rule

Analysis of the comments revealed two significant misconceptions regarding BAA-UC: (1) that BAA-UC is for leave under the FMLA, and (2) that BAA-UC is a new program, separate and apart from the regular UC program.

##### (1) Relationship Between BAA-UC and the FMLA

Many respondents referred to BAA-UC as "paid FMLA" leave or "paid family leave." It was also apparent from the many comments expressing concerns about the potential for employee abuse, personal illness, and time away from work to care for family members, as well as the administrative burdens on employers in regard to the FMLA, that respondents viewed BAA-UC as tied to FMLA leave. The misconception that BAA-UC is for leave taken under the FMLA is

understandable, as an impetus for BAA-UC was the finding in the 1996 study conducted by the Commission on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* (April 30, 1996) (hereinafter called the "FMLA study"), that new parents were not taking available unpaid leave because they could not afford it. Although there may be many cases where parents of newborns and newly-adopted children will be simultaneously eligible for BAA-UC and leave under the FMLA, the two are legally unrelated to each other. For example, the FMLA applies to employers with 50 or more employees and provides eligible employees with up to 12 weeks of unpaid, job-protected leave for their own or a family member's serious health condition, or to care for a newborn or newly-adopted child. The BAA-UC initiative, on the other hand, is voluntary on the part of the States, may not be made contingent on employer size, is limited to parents of newborns and newly-adopted children, does not guarantee leave, and has no job protection component.

##### (2) BAA-UC Is Not a "New" Program

Some respondents commented that BAA-UC is a new program, separate and apart from the regular UC program. Some comments included administrative questions regarding the relationship between "the new benefit program" and the UC program. Other respondents referred to BAA-UC as "a new and disparate benefit unrelated to legitimate" UC and stated that development of BAA-UC was beyond our authority. Concerns were also expressed that this "entirely different benefit" would artificially inflate the unemployment rates that trigger the extended benefit program. Based on the idea that BAA-UC is a separate program, many respondents contended that the unemployment funds that would be used to finance BAA-UC should be refunded to the employers.

BAA-UC is not a new program. Rather, it creates a new basis for eligibility under the "regular" UC program. BAA-UC is an experimental opportunity that is based on an expanded interpretation of the Federal requirements that UC recipients be able to work and available for work. As discussed, interpretation of Federal UC requirements is our responsibility and within our authority.

The comments regarding the NPRM fell into broad categories and are discussed, by category, in the following section.

#### C. The Comments

##### (1) Legal Authority For BAA-UC

###### (a) Presidential Directive

We received comments arguing that Congress should act on this proposal through legislation and that the President's directive to the Department to use the UC program to pay benefits in this manner is unconstitutional and violates the Administrative Procedure Act (APA). As the agency overseeing the Federal-State UC program, the Department has the authority to interpret the Federal UC laws, and we are exercising this authority through notice-and-comment rulemaking. The President's directive in no way limits the Secretary's discretion to consider comments in developing a final BAA-UC rule. Nor does this rulemaking usurp Congress's legislative authority; this rule represents the Department's interpretation of existing Federal UC law requirements.

###### (b) Federal Authority

We received comments regarding the Federal government's authority under the Federal UC laws to authorize the payment of BAA-UC. Several respondents suggested that no Federal A&A requirements exist and that States do not need a regulation to permit BAA-UC and can provide even broader coverage regarding eligibility beyond the payment of BAA-UC. Some respondents argued that Federal law sets a floor, but not a ceiling or cap, on UC coverage so that the States may pay benefits to whomever they wish (*e.g.*, even those on leave to care for a parent). Other respondents argued that the Federal UC laws necessarily prohibit the payment of BAA-UC and others suggested that the BAA-UC proposal is inconsistent with the Federal A&A requirements, as they have been interpreted in the past, as part of the Federal-State UC program.

The Department and its predecessors (the Social Security Board and the Federal Security Agency) have interpreted and enforced Federal A&A requirements since the inception of the Federal-State UC program. Several respondents noted that the A&A requirements are not clearly stated in the Federal UC statutes. Although no explicit A&A requirements are stated in Federal law, the Department and its predecessors interpreted four provisions of Federal UC law, contained in the Social Security Act (SSA) and Federal Unemployment Tax Act (FUTA), as requiring that UC 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 withdrawals, 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 A&A requirements provide a test of an individual'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 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 ability to work and availability for work. These A&A requirements serve, in effect, to "cap" UC eligibility.

Some respondents noted that we could authorize the payment by States of BAA-UC simply by issuing a UIPL rather than issuing a regulation. Other respondents encouraged notice-and-comment rulemaking, rather than issuing a UIPL. Because permitting States to pay UC for birth and adoption represents a change in interpretation and in order to permit public input into the decision-making process, we engaged in notice-and-comment rulemaking.

In addition to interpreting Federal UC laws to include A&A requirements, we have previously interpreted the A&A requirements in some specific areas: approved training, temporary layoffs, illness, and jury duty. We received some comments suggesting that existing interpretations of the A&A requirements, such as those regarding approved training and temporary layoffs, are not comparable to the payment of BAA-UC because they are directed toward re-employment. However, the goal of the BAA-UC experiment is to test the proposition that providing UC to new parents can enhance and strengthen their attachment to the workforce through the provision of benefits during a time when they are faced with the added responsibilities of a newborn or newly-adopted child so that they will remain in the workforce.

While paying BAA-UC is a departure from past interpretations, it is a permissible departure which we see as a natural progression evolving from our prior interpretations. At the inception of the Federal-State UC program, the A&A requirements were narrowly interpreted, but the realities of working life have, over the years, led us to revise our interpretation. We have gone from a strict interpretation of the A&A

requirements to a more flexible one. 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.

Each of our four prior interpretations of the Federal A&A requirements recognize situations in which the classic definitions of A&A should not apply for reasons of practicality or economic reality. The illness interpretation recognizes that it is unreasonable to penalize an individual who has already established that s/he is available for work simply because s/he becomes ill for a short time. The jury duty interpretation recognizes that it is unreasonable to hold an individual unavailable for work when the State has compelled his or her attendance in court for jury service. Both of these interpretations derive from a flexible application of the A&A requirements because we want a practicable, sound, workable system. The purpose of UC is to provide partial wage replacement during temporary spells of unemployment. Terminating or denying UC to someone for serving on a jury or because the individual has a short illness undermines this purpose by leaving the individual without financial support for no good reason. It would deprive the individual of UC support without regard to the realities of working life, that is, that no one can be constantly available for work. The approved training interpretation recognizes the economic reality that, in some cases, making oneself unavailable for immediate work opportunities produces a greater benefit to an individual's ability to obtain good work and strengthens his or her attachment to the workforce. The temporary layoff interpretation recognizes the economic reality that when an individual already has a job to which s/he will return, it does not make sense to compel him or her to be able and available for other work. All of these interpretations recognize the reality that attachment to the workforce—the ultimate aim of the A&A requirements—can be demonstrated in other ways than by a continuous availability for any job. While none of these interpretations precisely parallels the payment of BAA-UC, they do operate on the same premises: that situations exist in which

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 a current demonstration of availability.

Thus, in response to practical economic and societal concerns, we have revised our interpretation of the A&A requirements for the limited purposes of the BAA-UC experiment to include parents of newborns and newly-adopted children. States may wish to experiment by providing UC to these individuals to measure whether such payments will increase these individuals' attachment to the workforce.

We acknowledge that this is a reversal of our position taken in 1997, denying the State of Vermont's proposal to use UC in this manner to pay individuals on family and medical leave. The subsequent interest shown by several States, by various members of Congress, and by private organizations in using the UC program in this manner led us to analyze and re-evaluate our policy on this subject. While the interpretation that supports this rule is a change from the interpretation we expressed in our 1997 letter to Vermont, we believe that the change is supported by studies showing the benefits of providing cash benefits to those seeking to take parental leave. As demonstrated above, our new interpretation is part of an evolving interpretation of the Federal A&A requirements that recognizes practical and economic realities.

