

emphasized that “the issue of public benefits for strikers became a matter of express congressional concern in 1935 during the hearings and debates on the Social Security Act” and that Congress left that matter specifically to the states. (*Id.* at 542.) The Court remarked that “[t]he drafters of the Act apparently concluded that such proposals [to prohibit States from providing benefits to strikers] should be addressed to the individual state legislatures without dictation from Washington.” (*Id.* at 542–43.)

However, the Court also noted that not all matters concerning UC were left to the States. The Court recognized that “[f]rom the beginning * * * the Act has required a few specific requirements for federal approval.” (*Id.* at 542.) The Court explained that these requirements included those found in Section 3304(a)(5), FUTA, which provide, among other things, that a “State may not deny compensation to an otherwise qualified applicant because he had refused to accept work as a strikebreaker, or had refused to resign from a union as a condition of employment.” (*Id.*) The Court also noted that Section 3304(a)(5), FUTA, “from the start had provided” that “compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions” and then listed the specific conditions under which an otherwise eligible individual could refuse to accept new work.

The Court’s recognition of certain universal UC requirements is further supported by its quotation from the Senate Report: “Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, the States are free to set up any unemployment compensation system they wish * * *.” (*Id.* at 543, n. 42.) Allowing payment of BAA–UC from unemployment funds would transform a “genuine unemployment compensation” program into relief measures for those who have a job available and choose not to work and, thus, *New York Tel. Co.* does not in any way support allowing a state to do so.

In a later case, the Court recognized that there are limits on its broad statement about state discretion in *New York Tel. Co.* In *Baker v. General Motors Corp.*, 478 U.S. 621, 633 (1986), the Court, citing *Hodory* and the Report of the Committee on Economic Security, recognized that involuntary unemployment, although nowhere

specifically mentioned in FUTA or the SSA, “is thus generally a necessary condition to eligibility for compensation.” Although *Baker* did not specifically refer to the A&A requirement, that requirement is the test of “involuntary” unemployment under the FUTA and the SSA.

In sum, while we agree with the commenter’s statement and the Court’s observation that states are free to design their UC systems as they choose as long as those systems meet federal requirements, we disagree with the commenter’s conclusion that this principle voids the A&A requirement. As we have shown, the federal A&A requirement is part of the foundation that makes a UC system a true UC system, not a relief system. The Department has the authority to interpret what the test of continued “involuntary” unemployment requires, so long as its interpretation is based on a reasonable construction of FUTA and SSA. As discussed above, the Department and its predecessors have consistently interpreted federal law to require that individuals must be A&A as a condition of receiving UC.

(9) Whether BAA–UC Is Paid Leave

In the BAA–UC Final Rule, the Department addressed what were termed “misconceptions” regarding BAA–UC. The Department noted that “[m]any respondents referred to BAA–UC as ‘paid FMLA’ leave or ‘paid family leave.’” The Department responded that “[a]lthough 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.” (65 FR 37212 (June 13, 2000).) The Department also said that BAA–UC is “not a new program.” (*Id.*)

Although the Department did not ask commenters to address this distinction, the overwhelming majority did comment about FMLA and/or paid leave. As previously noted, many of those supporting removal of the rule described BAA–UC as a “back door” expansion of the FMLA, while many of those opposing removal cited the need for “paid family leave” and discussed BAA–UC as though it were paid family leave. In other words, despite the Department’s explanation of differences between UC and paid leave, these commenters viewed BAA–UC as paid family leave.

As one commenter supporting removal noted, the purpose of UC “is to compensate a worker who becomes temporarily unemployed when the employer no longer has suitable work available * * *.” Family leave, the

commenter noted, citing Section 2(b)(1) of FMLA, is “to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.” This commenter concluded, “Clearly, these are two entirely separate systems.” Concerning the Department’s rationale that BAA–UC might strengthen long-term attachment to the workforce, another commenter also noted that one “could argue that paid leave programs for any purpose permitted by the FMLA might strengthen long-term attachment to the workforce,” as might “any leave policy” and raised the concern that “UC funds might be used not just for leave programs, but for other social benefits such as health or pension benefits.”

Thus, most commenters did not view the Department’s attempts in the original BAA–UC rulemaking to distinguish between “paid leave” and BAA–UC as being sound. We agree. As we noted above, for individuals who were taking approved leave when an employer is holding a job open for them, BAA–UC would be a payment for voluntarily taking time off work rather than payment due to lack of suitable work. This makes the payment more in the nature of paid leave than UC. The payment is not made due to involuntary unemployment due to lack of suitable work, but due to the individual’s decision to take time off from an existing job that is still available to the worker.

(10) Justification for Changes in Position

Commenters also addressed the soundness of the Department’s justification for changing its position, both in the BAA–UC final rule and the NPRM. One commenter opposing removal argued, among other things, that repealing BAA–UC represents a “radical shift in the agency’s position [that] undermines [its] credibility. * * *.” Some commenters supporting removal took the opposite approach. One, for example, argued that the rulemaking creating BAA–UC “failed to justify the Department’s radical departure from over 60 years of precedent.”

We agree that the original BAA–UC rulemaking did not adequately justify a reversal of the Department’s longstanding position. As previously noted, the BAA–UC rule failed to discuss why an A&A test exists, which is to test involuntary unemployment due to a continuing lack of suitable work. Due to this failure, the BAA–UC rulemaking resulted in a misapplication of federal law.