

BAA-UC. Notably, it authorizes payments beyond the scope of BAA-UC to certain individuals who take time off from work to care for a sick or injured child, spouse, parent or domestic partner as well as for foster care placements of a new child. The California law does not use its unemployment fund as a funding source, but instead uses employee contributions to its Temporary Disability Insurance fund. Similarly, the BAA-UC rule limits the types of eligibility conditions that may be imposed on individuals. For example, the BAA-UC rule at 20 CFR 604.20 lists industry, employer size, or the unemployment status of a family member as unacceptable eligibility factors.

Other flexibility issues have also been identified. For example, the Department expressed concern with a state bill that appeared to be close to enactment because it appeared to be inconsistent with Section 3304(a)(6)(A) of the Federal Unemployment Tax Act (FUTA). This bill would have made BAA-UC mandatory for all services performed in the state, except for services performed for certain governmental and nonprofit entities that could elect to participate. Because Section 3304(a)(6)(A), FUTA, requires that, with respect to these governmental and nonprofit services, UC must be paid "in the same amount, on the same terms, and subject to the same conditions" as UC payable on other services performed under state law, the Department advised the state that this legislation, if enacted, would be inconsistent with FUTA.

Finally, when the BAA-UC Final Rule was issued in 2000, state unemployment funds were in sounder financial condition than today. Since the publication of the rule, many states have seen a drastic decline in their unemployment fund balances, and most states are below our recommended 1.00 average high-cost multiple. (The average high-cost multiple indicates how many years of benefits a state has available under a recessionary scenario. A rating of 1.00 indicates the state has one year's worth of benefits on hand. The Department recommends a 1.00 high-cost multiple as a reasonable margin of safety to ensure fund solvency in periods of high unemployment.) Indeed, at the time BAA-UC was created, one of the policy arguments made for using a state's unemployment fund for BAA-UC was the claim that states had "surpluses" in their unemployment funds, which could be made immediately available to implement a BAA-UC experiment. The sudden and

rapid decline in fund balances undercuts this argument and emphasizes the need for states to preserve the integrity of their unemployment funds for providing temporary income support to the involuntarily unemployed.

E. Legal Reasons for Repeal

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. Although no A&A requirements are explicitly stated in federal law, the Department and its predecessors interpreted four provisions of federal UC law, contained in the Social Security Act (SSA) and FUTA, as requiring that states condition the payment of UC upon a claimant being 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 federal test of an individual's continuing "unemployment." (The meaning of "unemployment" in this statutory framework is discussed below.) 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 both an individual's ability to work and availability for work. These A&A requirements serve, in effect, to limit UC eligibility.

The basis for the federal A&A requirements was summarized in a March 11, 1939, letter from the Chair of the Social Security Board to the Governor of California, concerning whether the state could make payments with respect to temporary disability from its unemployment fund:

The entire legislative history [of the UC titles of the original SSA] including the Report to the President of the Committee on Economic Security, the report of the House Committee on Ways and Means, the report of the Senate Committee on Finance, and the Congressional debates all indicate, either expressly or by implication, the compensation contemplated under [these titles] is compensation to individuals who are able to work but are unemployed by reason of lack of work. Several provisions of those titles are meaningful only if applied to State laws for the payment of such

compensation. For example, the requirement that compensation be paid through public employment offices, or the requirement that States make [certain information] available to agencies of the United States charged with the administration of public works or assistance through public employment, are obviously without reasonable basis if applied to payments to disabled individuals. Many of the standards contained [in the experience rating provisions] are similarly without reasonable basis if applied to a State law for the payment of disability compensation.

For these reasons, the Board is of the opinion that the [UC titles of the SSA] are applicable solely to State laws for the payment of compensation to individuals who are *able to work and are unemployed by reason of lack of work*. [Emphasis added.]

That involuntary unemployment due to lack of suitable work was the key test is supported by the Congressional Committee Reports:

The essential idea in unemployment compensation* * * is the accumulation of reserves in time of employment from which partial compensation may be paid to workers who become unemployed and are unable to find work. * * * In normal times it will enable most workers who lose their jobs to tide themselves over, until they get back to their old work or find other employment without having to resort to relief. * * * [H. Rep. 615, 74th Cong. 1st Sess. 1935 Page 5.]

The essential idea in unemployment compensation is the creation of reserves during periods of employment from which compensation is paid to workmen who lose their positions when employment slackens and who cannot find other work.

Unemployment compensation differs from relief in that payments are made as a matter of right, not on a needs basis, but only while the worker is involuntarily unemployed.

* * * Payment of compensation is conditioned upon continued involuntary unemployment. Beneficiaries must accept suitable employment offered them or they lose their right to compensation. [S. Rep. 628, 74th Cong. 1st Sess. 1935 Page 11.]

For the great bulk of industrial workers unemployment compensation will mean security during the period following unemployment while they are seeking another job, or are waiting to return to their old position. [*Id.* Page 12.]

As illustrated by this history, the UC program is designed to provide temporary wage insurance for individuals who are unemployed due to lack of suitable work. *In order to be eligible for UC, an individual must be able to accept suitable work if it is offered, must be available to accept that work and must not refuse suitable work if offered. In other words, an individual may not voluntarily make him/herself unavailable for offered suitable work. Rather, a fundamental premise of the UC program is that benefits are only available to individuals who are involuntarily unemployed because there is no suitable work available to them.*