Several studies potentially relevant to BAA-UC were mentioned in the comments submitted by BAA-UC proponents. A few of these studies examined United States (U.S.) parental leave practices, while others studied European or other parental leave systems. A few studies examined paid leave, while others studied unpaid leave; at least three studies examined both, to some extent. The studies also examined differing time periods, controlled for different factors, and used differing statistical methodologies. Nonetheless, these studies collectively contained the following potentially relevant findings: (1) Family leave coverage increased the likelihood that a woman will return to her employer after childbirth in the U.S., Britain, and Japan (Waldfogel, Jane, et al. "Family Leave Policies and Women's Retention After Childbirth: Evidence from the United States, Britain, and Japan." *J. Popul. Econ.* (1999) 12:523-545); (2) U.S. women with fully-paid leave worked later into their pregnancies than women with partially paid leave or women with no leave (O'Connell, Martin. "Maternity

Leave Arrangements: 1961–85.” *Work and Family Patterns of American Women*. U.S. Bureau of the Census, Current Population Reports, Special Studies Series P–23, No. 165. (March 1990), 17–20); (3) U.S. women with paid leave started back to work sooner than women with unpaid leave once their infants were at least two months old (Joesch, Jutta M. “Paid Leave and Timing of Women’s Employment Before and After Birth.” *J. Marriage & Fam.* (November 1997). Vol. 59, No. 4, 1008–1022); (4) women, as opposed to men, account for almost all parental leave taken, and rights to paid leave were found to raise the percentage of women employed in nine European countries (Ruhm, Christopher J. “The Economic Consequences of Parental Leave Mandates: Lessons From Europe.” *Q. J. Econ.* (February 1998). Vol. CX 113, Issue 1, 285–317); (5) extending paid maternal leave programs was shown to raise rates of labor force participation for women in the prime child-bearing years in 17 industrialized countries (Winegarden, C.R. and Bracy, Paula M. “Demographic Consequences of Maternal-Leave Programs in Industrial Countries: Evidence from Fixed-Effects Models.” *S. Econ. J.* (April 1995). Vol. 61, No. 4, 1020–1035); and (6) U.S. women, who stayed at their existing jobs instead of quitting or changing jobs, were those with the longest maternity leaves and highest levels of “workplace social support” (Glass, Jennifer L. and Riley, Lisa. “Family Responsive Policies and Employee Retention Following Childbirth.” *Social Forces* (June 1998). 76(4):1401–35.).

As discussed below, while we do not find these studies definitive, they do appear to support the premise of the BAA–UC experiment, that BAA–UC will strengthen workforce attachment.

## (2) Funding Issues

### (a) Costs

A number of respondents viewed the proposal’s costs as minimal, while others believed that the costs would be quite high. Comments also indicated that the use of abundant State unemployment funds for this purpose is beneficial and would have the long-term effect of keeping individuals off welfare. Many respondents mentioned that high State unemployment fund balances have allowed employers in a number of States to receive contribution rate reductions. Some of these respondents also believed that the costs of administration would be limited because systems for providing UC are already well established.

Some respondents raised general concerns regarding costs. Some also disagreed with our BAA–UC cost estimates. While some stated that our estimate was too high and costs would be minimal, others felt the estimate was too low, suggesting figures in excess of \$36 billion per year. Some respondents presented alternative methodologies which did not account for some important factors that would significantly reduce the cost of BAA–UC.

For example, several respondents assumed that all States would provide 12 weeks of BAA–UC and that all leave-takers would take all 12 weeks. UC data collected by the Department as well as independent research suggest duration would be lower than 12 weeks. Our estimate combines data on distribution of leave duration from the FMLA study, with an assumed increase in duration, based on several independent UC duration studies, due to the availability of BAA–UC. This results is an estimated BAA–UC average duration of about 6 weeks (including any waiting week) for unpaid leave-takers.

Another cause for overestimation was the assumption of a 100% take-up rate for both States and individuals. Several respondents assumed all States would provide BAA–UC, and all parents would receive benefits. As explained below, we do not think all States will adopt BAA–UC. Also, not all new parents are employed or covered by UC, either because they are self-employed or they do not have a sufficient work history to be eligible. Of those who are eligible, some will receive some form of income support from their employers such as paid annual leave. These individuals either would not apply for BAA–UC or would receive BAA–UC for a shorter duration. Even among those who are not paid by their employer, not all leave-takers would apply for BAA–UC. Based on studies on UC take-up rates, about 65% of eligible workers actually applied for UC before phone claims were available. The introduction of phone claims is estimated to increase take-up rates by about 10 percentage points.

Several respondents provided alternative methodologies for estimating the cost of BAA–UC. For example, one respondent suggested starting with the overall employment-population ratio and adjusting it to the participation rates for women ages 16 to 44, assuming that the majority of women taking leave for a child under one year old would be under 44. This methodology gives a less precise estimate of the relevant employment-population ratio than the data we relied on from the Current Population Survey, published in the

Bureau of Labor Statistics publication, “Employment Characteristics of Families in 1998.” This publication provides the employment-population ratio for mothers with a child under one year old (54%). This same respondent also pointed out that parents adopting children from foreign countries should be included in the estimate. These parents were excluded from the original estimate; however, based on the number of immigrant visas issued to orphans by the State Department, foreign adoptions represent only 0.4 percent of the number of women with children under one year old. (For the number of immigrant visas issued to orphans, see the State Department website at <[http://travel.state.gov/orphan\\_numbers.html](http://travel.state.gov/orphan_numbers.html).>) Although the effect of foreign adoptions is small, we have now included these adoptions in our cost estimate.

Another respondent cited problems with using data from the FMLA study. Although we did use some of the percentages gathered in this study, the findings were adjusted for the differences between the FMLA and BAA–UC. On one hand, the BAA–UC proposal has a broader scope, in some respects, because those who work for companies with fewer than 50 employees will be able to receive BAA–UC while they would be ineligible for FMLA leave. Therefore, the percentages of men and women taking leave are found by weighting the average percentages of both FMLA-covered and non-covered leave-takers. On the other hand, BAA–UC is more limited than FMLA-covered leave because it covers only those taking leave to care for a newborn or newly-adopted child. The respondent was concerned that the FMLA study did not account for incentives and changes in leave-taking patterns since the FMLA was enacted, thus representing a “premature look at the FMLA.” The FMLA study provided some categorized data showing that, in fact, 98% of women needing leave for newborn care actually took some leave. There is, therefore, only a small margin for an increase in leave-taking by women because of incentives under either the FMLA or BAA–UC. Even so, we increased the percentage of women leave-takers by 1 percentage point to account for these potential incentives and increased the percentage of men by 5 percentage points, from 63% to 68%, for the same reason. According to the study, 91% of all women and men needing leave for birth or adoption took some leave; however, many felt compelled to cut short their leave

because they could not afford to be off work.

In the NPRM, we estimated that the BAA-UC costs would range from zero to approximately \$68 million per year. This figure was based on the "expressed interest" of a small number of States as measured by whether BAA-UC legislation was introduced in a State. A respondent suggested that the four States specifically cited would not enact BAA-UC legislation; other respondents indicated more States would enact BAA-UC legislation.

Since the publication of the NPRM, a significant number of additional States have introduced BAA-UC legislation indicating that potentially more States than were included in our original estimate may enact BAA-UC. We do not know at this time which States will enact BAA-UC legislation; consequently, as described below, we revised the method of selecting States for inclusion in the cost estimate. This revised methodology and minor revisions in various estimating factors have changed the possible annual aggregate BAA-UC cost to an estimated range from zero to approximately \$196 million.

In our revised methodology, we relied on past enactment of UC benefit expansions as an indicator of possible State participation in the BAA-UC experiment. We think this history of benefit expansions is a better indicator than introduced legislation because: (1) Additional States will likely introduce legislation in the future, and (2) it is extremely difficult to predict whether a particular State will actually enact legislation. Thus, to determine the number of States that may enact BAA-UC legislation, we grouped the States based on population as large, medium, and small. We then found the average number of States, by population group, that had enacted certain UC benefit expansions. Based on these findings, we estimated that 3 large states, 6 medium states and 4 small states may enact BAA-UC legislation. We then assigned to each State the average cost for its group. We assumed that States would gradually enact BAA-UC legislation over a 5-year period. We assumed that two States would enact BAA-UC legislation in the first year after the rule becomes effective, two more in the second year, and three more in each of the subsequent three years. The resulting year-by-year costs were then converted to their present value and averaged over the five-year period. The resulting average annual cost, \$196 million, is the upper limit of our cost range. More detail on the cost calculation can be found in the

Regulatory Impact Analysis which is part of the rulemaking record and available to the public.

Costs beyond the cost specific to BAA-UC were also discussed in the comments. For example, some respondents believe that the costs to government would be reduced because BAA-UC would increase individuals' workforce attachments and keep them off welfare. We expect to have more information in this area as a result of the BAA-UC experiment.

