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**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)**

- 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.
- 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 330411) of the Internal Revenue Code of 1954: and Jenkins v. Bowling, 691 F.2d 1225 (7th Cir. 1982).
- 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.
- 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.

Attachment I - [Model State Legislation](#)

Attachment II - [Commentary](#)

### 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.

## 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 51<sup>st</sup> 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 3304fa) 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. Bowline, 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 (UCH 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.