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Unemployment Compensation: Benefits While on Leave for the Birth or Adoption of a Child

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Summary

On June 13, 2000, the Department of Labor (DOL) published a final regulation that allowed states to use their unemployment compensation (UC) systems to provide cash benefits to parents who take unpaid leave under the Family and Medical Leave Act (FMLA) or other approved unpaid leave, or otherwise take time off from employment after the birth or adoption of a child. The final regulation establishing the voluntary program, the Birth and Adoption UC (BAA-UC) Experiment, went into effect on August 14, 2000. States were required to elect this voluntary program by enacting legislation to make BAA-UC a part of their UC programs. No state passed such a BAA-UC law, although California passed a related law authorizing paid family and medical leave under certain circumstances, including the birth or adoption of a child, beginning in July 2004.

The BAA-UC program was highly controversial, with opponents arguing that the program changed the fundamental purpose of the UC system while proponents lauded the program as a means of expanding the use of family medical leave. On June 26, 2000, a lawsuit was filed in federal court seeking to bar the Clinton Administration from implementing the regulations on the BAA-UC program. The lawsuit was rejected by a federal district court in the District of Columbia on July 24, 2002. On December 4, 2002, the Bush Administration proposed a repeal of the BAA-UC regulation. The BAA-UC Experiment was removed from federal regulations by a final rule published in the *Federal Register* on October 9, 2003, effective November 10, 2003. This report will not be updated.

Background

The Department of Labor (DOL) issued a final regulation on June 13, 2000, that created a voluntary experimental program allowing state employment agencies that administer the Unemployment Compensation (UC) program to pay unemployment insurance (UI) benefits to eligible parents who take approved unpaid leave or otherwise take time off from their jobs after the birth or adoption of a child. The program was referred to as the Birth and Adoption UC (BAA-UC) Experiment and known colloquially

as "Baby UI." Besides offering cash payments from the state, the BAA-UC initiative was different from the Family and Medical Leave Act (FMLA) in that it was voluntary on the part of states, could not be made contingent on employer size, was limited to parents of newborns or newly adopted children, did not guarantee that an employer would grant leave, and had no job protection component.[1]

The BAA-UC regulations were developed in response to an executive memorandum issued by President Clinton in May 1999 directing DOL to issue a rule specifically allowing states to enact legislation that would permit the use of the UC system for wage replacement in certain parental leave situations. This action stemmed from requests from four states — Massachusetts, Vermont, Maryland, and Washington — for the DOL to clarify federal UC law regarding pending legislative proposals to use UC benefits for parental leave that were under consideration by state legislatures. These states sought clarification of the UC requirements that individuals eligible to receive UC benefits must be involuntarily unemployed and must be "able and available" for suitable employment. After the original proposed federal rule was issued in December 1999, BAA-UC proposals were introduced in 15 states: Connecticut, Florida, Illinois, Indiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, Pennsylvania, Vermont, and Washington. No state legislature enacted such a proposal. However, the California legislature passed a related law authorizing paid family and medical leave under certain circumstances, including the birth or adoption of a child, through the state's existing temporary disability insurance program set to go into effect in July 2004.

The Final Regulation

The final rule on the BAA-UC program,[2] published on June 13, 2000, provided guidance to states voluntarily seeking to change their UC systems to support parents of newborns or newly adopted children on approved unpaid leave. The system essentially would have created an exemption from the federal requirements that unemployed recipients of UC benefits be involuntarily unemployed and "able and available" to work. Under the federal regulation, new parents who took an unpaid leave of absence during the first year after the birth or adoption of a child would have been eligible to receive UC benefits for a benefit period determined by the states.

Many of the details of how the program would be structured were left to the states to determine through legislation they were required to enact if they wished to implement the voluntary program. For example, states adopting BAA-UC would have been permitted to establish their own requirements for earnings amounts and length of employment necessary for individuals to qualify for benefits, as well as the amount of weekly benefits provided. States would also have been free to determine the maximum duration of BAA-UC benefits. Similarly, the financing of BAA-UC benefits was left to

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[1] For more information on FMLA, see CRS Report RL31760, *The Family and Medical Leave Act: Legislative Activity in the 108th Congress*, by Linda Levine. 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.

[2] 20 CFR Part 604.

states to determine. States would have been required to determine whether payments for these benefits would effect state experience rating systems[3] and employer contribution rates under state UC law.