Other respondents, however, expressed concern about additional costs, citing lost productivity as a key problem of paying BAA-UC. However, the FMLA study found that most employers found no effect of the FMLA itself on productivity, and if they did report an effect, it was "as likely to be positive as negative on business productivity and growth" (p. xviii). Another study of nearly 300 employers in November 1993 also found that mandated leave policies can improve morale, public relations, and supervisory relationships, as well as decrease the level of absenteeism. (William M. Mercer et al. "Survey Results: Family and Medical Leave Act" (January 1994); see Final Rule for Family and Medical Leave Act, 60 FR 2237 (January 6, 1995).) Another concern was the loss of income taxes as a result of increased leave-taking. However, those receiving BAA-UC benefits would be required to pay taxes on their benefits. Therefore, although some individuals will pay income taxes on reduced income, some individuals who would have taken unpaid leave will pay more taxes than otherwise. Also, many employers use temporary employees to perform the duties of a person taking leave to care for a new baby. Thus, we believe there would be a minimal loss in income taxes collected.

#### (b) Experience Rating

Several respondents expressed concerns regarding the effect of BAA-UC on State experience rating systems and employer contribution rates. They argued that contribution rates will go up as a result of replacement employees being laid off; that charging employer accounts for BAA-UC payments conflicts with Section 3303(a)(1), FUTA; that noncharging will shift the costs from one group of employers to another; and that employers who reimburse States for payments of UC (e.g., local governments and non-profit organizations, such as hospitals, school districts, and health care organizations) would have no relief from charges in some States. A respondent also

suggested that contributing employers would be subsidizing reimbursing employers.

Concerning the statements that contribution rates will go up as a result of replacement employees being laid off, we believe that, because many employers already respond to leave-taking by using temporary employees or shifting the duties of current employees, the effect on contribution rates is likely to be small.

Regarding the comment that charging employers for BAA-UC would conflict with Section 3303(a)(1), FUTA, we see no cause for concern. Section 3303(a)(1), FUTA provides that "no reduced rate" of unemployment insurance taxes may be assigned except on the basis of an employer's "experience with respect to unemployment or other factors bearing a direct relation to unemployment risk." The objections to charging employers for BAA-UC costs are apparently premised on the fact that the employer may exercise little or no control over an employee's taking of leave. While this may be true, it is well established that employers may be charged for situations where they did not create the unemployment; section 3303(a)(1), FUTA, permits a State to charge an employer so that the employer possibly pays a higher tax rate. For example, we do not require a State to "noncharge" (i.e., spread the costs among all employers) an employer when an employee quits for good cause not attributable to the employer; however, a State may choose to noncharge these costs.

Concerning the statements that noncharging employer accounts for BAA-UC costs would shift costs from one group of employers to other employers, effectively creating a situation where BAA-UC payments attributable to employers whose employees receive BAA-UC are being subsidized by employers whose employees may not receive BAA-UC, we note that this is not an issue specific to BAA-UC. States currently noncharge employers in specific situations, especially when the separation is beyond an employer's control. Just as States currently consider the effects of noncharging, we expect States to consider the effects of noncharging BAA-UC payments on the overall contribution system. Recognizing the arguments on both sides, we think that spreading BAA-UC costs among all employers is the most equitable means of financing this experiment. Consequently, our Model State Legislation provides for noncharging, and we encourage States to include such a provision in their legislation.

As with experience-rated employers, States may noncharge reimbursing employers. Specifically, in situations where the State determines that the UC paid is not attributable to service in the employ of the reimbursing employer, States may choose not to require reimbursement. As the commentary in Appendix B of the NPRM pointed out (64 FR 67979 (December 3, 1999)), reimbursing employers may be noncharged for BAA-UC payments just as the accounts of contributing employers may be noncharged. A respondent suggested that we make noncharging options for reimbursable employers more clear; however, the BAA-UC regulation makes no changes to the experience rating or reimbursement requirements and we see no reason to single out this one facet of the UC program for elaboration. For more information regarding the noncharging of reimbursable employers, interested individuals are referred to UIPL No. 21-80 and UIPL No. 44-93 (58 FR 52790, 52792 (April 12, 1993)).

#### (c) Other Funding Methods

Some respondents suggested that benefits like BAA-UC could be funded in ways other than the current method of financing benefits through employer contributions to State UC programs. Suggested funding methods for BAA-UC included using Federal unemployment tax revenues, using Social Security funds, allowing tax-free withdrawals from retirement plans, and creating Federal loan programs similar to student loans. Suggestions for State funding included the introduction of an employee-paid tax, such as currently exists for temporary disability insurance in some States. There was also a suggestion that individuals obtain private insurance.

Federal law governs how Federal unemployment tax revenues may be used. Nothing in Federal law authorizes the Department to use these revenues for purposes such as the BAA-UC experiment. The other suggested Federal funding mechanisms are beyond the Department's jurisdiction. As for the suggested State funding mechanisms, States are (and always have been) free to develop means outside the UC program to provide income support for new parents who are not working. Also, if a State elects to use a funding source outside the UC program, the State's program would not be subject to the requirements of the BAA-UC regulation.

#### (d) Potential Loss of Administrative Funding and Employer Tax Credits

We also received some comments expressing concern about the loss of

Federal unemployment tax credits and UC administrative funding if, after a State enacts BAA-UC, a Federal court were to strike down our regulation authorizing it. We are the only agency authorized to institute conformity and compliance proceedings against States which could result in the loss of these tax credits to employers. We will not withhold certification for administrative funding and employer credits for States participating in an effort that we have sanctioned. While we do not believe a court would strike down this rule, prior to any conformity and compliance proceeding, we would follow the normal procedures outlined in 20 CFR 601.5(b) to permit the State a reasonable time to change its laws in order to come into compliance.

#### (e) Unemployment Fund Solvency

Some respondents expressed concern that BAA-UC would jeopardize the financial solvency of the UC program, in particular the program's ability to handle future recessions. Others thought we should require States that enact BAA-UC to meet and maintain an unemployment fund solvency requirement of a 1.00 average high cost multiple (AHCM) or another measure that reflects a reasonable index of fund solvency. Some respondents recalled that we have expressed concern over many States' insufficient unemployment fund balances and pointed out that the Federal Government has had to "rescue" State unemployment funds in the past.

We have never interpreted Federal law to require "solvency." While we will continue to encourage all States to meet and maintain an AHCM of 1.00, we do not think we should tie BAA-UC specifically to fund solvency. A State in a weak solvency position should not conduct a BAA-UC experiment without also creating a means of financing it. Just as States currently assess the costs to their unemployment funds whenever coverage, benefit expansions, or tax changes are considered, we expect States to consider the costs of BAA-UC before enactment. We will provide technical assistance to States needing assistance in determining their solvency positions and, if requested, will work with States to determine financing options.

#### (3) Fundamental Program Changes

##### (a) The FMLA Program

As stated above, we received many comments that relate the BAA-UC proposal to the FMLA. The respondents see the payment of BAA-UC as an attempt to require paid leave under the

FMLA, which contains no such requirement. They contended that this proposal violates and/or amends the FMLA by converting unpaid leave under the FMLA into paid leave under the Federal-State UC program and runs counter to the notion that the FMLA would never require paid leave. Other respondents questioned whether BAA-UC requires the employer to hold the job for a BAA-UC claimant.

The FMLA is a distinct and entirely different statute from the SSA and FUTA which established the Federal-State UC program. The FMLA guarantees certain eligible employees unpaid, job-protected leave for up to 12 weeks for their own or a family member's serious health condition, or to care for a newborn or newly-adopted child. While the FMLA in no way mandates paid leave, it does not prohibit employers from providing paid leave to employees exercising their right to leave under the FMLA. Furthermore, the FMLA provides that nothing in it should be construed to supersede State or local laws that offer benefits greater than those contained in the FMLA. Consequently, neither the BAA-UC regulation nor the implementation of BAA-UC in the States would violate the FMLA. This regulation does not impose paid leave or address employment rights. Rather, it permits the States, through the UC program, to pay partial wage replacement to employees who choose to take time off for the very narrow purpose of being with a new child. The provision of BAA-UC is voluntary for States, and this regulation does not amend or change the FMLA. Thus, while nothing in BAA-UC changes the basic understanding that the FMLA does not require paid leave, States are free to enact BAA-UC as part of an effort to provide benefits greater than those contained in the FMLA. Indeed, we are not interpreting the FMLA, but the Federal UC laws.

##### (b) The UC program

Based on the premise that Federal UC law requires recipients to be involuntarily unemployed and actively seeking work, many respondents view BAA-UC as a fundamental change to the UC program. We received many comments suggesting that the group covered under this experiment constitutes persons not entitled to UC because they presumably would be voluntarily leaving their employment to be with their newborns or newly-adopted children. However, we have never interpreted Federal UC law to require that an individual's separation from employment be "involuntary" as a condition of entitlement to benefits.

