

BAA-UC legislative proposals in the states. Several observed that “in 2002, over 20 states had legislation introduced looking at this issue.” One commenter argued that repeal would have a “chilling effect” on state legislatures’ attempts to create paid family leave while others asserted that the Department made the BAA-UC experiment available only two years ago and many states have just begun the process of deciding whether to adopt it. It was also observed that the approach taken in California (discussed above) is not available in all states, while the UC system offers a long-standing, stable infrastructure available in all states.

The only lack of flexibility that will be caused by removal of the BAA-UC rule, however, is that states will not be able to use their unemployment fund moneys to pay workers who take approved leave, or otherwise leave employment, following the birth or placement for adoption of a child. States can use other means of funding paid leave programs. Protecting the integrity of unemployment fund moneys against use for non-UC purposes was a major area of concern for most commenters supporting removal. Among other things, these commenters characterized BAA-UC as a “back door” expansion of the Family and Medical Leave Act (FMLA); as putting “at risk the safety net for unemployed workers;” as “illegal;” and a “misuse” of the UC program. We agree that, as discussed elsewhere, BAA-UC fundamentally differs from UC.

While we acknowledge that California’s approach is limited to those states with temporary disability programs, nothing in federal law prohibits a state from using the existing UC administrative infrastructure for other programs, providing it properly allocates the costs of administration between the UC and non-UC programs. We also note that one commenter, citing state interest in paid leave, indicated the innovation and flexibility that several states have already demonstrated in fashioning an “at-home infant care” program where “low-income working parents receive subsidies” from non-UC funds for caring for infants at home.

(3) Unemployment Fund Balances

Most of the commenters supporting removal of the BAA-UC rule expressed concern with the solvency of state unemployment funds. Several commenters opposing removal disagreed with our assessment of the solvency of state funds, which is that most states have seen a drastic decline in fund balances and most states are below the Department’s recommended

level of solvency. For example, one commenter indicated that even though reserves have dropped from pre-recession levels, the UC “funding situation is exceptionally well positioned to handle the demand for benefits.” We believe our characterization of the fund balance situation is accurate. Indeed, arguments that the funds are well positioned can be made only because Congress distributed \$8 billion to states to assist in the payment of UC and for other purposes, in recognition that fund levels were dropping. (Section 209 of Public Law 107–147, March 9, 2002.) This infusion of funds on average increased state balances by about 20 percent at the time of the distribution and cannot be expected to recur in future downturns.

Some commenters opposing removal of the BAA-UC rule objected to including all states, even those with “abundant reserves,” in our solvency arguments. One commenter noted that the Department could establish a solvency standard as a condition of a state adopting or implementing BAA-UC, and indicated that several commenters on the NPRM proposing the BAA-UC experiment had suggested establishing such a standard. Other commenters criticized the Department for not taking action to stop state tax cuts which they claim precipitated solvency problems. However, as the Department noted in the final rule creating the BAA-UC experiment, it has “never interpreted Federal law to require “solvency” of state unemployment funds. (65 FR 37216 (June 13, 2000).) Even if the Department had authority to mandate a solvency standard, we believe it would be poor public policy to create a federal standard that would require states to deny specific types of benefits based on fund balances.

(4) Whether Certain Situations Are Exceptions to A&A

Most commenters agreed with the Department’s position that BAA-UC is inconsistent with the federal A&A requirements. Some also argued that there is an “involuntariness” requirement in federal UC law. Others disagreed, stating that the Department has allowed exceptions to A&A; that there are no specific A&A requirements in federal law; that Congress expressly rejected A&A requirements; and that federal law contains no “involuntariness” requirement (which is a basic underpinning of the federal A&A requirements).

Commenters addressed four situations—illness, jury duty, approved training, and temporary lay-offs “as

they relate to the A&A requirements. Generally, those favoring removal of the rule supported the Department’s analysis that these situations are materially different from the BAA-UC experiment and could not be used as a basis for supporting BAA-UC.

Opponents of removing the rule argued that these situations are approved “exceptions” to the A&A requirement.

The preamble to the BAA-UC Final Rule noted that these four situations affect individuals’ ability “to meet the stricter interpretations of the A&A requirements.” (65 FR 37213 (June 13, 2000).) Although that preamble also noted that none of these situations “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.” (*Id.*) However, the preamble also noted that “paying BAA-UC is a departure from past interpretations.” (*Id.*) The preamble of the NPRM (67 FR 72124–72125 (December 4, 2002)) noted that, unlike BAA-UC, none of these situations permit a voluntary withdrawal from the workforce. Instead, all of these situations require that an individual initially be A&A for work. These situations represent a practical response to situations in which it does not seem sensible to apply a strict application of A&A to an individual who is initially A&A for suitable work. In particular:

- *Illness.* The interpretation pertaining to illness applies only to individuals who initially meet the A&A requirements, but who then become ill *and* who do not refuse suitable work. Until work is refused, the unemployment is due to lack of work, which is what the A&A requirements are designed to test. The A&A requirements are preserved because the individual must initially demonstrate availability before the illness and must be held ineligible if s/he refuses suitable work offered during the illness.

- *Jury Duty.* The interpretation pertaining to jury duty applies only to individuals who initially meet the A&A requirements, but who are then called for jury duty. The unemployment continues to be due to a lack of work. The A&A requirements are preserved because the individual must initially demonstrate availability before being called for jury duty and because attendance at jury duty may be taken as evidence that the individual would otherwise be available for work. Even if