On the other hand, certain eligibility issues would have been federally determined. States implementing BAA-UC would have been required to allow both parents, who were otherwise eligible, to receive BAA-UC benefits concurrently or consecutively. The federal regulation also required that, if a state choose to adopt BAA-UC, the program would have to apply to all employees of employers subject to state UC law, and states would not have been permitted to limit BAA-UC based on employer size. In addition, if all the federal requirements of BAA-UC were met, states would have been permitted to use the federal administrative grants provided for the UC program to pay for the administration of the BAA-UC program. The regulation also would have required that the federal government conduct comprehensive evaluation of BAA-UC when at least four states had implemented legislation and had operated the program for a minimum of three years.

The regulation was accompanied by model legislation that provided a framework from which states could develop their experimental BAA-UC programs. The model legislation provided that UC benefits be made available to such parents during the first year after the birth or placement for adoption occurred, although states were free to reduce, but not expand, the one-year eligibility period which, under the regulation, would have started during the week that the birth or placement for adoption occurred. Although states would have been free to determine the length of BAA-UC benefits, the model legislation suggested that benefits be made available for a maximum of 12 weeks since the FMLA allows up to 12 weeks for such events. The model legislation also suggested that the benefit amounts provided to eligible persons be the same as those provided to unemployed beneficiaries.

Controversy

The BAA-UC program was controversial from the time the proposed rule was issued. The business community criticized the program as changing the fundamental purpose of the UC system by providing benefits to individuals who voluntarily left employment and were not "able to and available for work." Employer groups contended that the regulations were illegal because they conflicted with the language, history, and long-standing interpretation of the Federal Unemployment Tax Act (FUTA) under which the UC program is authorized. Under FUTA, a payroll tax is imposed on employers to fund benefits designed to provide temporary and partial wage replacement to involuntarily unemployed workers while maintaining a trained workforce prepared to re-enter the labor force when business improves. Employer groups argued that, by promoting BAA-UC, the burden of paying for parental leave would have shifted to employers by a backdoor payroll tax. They pointed out that Congress chose not to provide a paid leave benefit when it originally enacted the FMLA. In addition, employers argued that BAA-UC, by

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[3] At the state level, UC benefits are financed from employer taxes and each employer is assigned a particular tax rate based on its experience with unemployment relative to the experience of other employers. This is known as the state's experience rating system.

offering wage replacement, could have increased the duration and frequency of leave taken by new parents.

Concerns were also raised about the impact of BAA-UC on the solvency of the UC trust fund accounts. Opponents pointed to past recessions that were severe enough that many state trust fund account balances were depleted, forcing states to borrow from the federal government in order to pay regular UC benefits to unemployed workers. During most non-recessionary periods, the trust funds are intended to permit the states to build up their reserves in order to cope with any future economic downturn. Opponents argued that the BAA-UC might not only have reduced current funds for regular UC benefits, but could also have reduced the buildup in state trust fund reserves that might be needed to pay benefits during a recession. If the trust funds became depleted, opponents argued that states might find it necessary to raise UC taxes on employers to bolster the trust funds.

Advocates of the program included organized labor, women's rights organizations and groups representing low-income workers. These groups saw the program as an innovative way to enable more people, particularly low-income workers who could not afford to take unpaid FMLA leave, to take time off from work to care for newborn or adopted children. As 60% of women today work outside the home,[4] national programs and policies were needed to help them balance work and family responsibilities, they contended. Moreover, proponents argued that this was only a permissive regulation that left it to the states to determine whether to adopt the policy. The regulation simply removed a barrier to doing so if they desired.

Implementation and Litigation

Under its authority to interpret the provisions of federal UC law, the DOL regulation on BAA-UC included family medical leave for parents of newborn or adopted children as an exception to the requirement that UC claimants be "able to and available for work." In the past, DOL had used its authority to interpret the "able and available" requirements regarding other specific situations for exceptions to the UC requirements for workers who demonstrated an attachment to the workforce. These exceptions included situations such as approved training as a means of making the individual more job-ready, illness, jury duty and temporary layoffs. By expanding the interpretation of the "able and available" requirements, DOL argued that the experimental program would test whether providing BAA-UC to new parents promoted a continued connection to the workforce for new parents who would have been eligible for such payments.

On June 26, 2000, a coalition of employer groups and management organizations[5] filed a lawsuit in U.S. District Court for the District of Columbia seeking to bar the

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[4] U.S. Bureau of Labor Statistics data for 1999.