Indeed, in those situations where a job relocation forces a spouse to quit his/her job to follow the other, some States allow the payment of UC without disqualification.

We also received many comments alleging that the group of employees covered by the proposed regulations are not truly "unemployed" as that term has been understood in common usage. The comments focused on the fact that these new parents would not, for the most part, be laid off by their employers but would be leaving a job the employer would continue to allow them to have. These comments appear to assume that there is a requirement in the UC program that in order to be considered unemployed, the employment relationship must be severed. This is not the case as illustrated by the payment of UC to individuals on recall. Whether an individual is unemployed within the meaning of Federal law depends on whether the individual has experienced an actual reduction in hours worked. (See UIPL 08-98, 63 FR 6774, 6776 (February 10, 1998)). (Most States define "unemployment" as a reduction in hours worked. See also 20 CFR 625.2(w)(1).) Persons receiving BAA-UC would come under this definition since they would have suffered a loss of work. Moreover, an individual need not completely sever his or her connection to his or her employment to qualify for UC as Federal law also permits payments to individuals for partial unemployment.

We also received comments expressing concern that the regulation does not require BAA-UC recipients to demonstrate, prior to the end of the leave period, that they intend to go back to work. There was a similar concern that individuals who otherwise leave employment, but do not intend to return to the workforce, will receive BAA-UC. Still other respondents were concerned that BAA-UC recipients are not required to actively seek work and that the regulation will eliminate the "refusal of suitable work" disqualification. Respondents also noted that BAA-UC would conflict with existing eligibility requirements under State UC laws.

The BAA-UC regulation defines "approved leave" as "a specific period of time, agreed to by both the employee and employer or as required by law or employment contract (including collective bargaining agreements), during which an employee is temporarily separated from employment and after which the employee will return to work for that employer." Therefore, by definition, BAA-UC recipients on approved leave from their

employers have demonstrated their intent to return to work by agreement or by contract. States may establish BAA-UC overpayments if individuals on approved leave choose not to return to work. As for individuals who otherwise leave employment, the BAA-UC experiment will also test whether their workforce attachment is strengthened.

As for work search requirements and the "refusal of suitable work" disqualification, these are not generally applicable Federal UC requirements but are permissible restrictions contained in various State UC laws. Except for the extended benefits program, there is no Federal requirement that States ensure that UC recipients be actively seeking work. While the BAA-UC experiment neither specifically mandates nor eliminates these State-imposed requirements, States would need to amend their State UC laws with regard to these requirements to the extent they interfere with the payment of BAA-UC should they wish to implement BAA-UC.

#### (4) Scope

Several respondents stated that BAA-UC should be extended to all adults who fulfill parental responsibilities, such as foster parents, step-parents, domestic partners, or any individual who stands in loco parentis to a child. Still others think that experimental BAA-UC should be expanded to other types of medical and family leave, such as leave during pregnancy, for personal illness, and to care for ill family members. There was also a suggestion that we clarify that States may provide "supplemental" BAA-UC.

No decisions regarding expanding the potential universe of recipients will be made until we have evaluated BAA-UC. Because BAA-UC is an experimental effort, there must be limitations, as with any experiment. Consequently, we have limited BAA-UC to the parents of newborns and newly-adopted children. This small, easily-defined group can be used to test whether compensating absences from employment will assist individuals to maintain, or even improve upon, their connection to the workforce. Changing the definition of parents to include all parents as defined under the FMLA or to extend UC to all FMLA leave will not enhance the experiment.

As for "supplemental BAA-UC," States currently have the authority to provide supplemental (commonly known as additional) UC. For example, some States provide supplemental UC to "displaced" workers or to workers in State-approved training. BAA-UC is no different. While the regulation does not

prohibit supplemental BAA-UC, we had not contemplated its provision when developing the experiment.

#### (5) Eligibility

A number of respondents noted with approval that the States would have the opportunity to determine eligibility criteria (work history requirements) and benefit amounts and durations, as is currently done. Others indicated that the BAA-UC regulations should be more prescriptive in terms of eligibility and benefits for BAA-UC. A few respondents felt the UC program would discriminate against the poorest workers by tying benefit levels to past wages. Others said that BAA-UC claimants should receive the same benefit levels as regular UC claimants.

##### (a) Breadth of Eligibility

We received comments characterizing the potential eligible population as overly broad. The stated concerns included:

- No limitations on the number of times parents may claim BAA-UC, allowing parents to take extensive periods of leave multiple times (for example, BAA-UC eligibility is not restricted to a specific number of births or adoptions);
- No limitation on the number of parents per child who may make a claim for BAA-UC, thereby allowing both the biological and adoptive parents of a child to claim benefits;
- No requirement that the child actually live with the parents or be cared for by the parents; and
- Silence in the regulations regarding continuing eligibility in cases where an adoptive parent ceases to be the parent or in cases where the child dies.

States have broad latitude regarding UC eligibility requirements. Consequently, we designed the regulation in a manner, consistent with the general structure of the UC program, that is not overly prescriptive. By so doing, the States have the flexibility necessary to best meet the needs of their respective populations. States are free to consider these kinds of issues in developing eligibility rules for their BAA-UC experiments.

Although State flexibility and innovation are key elements of BAA-UC, all Federal UC law requirements must be maintained, such as making payments when due (which also means not making payments that are not due) as required by section 303(a)(1), SSA, and not introducing eligibility factors unrelated to the fact or cause of an individual's unemployment. For example, restricting BAA-UC eligibility based on the number of births or

adoptions for which an individual has previously received BAA-UC is unrelated to the fact or cause of the individual's unemployment, and, therefore, would be inconsistent with Federal law.

#### (b) Length of Eligibility Period

One respondent felt that the availability of BAA-UC any time within the year following the birth or placement for adoption of a child was longer than needed for parent/child bonding. Several respondents advocated a period of at least one year because they believed it would encourage breastfeeding for the health and well-being of the child, while shorter periods may encourage premature weaning. Another respondent stated that, as long as benefits began within the first year, States should be allowed to extend the eligibility period beyond the first year. Some respondents advocated that BAA-UC be provided intermittently throughout the eligibility period, in some cases in time frames as short as one-half hour.

Research suggests that parental leave is beneficial for early childhood development. In terms of the eligibility period, we selected one year as the eligibility period because it correlates the needs related to introducing a new child into a family with the current benefit year under the UC program: States could establish a shorter eligibility period. Our Model State Legislation provides for a 12-week benefit period within a one-year eligibility period, and we encourage States to include such a provision in their legislation.

The BAA-UC regulation does not require that BAA-UC be paid only for consecutive weeks; therefore, as part of the regular UC program, BAA-UC may be provided intermittently throughout the benefit year. Partial BAA-UC may also be claimed for weeks in which an individual is partially unemployed; however, BAA-UC may be reduced under State law by wages earned during a week of partial unemployment. Typically, wages earned during one-half week or more exceed the available UC; therefore, very short time frames of unemployment (such as one hour per day) would not be compensable.

#### (c) Employer-Provided Benefits

Some respondents expressed the opinions that employers should be able to require employees to take employer-paid leave before being eligible for BAA-UC, and that employers who provide paid leave or disability coverage should be excepted from BAA-UC coverage. Other respondents suggested

that employers who currently provide paid leave will reduce or eliminate those benefits to avoid paying twice.

BAA-UC is part of the UC program and applies to all employers covered by State UC law. Therefore, just as there is no basis for excepting employers who provide private unemployment insurance to their employees, there is no basis for excepting employers from BAA-UC based on employer-provided benefits. As stated earlier, the introduction of factors unrelated to the fact or cause of an individual's unemployment would be inconsistent with Federal law. Consequently, even though employers may require employees to take employer-paid leave before taking unpaid leave under the FMLA, States may not make BAA-UC eligibility contingent upon the exhaustion of employer-paid leave. States may, however, reduce BAA-UC by the amounts of the employer-paid benefits and wages. Generally, States and employers could have lower costs if employers continue to provide benefits. Our Model State Legislation provides for employer-provided wages and benefits to be deducted from BAA-UC, and we encourage States to include such a provision in their legislation.

#### (d) BAA-UC Exhaustions

A few respondents requested clarification as to what happens after BAA-UC is exhausted. These respondents questioned whether States could pay UC where conventional A&A requirements apply upon exhaustion and whether States could demand repayment of BAA-UC if an individual failed to return to work.

BAA-UC is a part of the States' regular UC programs. States are, therefore, free to determine BAA-UC's relationship to UC where the conventional A&A requirements apply. Thus, a State could pay an individual conventional UC after BAA-UC is exhausted if the individual meets all conventional UC eligibility requirements. Whether BAA-UC counts toward the maximum number of weeks of conventional UC in this case is also a State decision. Our Model State Legislation provides for counting BAA-UC weeks toward the maximum UC entitlement, and we encourage States to include such a provision in their legislation.

Concerning overpayments, the questions and answers that accompanied the NPRM indicated that a State may declare an overpayment of BAA-UC when the individual did not return to work after receiving BAA-UC. We note, however, that there may be cases where the individual is unable to

return to work. For example, the employer may have had a general layoff. In cases such as this, a more equitable approach is to determine whether the individual meets all other State UC requirements, including actively seeking work. For these and operational reasons, our Model State Legislation does not provide for recoupment of overpayments.

#### (6) Experimental Nature of BAA-UC

##### (a) Experiment Versus Non-Experiment

We received numerous comments concerning the experimental nature of BAA-UC. Some respondents argued that we do not have the authority to conduct an experiment. Some respondents stated that there was no need to experiment because other studies have already proven the benefits of compensated parental leave. Noting that the Department did not require a period of experimentation in other areas, such as allowing payment of UC to individuals in approved training programs or to ill individuals, some respondents asked why experimentation was necessary for BAA-UC. A respondent suggested that if we intended to conduct a test we should fully fund a pilot involving a few States.

Other respondents questioned whether BAA-UC really is an experiment. Among the comments were claims that it would be difficult and politically unpopular to stop once started, and that the purpose of the experiment (that is to test whether the provision of BAA-UC would promote a continued connection to the workforce) "is an unmeasurable, wholly subjective concept." Other respondents suggested that BAA-UC was not truly experimental because the proposed regulation did not include specific measures and lacked definitive beginning and ending periods. Still other respondents saw BAA-UC as the first phase of an inevitable, continued expansion of the UC program.

Some respondents approved of our approach. They likened the BAA-UC experiment to the UC program design and quoted President Franklin Roosevelt in his message to Congress encouraging enactment of the SSA: "[T]he 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 compensations laws in order to conclude what types are most practicable in the country." 79 Cong. Rec. 546 (1935).

BAA-UC is indeed an experiment. We have the authority to interpret Federal

UC law, and we chose an experimental approach to test whether BAA-UC promotes parents' continued connection to the workforce. Thus, through voluntary State participation, the BAA-UC experiment will allow us to gather the necessary facts on whether a positive correlation exists between the provision of UC to parents of newborns and newly-adopted children and a demonstrated connection to the workforce by these parents. The fact-finding in this experiment is critical in assisting us to fulfill our authority and responsibility to assure that the States' UC programs conform to Federal UC law.

As stated in the NPRM, this experiment recognizes the impact of women in the workforce and responds to the societal and economic changes resulting from the large number of families where both parents work. We intend to gather information and evaluate the impact of the provision of partial wage replacement on employees, employers, and States' unemployment funds. We have chosen to adopt an experimental approach because the introduction of BAA-UC represents a significant shift in our view of the Federal UC requirements. We think the impact on not only employees, but also on employers and State unemployment funds should be studied. Consequently, rather than developing a pilot that might be less flexible, we chose an experimental approach that is designed to promote State innovation.

Several respondents suggested that the U.S. lags behind other developed countries in providing paid family and medical leave and pointed to studies that discussed the positive effects of paid leave in other countries. However, the benefits programs of other countries are dissimilar to the UC program in the U.S. Other respondents pointed to existing studies in this country that indicated positive effects on workforce attachment from paid parental leave. While these studies support our initiative, we believe it advisable to independently study the effects of partial wage replacement for parents of newborns and newly-adopted children on the States' UC programs, since no study was specific to the UC program. Therefore, we see experimentation with BAA-UC as a logical step.

Statistics reported for the regular UC program will include all data related to BAA-UC. Additional administrative data will be collected, using an existing data collection mechanism, from participating States as soon as they implement experimental BAA-UC. Several respondents proposed specific elements that should be evaluated.

While the specifics have yet to be determined, we anticipate that the administrative data will include, among other items, initial claims, weeks claimed, weeks compensated, and benefits paid. As States gain experience with BAA-UC, we will evaluate the effect of BAA-UC on each implementing State's UC program as part of an ongoing evaluation.

Some respondents criticized the regulations for not placing any formal sunset or termination provisions or time frame for the study. Because of the flexible nature of the BAA-UC regulations and the potentially different enactment dates, we have set a target that would trigger a comprehensive evaluation of BAA-UC when at least four States have implemented legislation and operated BAA-UC for a minimum of three years, as noted in section I. B. (4) of the preamble to the NPRM (64 FR 67974).

We believe an evaluation based on this target will provide reliable information that takes into account the variations among the States' BAA-UC experiments and allows us to ascertain the impact of BAA-UC on States' unemployment funds, employees, and employers' contribution rates, in addition to determining the workforce connections of BAA-UC recipients. While all these factors are important, we note that many respondents were interested in the impact of BAA-UC on State unemployment funds. Therefore, even though we are not establishing a solvency requirement, we will thoroughly evaluate how States determined their solvency positions and the impact of BAA-UC on State unemployment funds.

BAA-UC legislation introduced in States prior to the issuance of the NPRM varied substantially—an early indication that BAA-UC experiments among the States could differ greatly. In addition, regardless of whether States enact vastly different BAA-UC legislation or enact similar legislation, demographics, take-up rates, benefit levels, and benefit charging methodologies could vary substantially among the States. A comprehensive evaluation, therefore, will be conducted when at least four States have operated BAA-UC for at least three years. We are committed to completing a comprehensive evaluation, and this evaluation will serve to determine whether to make BAA-UC permanent, to expand it, or to end it entirely. If four States do not enact BAA-UC legislation, we will then consider how best to comprehensively evaluate the experiment given the limited data.

(b) Impact of Experimental BAA-UC on Employees, Employers, and Families

*Employees.* Numerous respondents commented on the potential negative impact of BAA-UC on employees. Some speculated that, because of costs associated with BAA-UC, employers would be discouraged from providing employer-paid benefits to employees or from hiring individuals of childbearing age. Others asked about the effects of BAA-UC on an individual's eligibility for various employer-paid benefits and on Federally-mandated benefits, such as private health insurance benefits under the Consolidated Omnibus Budget Reconciliation Act of 1985 and the Health Insurance Portability and Accountability Act of 1996. Others expressed concern that employers would move jobs out of the country, causing employees to lose jobs. Some, noting that the work of absentee employees would likely be spread among co-workers, predicted "negative effect[s] on co-workers and their families." Among claims that BAA-UC discriminates against employees who do not meet the eligibility requirements, there was speculation that implementation of BAA-UC would pit childless employees against employees with children in addition to pitting employees unemployed as a result of economic downturns against BAA-UC recipients vying for benefits from diminishing unemployment funds.

There were also numerous comments focusing on the positive impact of BAA-UC on employees. Respondents suggested that providing BAA-UC would decrease worker anxiety and reduce employee turnover, resulting in greater productivity.

*Employers.* As with employees, we received many comments about the impact of BAA-UC on employers. Many speculated that employer costs and administrative burdens would be excessive, that litigation would increase, and that worker shortages would be exacerbated because employees would be more able to take off work. Some employers worried that their global competitiveness would suffer, and some small employers were concerned that they would be subsidizing leave taken by employees of FMLA-covered businesses. Many employers urged a tax cut for businesses instead of expanding UC. A few respondents suggested that, as increased employer State UC taxes are passed on, employees and consumers will suffer. Others suggested that employer costs would be minimal and employers would benefit from a more stable workforce resulting in lower employee turnover and greater

productivity. Respondents also referred to studies that indicate that women who have paid maternity benefits take less time from work and are less likely to quit their jobs than women with access to unpaid leave or women who have no leave available. Others suggested different ways of reporting FMLA leave on UC forms as an alternative to providing BAA-UC.

*Families.* There seems to be general agreement in the comments that families would benefit from parents and children having the opportunity to bond. Many respondents commented that quality day care is expensive and scarce. However, as noted above, some respondents think that there will be a negative impact on the families of the co-workers of BAA-UC recipients due to increased workloads and overtime required to cover for persons on leave. There were also comments that BAA-UC would be bad for families because it would encourage both spouses to work and promote parental attachment to the workforce instead of the family. Some respondents criticized us for encouraging population growth, and others stated that income tax cuts or child tax credits would be more beneficial than BAA-UC in helping families with children.