[5] The coalition included LPA Inc., a public policy advocacy organization representing human resource executives; the Society for Human Resource Management, an organization for human resource professionals; the U.S. Chamber of Commerce; and two private businesses, Counterpulsations Inc. and Danneman Auto Service Inc.

Administration from implementing the BAA-UC regulations.[6] The complaint included allegations that the regulation violated the Social Security Act and FUTA, where the UC program is codified, by authorizing payment of UC benefits to individuals who were not able and available for work and who were voluntarily out of work.[7] The complaint further stated that under the law withdrawals from state UI accounts can only be used to pay UC benefits. It also alleged that the new regulations violated congressional intent in enacting the FMLA because businesses were not *required* to pay employees on approved leave and because businesses with fewer than 50 employees were exempt from leave requirements. Remedies sought under the complaint included a request that the court grant a judgement that the regulations were not authorized under federal law and violate several federal laws. The request also sought a preliminary injunction to keep the regulation from going into effect, as well as a permanent injunction ordering the secretary to withdraw the regulations.

The lawsuit was rejected by a federal district court in the District of Columbia on July 24, 2002. The court found that the business groups had no standing to challenge the rule, since to have "standing" a plaintiff must show that it has suffered an injury to a legally protected interest, that the injury is traceable to the defendant's conduct, and that a favorable decision on the merits of the lawsuit will redress the injury.[8] DOL contended that the plaintiffs were not injured because no state had passed or was about to pass a law implementing the rule. The court agreed with DOL that no adverse effects had occurred and that any harm caused by the potential BAA-UC laws would depend on the specific provisions of law enacted by each state.

After the regulations providing for BAA-UC went into effect on August 13, 2000, no state legislature enacted the necessary changes in state UC law required to implement the BAA-UC regulation. Although as many as 15 states introduced legislation to provide for it, these efforts were met with strong opposition from business interests and little headway was made toward implementation of BAA-UC. In Massachusetts, a three-year BAA-UC pilot program was enacted by the legislature as an amendment to a supplemental budget bill, but the measure was ultimately rejected by the governor.

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[6] For more information on the legal issues surrounding BAA-UC, see CRS Congressional Distribution Memorandum, *Family and Medical Leave and Unemployment Insurance Coverage,* by Kimberly D. Jones, June 14, 1999.

[7] California, Hawaii, New Jersey, New York, Puerto Rico, and Rhode Island provide temporary disability insurance (TDI) programs which are coordinated with UC and provide cash benefits, for limited periods, for workers unemployed and unable to work because of the individual's physical or mental condition. Beneficiaries under these programs are exempt from the able to and available for work requirements under the UC program. However, it should be noted that these benefits are financed separately from UC benefits, mainly from employee contributions or special taxes on employers required under state law. Originally enacted in 1946, §303(a)(5) of the Social Security Act provides that amounts of employee contributions to a state unemployment fund may be withdrawn for the payment of disability benefits. Like BAA-UC proposal, the temporary disability programs are optional and states can determine the coverage and financing of these benefits.

[8] BNA, Inc., *The Family Law Reporter*, vol. 28, no. 38 (Aug.13, 2002).

Repeal of the BAA-UC Rule

On December 4, 2002, the Bush Administration proposed a repeal of the BAA-UC regulation.[9] According to DOL, the review of the regulation was conducted in the context of a substantial downturn in the economy, resulting in substantially lower state unemployment fund balances than in 2000, and in the context of a legal challenge in federal district court that the BAA-UC rule was inconsistent with federal UC law. As a result of the review, DOL concluded that the BAA-UC experiment was "poor policy and a misapplication of federal UC law relating to" the requirements that beneficiaries be able and available for work. Since no state had enacted a BAA-UC program, terminating the experiment did not result in any state withdrawing benefits previously granted. According to DOL, the only effect of the removal of the regulations would be that it would reduce state flexibility since a state could no longer elect to use its unemployment fund to pay BAA-UC.

The proposed repeal of the BAA-UC rule drew praise from the business community and criticism from workers' representatives. During the comment period for the proposed rule, comments submitted from opponents of BAA-UC vastly outnumbered the comments submitted by supporters of the rule. The DOL finalized the proposal to rescind the BAA-UC regulation in a final rule published in the *Federal Register* on October 9, 2003.[10] The final rule was effective November 10, 2003.

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[9] U.S. Department of Labor, "Notice of Proposed Rule Making," 67 *Federal Register* 72122, Dec. 4, 2002.

[10] U.S. Department of Labor, "Final Rule," 68 *Federal Register* 58539, Oct. 9, 2003.