Although the effects of BAA-UC on employers, employees, and families have not yet been documented, these effects concern us, and we expect that States will consider potential effects prior to enacting BAA-UC. As part of our study of the BAA-UC experiment, we will compile the necessary information needed to evaluate the effects of BAA-UC on employees and employers.

As stated in the NPRM, we believe that providing BAA-UC will have a positive impact on families because it will allow more parents to take leave to be with their newborns or newly-adopted children. Although studies suggest a positive impact on the workforce from compensated maternity and family leave, this is the first test of the effects on employers and employees of using the UC program to provide partial wage replacement for parents following the birth or adoption of a child. Because our cost estimates for the BAA-UC experiment are relatively low as a percentage of overall UC costs, we do not believe that BAA-UC will move jobs out of the country, impair U.S. global competitiveness, or otherwise adversely affect employers. For that same reason, we do not believe that litigation or employer administrative burdens would significantly increase.

Regarding size-of-employer concerns, BAA-UC applies to employees of both

small and large employers. Small employers not subject to the FMLA may well approve leave without the compulsion of the FMLA. Also, States are free to offer BAA-UC to individuals who otherwise leave their employment as a result of being ineligible for leave under the FMLA. The effect that the receipt of BAA-UC might have on either employer-paid benefits or non-UC Federally-mandated benefits would be determined by those programs and/or applicable statutes. But these effects are among the things we will review when evaluating the BAA-UC experiment. Finally, we have no data to suggest that providing partial wage replacement promotes higher birth rates, discriminates against individuals of childbearing age, or creates worker shortages; and, as we noted earlier, other options to help families, such as tax cuts or credits, are outside our purview.

#### (7) Voluntary Effort

Some respondents referred to BAA-UC as a mandate by the Administration. There were also some comments maintaining that the experiment is not really voluntary in that all States will be impacted because of interstate and combined-wage claims. (In an interstate claim, the individual has worked in one State, but files a claim in another. In a combined-wage claim, an individual has worked in more than one State and combines the work into one State for purposes of qualifying for UC or for receiving higher benefit amounts or longer duration. (See 20 CFR Part 616.)) Noting that each State participating in the Interstate Arrangement for Combining Employment and Wages must act as an agent for other participating States, one respondent held that it would be "impossible for one [S]tate to have an experimental program without impacting other [S]tates."

BAA-UC is a State option, not a mandate. States currently have wide latitude in determining most eligibility criteria. Indeed, with a few exceptions, States determine most aspects of their UC programs, such as earnings requirements, "good cause" for voluntary quit occurrences, disqualifications, benefits amounts and durations, and continuing eligibility requirements. In this regard, there are substantial variations among the State UC programs. As a result, there are situations where benefits are paid in one State that would not be paid in another, and this is reflected in combined-wage claims. We agree that, just as there now is some financial impact on States resulting from combined-wage claims,

there will be some impact on non-BAA-UC States resulting from combined-wage claims which are also BAA-UC claims. That impact is the result of State participation in the Federal-State UC program.

#### (8) Administration

Some respondents, particularly SESAs, submitted a broad range of administrative questions. The scope of the questions included how to count BAA-UC claims on Federal reporting forms, required documentation for eligibility determinations, and confidentiality of information.

We will issue specific reporting and other administrative guidance on these issues and others to SESAs in a directive separate from this rule. States will be required to report specific BAA-UC claims data. When States implement BAA-UC, statistics reported for the regular UC program will include all data related to BAA-UC. To identify only BAA-UC activity, we will use the "Quick Response Report" (the report used when collections involve fewer than 10 States, assuming that fewer than 10 States implement BAA-UC) under the standard reporting requirement authority in section 303(a)(6), SSA. This report provides for the collection of up to 12 items of information. It is anticipated that data collected will include, among other items, initial claims, weeks claimed, weeks compensated, and benefits paid. If 10 or more States enact BAA-UC, reporting requirements will be issued in a separate information collection request in accordance with the Paperwork Reduction Act.

Concerning administrative methods, States are required under section 303(a)(1), SSA, to have "methods of administration \* \* \* reasonably calculated to insure the full payment of unemployment compensation when due." For BAA-UC, this means that, as is the case for all types of UC, States must have reasonable administrative methods to assure that an individual is eligible. States are expected to obtain the requisite documentation, for example, that an individual is on approved leave or has left his or her employment, that the individual has a newborn child under one year old, or that a child has been placed for adoption. States must have reasonable methods to assure that the individual is eligible for each week claimed and methods for detecting and collecting overpayments. Each State already has all of these methods in place for the regular UC program; States need only modify them as appropriate to accommodate BAA-UC requirements. If

we identify a need for further guidance on any "methods of administration," we will issue guidance as appropriate.

Concerning confidentiality of information, States must treat BAA-UC claims information in the same manner as claims information for the regular UC program. Guidance on confidentiality is found in UIPL No. 34-97 (62 FR 40118, 40119 (July 25, 1999)).

#### (9) Inconsistency With Welfare to Work (WtW) and Workforce Investment Act (WIA) Initiatives

Some respondents contended that experimental BAA-UC is inconsistent with the WtW and WIA initiatives. As they pointed out, these programs are designed to help and encourage individuals to join the workforce. Comparing BAA-UC to the pre-1996 welfare program, one respondent asserted that BAA-UC was counter to the WtW and WIA initiatives in that it would "create a disincentive for individuals to access WIA training and child care programs, and encourage them not to enter or stay in the workforce." Respondents also were concerned that BAA-UC would discourage personal responsibility.

We view BAA-UC and the WtW and WIA initiatives as compatible efforts. Just as the WtW and WIA initiatives help individuals enter into the workforce, BAA-UC may help them maintain a connection to the workforce. As with all UC recipients, experimental BAA-UC recipients must have a sufficient work history, as determined by each State, to be eligible for benefits. Consequently, implementation of BAA-UC provides no inducement to avoid entering into the workforce. Indeed, the whole premise of BAA-UC is that individuals who receive these benefits will be more attached to the workforce. Because, as with all UC programs, experimental BAA-UC will provide only short-term, partial wage replacement, we see no disincentive to individuals to remain in the workforce.

#### (10) Fraud and Abuse

Some respondents expressed concern about the potential for fraud and abuse, noting that the regulation does not condition receipt of BAA-UC on any evidence of parent-child bonding efforts, on the parent(s) and child sharing a residence, or on whether the parent(s) support and/or actually spend time with the child. Some respondents surmised that BAA-UC would be "a paid vacation plan."

The purpose of the regulation is to test whether compensating absences from employment will help parents of newborns or newly-adapted children

maintain or improve their connection to the workplace; it is not designed to test whether the parents and children actually bond. We do not presume that any specific parental activity or circumstance is more (or less) appropriate for promoting bonding between parents and children. The regulation, therefore, does not impose upon States the burden of verifying specific bonding activities. As is the current practice, methods of fraud detection and overpayment collection will be developed as deemed appropriate by the SESAs.

#### (11) UC Program Reform

We received several recommendations that BAA-UC should be aligned with other State UC program reform efforts and that we should track and measure all reform efforts of States that implement BAA-UC. We believe that UC reform is of the utmost importance and have been diligently working to promote UC reform through the legislative process and have tracked and evaluated such efforts. Although we would like to see broad reform of the UC program, such reform is beyond the scope of this rule.

#### (12) Comment Period

Under the Administrative Procedure Act (APA), an agency is required only to provide a 30-day comment period and public hearings are not required by the APA for notice-and-comment rulemaking. We received several hundred responses from interested parties requesting that we extend the initial 45-day comment period ending on January 18, 2000, and/or that public hearings be held in venues around the country. Given the simple nature of the experiment and the relatively short length of the proposed rule, we thought that a 45-day comment period was adequate and that hearings were unnecessary. Some of the initial comments noted that the comment period fell during the holiday season, so we decided to extend the comment period 15 days through February 2, 2000, for a total 60-day comment period.

A few respondents requested in their timely submissions that we permit them to submit additional comments after February 2, 2000. However, the sheer volume of comments, as well as the extensive detail of some of the comments received, including the timely comments from the respondents asking to submit additional comments, convinced us that sufficient time was allotted for comments and that additional time was not necessary.

#### (13) Rulemaking Requirements

We received comments that this rule is subject to the Regulatory Flexibility Act requirements because it will have a significant economic impact on a substantial number of small entities, and it violates the Unfunded Mandates Reform Act of 1995.

Respondents challenging our conclusion that BAA-UC is not subject to the Regulatory Flexibility Act requirements suggested that the experiment will undoubtedly have a significant economic impact on a substantial number of small entities since the experiment will result in a potentially higher payment of UC due to the expansion of coverage to include new parents, thus requiring a regulatory flexibility analysis. However, the BAA-UC regulations impose no regulations upon small entities (*American Trucking Association v. EPA*, 175 F.3d 1027, 1044 (D.C. Cir. 1999)), rather, we are regulating the States that choose to experiment with BAA-UC. Furthermore, the Unfunded Mandates Reform Act of 1995 (UMRA) is not applicable to this regulation since this is not a "Federal intergovernmental mandate" as defined in section 421(5) of the Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. 658), as amended by section 101(a)(2) of the UMRA. Indeed, we are not mandating that a State, local or tribal government, or the private sector implement BAA-UC.

#### (14) Model State Legislation

We received some comments about the Model State Legislation that was appended to the proposed rule in the NPRM. Some comments indicated that respondents interpreted the Model State Legislation to be required legislative language. Others suggested that the Model State Legislation be restructured with affirmative language to guarantee payment of BAA-UC and suggested that the Model State Legislation be changed to read "compensation shall be provided" rather than stating that compensation "shall not be denied" as published in the NPRM.

The Model State Legislation is provided only as a guide to aid the States that enact BAA-UC in developing State legislation: States are not required to use it. The Model State Legislation is written in the style that States typically use in their statutes. We think there is no substantive difference between the suggested language style and the style used in the Model State Legislation; therefore, no stylistic changes were made. States that elect to follow the

Model State Legislation must adapt it to their State UC laws.

#### IV. Explanation of Final Rule and Changes to Proposed Rule by Section

There is little difference between the proposed rule and the Final Rule. An explanation is provided where differences occur. Technical changes are not discussed.

##### *Subpart A—General Provisions*

Subpart A of rule discusses the purpose of the rule, the scope of the rule and critical definitions. The definitions of “approved leave,” “newly-adopted child,” “placement,” and “parents” warranted amendment and are discussed below. All other aspects of Subpart A remain unchanged from the proposed rule.

##### Definition of “Approved Leave”

Respondents raised two concerns about “approved leave” as it is described in the NPRM—one that it would make individuals eligible for benefits while still employed and the other that it would inhibit eligibility by forcing legally permissible leave to pass an employer approval test.

In the preamble to the NPRM, “approved leave” was described as “an approved, temporary separation from a specific employer.” Pointing to the phrase “specific employer,” concerns were expressed that this would permit employees who work for multiple employers to be eligible for BAA–UC based on a separation from one employer while continuing to work for other employers and that the individual’s UC would be charged to the other employers. We also received comments about whether individuals could receive partial BAA–UC while working a reduced number of hours for the same employer.

The Federal-State UC program already is designed to accommodate situations where an individual separates from one job while continuing another and where individuals are continuing to work at reduced hours. We expect States to handle these types of BAA–UC situations just as they currently handle similar situations. For example, an individual continuing to hold a job will have earnings; these earnings will affect the individual’s eligibility, including the amount payable, under BAA–UC.

Other respondents expressed concern that the “approved leave” definition limits the availability of BAA–UC; some respondents suggested that the definition of “approved leave” be amended to include “required” leave. The concern was that some employees are granted leave under law or contract,

regardless of whether the employer “approves” the leave. The respondents were concerned that, under the definition of “approved leave” in the NPRM, these employees would not be eligible for BAA–UC.

We do not intend to exclude from BAA–UC eligibility employees who are provided leave by law or contract. To assure that this group of employees is not unintentionally excluded from BAA–UC, the definition of “approved leave” is amended to read “a specific period of time, agreed to by both the employee and employer or as required by law or employment contract (including collective bargaining agreements), during which an employee is temporarily separated from employment and after which the employee will return to work for that employer.”

The other concerns about the definition of “approved leave” stemmed from the notion that only employers covered by the FMLA would approve leave and that, as a result, employees of smaller businesses would not be eligible for BAA–UC. As a result, some respondents thought there was conflicting information within the NPRM regarding eligibility because employees of smaller businesses would not be eligible for BAA–UC if eligibility is conditioned on approved leave. Some respondents suggested as a remedy that the State option to limit BAA–UC to individuals on approved leave be eliminated. We expect States to evaluate whether employees of small businesses would be unable to obtain approved leave and to determine whether to cover these individuals under 20 CFR 604.10, which applies to employees who otherwise leave their employment.

##### Definition of “Newly-Adopted Child”

In an effort to afford States maximum flexibility and in acknowledgment that adopted children may be more than one year old, the definition of “newly-adopted child” in the NPRM included no limitation on the age of an adopted child. We received comments stating that, without an age limitation on adopted children for purposes of BAA–UC, there was potential for adults who adopted adults to be eligible for BAA–UC.

The BAA–UC experiment is clearly designed for the parents of young children and will test whether providing those parents with BAA–UC during the first year of a child’s life or placement for adoption will help maintain or even promote their connection to the workforce by allowing them time to bond with their children and develop stable child care systems

while adjusting to the accompanying changes in lifestyle before returning to work. To help assure that BAA–UC is used for this purpose, we are establishing an age limitation of 18 years old or less within the definition of “newly-adopted children.” This age limitation is within the commonly accepted age range of a “child” and also acknowledges that adopted children may be more than one year old. The definition of “newly-adopted children” is amended to read “means children, age 18 years old or less, who have been placed within the previous 12 calendar months with an adoptive parent(s).”

##### Definition of “Placement”

Respondents also raised concerns about the definition of “placement.” *Placement* was defined in the NPRM as “the time a parent becomes legally responsible for a child pending adoption.” Comments indicated a concern that individuals in the process of adopting a child and who have actually received the child would be precluded from receipt of BAA–UC because adoption agencies may retain legal responsibility for a child until the adoption is complete. Therefore, to assure that these parents are not excluded on a technicality, the word “legally” has been deleted from the definition. Generally, foster parents are excluded from BAA–UC; however, this change may, in some situations, permit some foster parents in the adoption process to be eligible for BAA–UC. “Placement” is defined in this rule as: “the time a parent becomes responsible for a child pending adoption.” A minor change was made to the definition of “parents” to make it more compatible with the definition of “placement.”

##### *Subpart B—Federal UC Requirements*

No changes were made to this section; therefore, Subpart B of the Final Rule is the same as Subpart B in the NPRM.

##### *Subpart C—BAA–UC Eligibility*

A review of Subpart C resulted in two changes. First, the subpart title was changed to “Subpart C—Coverage and Eligibility” to better reflect the subpart’s content. Second, the review revealed that § 604.22 was unnecessary because it did not regulate State actions. Consequently, § 604.22 is not included in the Final Rule.

##### *Executive Order 12866*

This 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. It is also "economically significant" within the meaning of Section 3(f)(1) of that Executive Order because it may have an annual effect on the economy of \$100 million or more. Specifically, the estimated costs range from zero to \$196 million. Accordingly, this rule was submitted to, and reviewed by, the Office of Management and Budget. As directed by Section 6(a)(3)(C) of Executive Order 12866, we have prepared a Regulatory Impact Analysis that assesses the costs, benefits, and alternatives associated with this regulation. The Regulatory Impact Analysis is available to the public as part of the rulemaking record.

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

#### *Paperwork Reduction Act*

We have determined that this rule contains no information collection requirements. If the evaluation of this experiment requires information collections covered under the Paperwork Reduction Act, we will seek OMB approval at that time.

#### *Executive Order 13132*

This regulation has been reviewed in accordance with Executive Order 13132 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. We do not believe that Executive Order 13132 applies. In the interest of consultation, however, we invited major intergovernmental associations to a meeting at which we briefed the associations on the proposed rule.

#### *Executive Order 12988*

This 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 rule 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*

This rule has been reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*). We have determined that this rule does not include any Federal mandate. States have full discretion to decide whether or not to enact BAA-UC.

#### *Regulatory Flexibility Act*

This rule will not have a significant economic impact on a substantial number of small entities. The rule 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 BAA-UC under this 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.

#### *Effect on Family Life*

We certify that this rule has been assessed in accordance with section 654 of Public Law 105-277, 112 Stat. 2681, for its effect on family well-being. We conclude that the 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.

#### *Congressional Review Act*

Consistent with the Congressional Review Act, 5 U.S.C. 801, *et seq.*, we will submit to Congress and the Comptroller General of the United States, a report regarding the issuance of this Final Rule prior to the effective date set forth at the outset of this document.

OMB has determined that this rule is a "major rule" as defined in the Congressional Review Act. The rule is likely to result in an annual effect on the economy of \$100 million or more. The cost estimate is discussed in Section III.C.(2)(a) of the "Supplementary Information," above. The effective date of this rule has been adjusted in accordance with the requirements of the Congressional Review Act.

#### **Catalogue of Federal Domestic Assistance Number**

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

#### **List of Subjects in 20 CFR Part 604**

Unemployment compensation.

Signed at Washington, DC on June 7, 2000.

**Alexis M. Herman,**  
*Secretary of Labor.*

#### **Words of Issuance**

For the reasons set forth in this preamble and in the NPRM, Chapter V of Title 20, Code of Federal Regulations, is 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—Coverage and Eligibility**

604.20 Who is covered by Birth and Adoption unemployment compensation?

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

**Authority:** 42 U.S.C. 503 (a)(2) and (5) and 1302(a); 26 U.S.C. 3304(a)(1) and (4) and 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?**

The regulation in this part 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 this regulation?**

The regulation in this part 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 this regulation?**

The following definitions apply to the regulation in this part:

(a) *Approved leave* means a specific period of time, agreed to by both the employee and employer or as required by law or employment contract (including collective bargaining agreements), 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) *Department* means the United States Department of Labor.

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

(e) *Newly-adopted children* means children, age 18 years old or less, 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 custody of a child pending their adoption of that child).

(g) *Placement* means the time a parent becomes 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, the regulation in this part does not change the Federal unemployment

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

**Subpart C—Coverage and 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 individual'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.

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

**Appendix to the Preamble—  
Unemployment Insurance Program  
Letter No. 26-00**

**U.S. Department of Labor**

*Employment and Training Administration,  
Washington, D.C. 20210*

CLASSIFICATION: UI

CORRESPONDENCE SYMBOL: TEUL

DATE: May 31, 2000

**DIRECTIVE:** Unemployment Insurance Program Letter No. 26-00.

**TO:** All State Employment Security Agencies.

**FROM:** Grace A. Kilbane, Administrator,  
Office of Workforce Security.

**SUBJECT:** Model State Legislation and Commentary to aid States implementing Birth and Adoption Unemployment Compensation Unemployment Compensation (BAA-UC).

Rescissions: None.

Expiration Date: Continuing.

1. *Purpose.* To provide Model State Legislation and Commentary for States implementing BAA-UC. The Model State Legislation is offered as a guide for States that need to amend their current UC laws, it is not required. The Commentary provides information on the Model State Legislation and will aid States in making policy decisions.

2. *References.* 20 Code of Federal Regulations (CFR) parts 604, 615, and 625; sections 303(a)(1) and (8), Social Security Act (SSA); Unemployment Insurance Program Letters (UIPLs) No. 21-80 and No. 44-93; Family and Medical Leave Act, Pub. Law 103-3; the *Manual of Employment Security Legislation* (rev. 1950); UIPL No.787 transmitting the 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*; and *Jenkins v. Bowling*, 691 F.2d 1225 (7th Cir. 1982).

3. *Background.* The Department of Labor (Department) created, by regulation, an opportunity for State agencies that administer the UC program to pay, as part of a voluntary, experimental effort, UC to parents who take time off from employment after the birth or placement for adoption of a child. (20 CFR Part 604.) This regulation allows States the opportunity to develop innovative ways of using UC to support parents taking approved leave or who otherwise leave their employment to be with their newborns or newly-adopted children and will permit us to evaluate the effectiveness of using the UC program for these or related purposes.

4. *Model State Legislation.* The attached Model State Legislation is offered as an optional aid for States that choose to enact BAA-UC. The Model State Legislation assumes that States will provide BAA-UC based on the same earnings and employment criteria that apply to other individuals. It also assumes that States will provide BAA-UC for no more than 12 weeks, that BAA-UC payments will count toward the maximum number of weeks of UC, and that employers will not be charged for BAA-UC. Further, the Model State Legislation provides for the deduction of other income from BAA-UC. The Model State Legislation conforms to the regulations at 20 CFR Part 604; however, States have wide latitude in creating their BAA-UC provisions within the parameters of those regulations.

5. *Commentary.* A Commentary in question-and-answer format is also attached (Attachment II) as an aid for States. The Commentary discusses policy approaches taken in the Model State Legislation and also discusses other matters.

6. *Action.* We suggest that States consider developing a BAA-UC experiment to provide partial wage replacement to parents on approved leave or who otherwise leave employment to be with their newborns and newly-adopted children. We expect that States will take into consideration the impact of such an effort on their unemployment funds prior to enactment. Appropriate staff should be provided with this UIPL.

7. *Inquiries.* Please direct inquiries to the appropriate Regional Office.

#### Attachments

Attachment I—Model State Legislation

Attachment II—Commentary

#### Attachment I—Model State Legislation

##### Section \_\_\_\_ *Birth and Adoption Unemployment Compensation*

(a) A parent on a leave of absence from his/her employer or who left employment to be with his/her child during the first year of life, or during the first year following placement of a child age 18 or less 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) For purposes of this section, the following definitions apply:

(1) *Parent* means a mother or father (biological, legal, or who has custody of a child pending her or his adoption of that child); and

(2) *Placement* means the time a parent becomes responsible for a child pending adoption in accordance with [cite State adoption law].

(c) 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.

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

(e) 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.

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

(g) 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 Birth and Adoption unemployment compensation.

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

#### Attachment II—Commentary

##### General

1. Must States implement Birth and Adoption unemployment compensation (BAA-UC)?

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

2. Does the BAA-UC regulation enable a State to pay UC for other types of family or medical leave?

No. This regulation enables States to pay UC, on an experimental basis, to parents on approved leave or who otherwise leave employment to be with their newborns or newly-adopted children. The experiment will test whether providing UC to individuals within this group will strengthen their workforce attachment and will provide data on the impact of BAA-UC on employees, employers, and States' unemployment funds. Permitting payment of UC for other types of family leave or care would be inconsistent with this experimental effort.

3. Must all employer-paid leave be exhausted before BAA-UC is available?

No. BAA-UC is designed to provide partial wage replacement to parents on approved leave or who otherwise leave employment to be with their 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.

4. Does the BAA-UC regulation impose any solvency requirements upon the States before they enact BAA-UC?

No. The Department expects that a State will not enact changes without assessing the effect on the solvency of its unemployment fund. A State in a weak solvency position should not conduct a BAA-UC experiment without creating a means of financing it. 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. We will provide technical assistance to States needing assistance in determining their solvency positions.

##### Monetary Qualifications and Benefits

5. 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.

6. 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.

7. 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.

8. How does the BAA-UC entitlement relate to UC payments where conventional able and available requirements apply?

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

##### Period of Eligibility

9. When may BAA-UC benefits begin?

Under 20 CFR 604.21, 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.

10. 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. 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 amount.

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

11. 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.

12. Must the individual serve a waiting period?

No. Nothing in Federal law requires States to have a waiting week for conventional UC or BAA-UC. However, not having a waiting week 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.

13. When is a child considered "placed" for adoption?

Under 20 CFR 604.3(g), placement occurs at the time a parent becomes 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

14. 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.

15. 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.

16. 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 Department 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 grants the leave, but on the parent's reason for wanting to take the leave.

17. 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 Department recommends that the notice be required to be given no more than 30 days prior to birth or placement, but only where practicable.

18. Must States declare an overpayment of benefits if the individual does not return to work?

No, although a State may choose to declare an overpayment of benefits if the individual fails to return to work. However, 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. See *Jenkins v. Bowling*, 691 F.2d 1225 (7th Cir. 1982).

19. 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 continue to 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

20. May BAA-UC costs be spread among employers?

Yes. States are free to spread the costs—commonly called "noncharging"—of BAA-UC. We think that spreading BAA-UC costs among all employers is the most equitable means of financing this experiment; therefore, the Model State Legislation provides for this. This position applies to both contributory and reimbursing employers.

Noncharging contributory employers is common in most States; however, some States do not noncharge reimbursing employers. States interested in noncharging reimbursing employers for BAA-UC are referred to UIPLs No. 21-80 and No. 44-93 (58 FR 52790, 52792 (April 12, 1993)) for general information about noncharging reimbursing employers.

21. May BAA-UC costs be paid from a State fund other than the State's unemployment fund, for example, a State's temporary disability insurance (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 the Department's BAA-UC regulation will not apply.

#### Administrative Costs

22. May States use UC administrative grants received from the Federal government to pay for the administration of BAA-UC?

Provided that all the requirements of the BAA-UC regulation are met, the use of UC administrative grants is permissible, including for purposes of studying and evaluating BAA-UC. 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), SSA.

*Reporting*

23. 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 Department 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."

24. What are the reporting requirements?

The Department has not yet finalized a methodology for evaluating BAA-UC. 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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