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Family - Paid Leave/UI Legislation

Family - Paid leave/UI mg

May 14, 1999

MEMORANDUM

TO: **Elena Kagan**
FROM: **Nicole Rabner**
SUBJECT: **Unemployment Insurance and Paid Leave Background**

This memo and the attachments that follow serve as background for the meeting on Monday at 1pm with Ed Montgomery (Acting Deputy Secretary of Labor), Karen Tramentano, Barbara Chow, and others.

The question at issue is whether it is permissible under Federal law for States to allow individuals taking FMLA-leave to qualify for unemployment insurance benefits through some change to the State requirement that claimants be "available" for work. In 1997, Vermont introduced legislation to allow UI payments to individuals who were on leave under Vermont's family and medical leave law by "deeming" them available for work. Through a letter to the bill sponsors, the Department of Labor's Employment and Training Agency (ETA) objected to the pending legislation, asserting that it violates Federal law.

This year, in four State legislatures – Massachusetts, Vermont, Maryland, and Washington – bills have been introduced that would provide UI benefits to individuals on some form of FMLA-leave. These bills respond to growing surpluses in the states' UI trust funds, due to steady declines in unemployment. Senators Kennedy, Dodd, Leahy, and Murray (as well as groups such as the AFL-CIO, the National Partnership for Women and Families and the National Employment Law Project) have pressed Secretary Herman to withdraw DOL's objections. Secretary Herman reportedly has told Senator Kennedy that she would like to "find a way to get to yes."

Below is an overview of the case on either side of this debate, and attached are the following documents: (1) a DOL background paper prepared for an earlier meeting convened by Barbara Chow; (2) a briefing submitted to DOL by AFL-CIO and others (the executive summary of which is sufficient reading); and (3) letters from Senators Leahy and Murray on this issue.

The DOL Case

DOL maintains that statutory change is necessary to give States the authority to waive the "availability" requirement. Even though this requirement is not defined in Federal law, DOL argues that the Department has long interpreted the law to require that a claimant's unemployment is involuntary and due to a lack of work. They insist that exceptions made by DOL in the past (such as to allow claimants to receive benefits if they are on jury duty, on lay-offs and subject to recall, or in a medical emergency) do not violate the principle of being "available for work." And, they argue that because Congress amended Federal law to allow UI payments for temporary disability and self-employment, Congress reserves to itself "waivers" of the availability requirement.

It is clear, however, that DOL also thinks this is a bad idea. They suggest that allowing UI payments in FMLA-type situations would set a dangerous precedent, making it difficult to prevent other types of payments from the UI fund, such as to individuals on vacation, sick leave or sabbatical, or retirees. Further, they fear that eroding the basic tenet of the program would generate significant employer opposition, perhaps even instigating action to limit the scope of the program (i.e. a rider or legislation that sets a Federal definition of availability, thereby undermining DOL's future flexibility).

The Case of the Advocates

The advocates argue that the approach by Massachusetts and other States (to provide UI benefits to workers who are separated from their jobs for reasons that quality for protection under their family and medical leave laws) is consistent with the broad discretion given to States to design and implement their own UI programs. They argue that the legislative history of the Social Security Act (which created the UI program) does not require States to adopt a particular definition of "availability" for work and that DOL does not have authority to impose limitations on a State's determination of UI eligibility. Further, they argue that there is ample precedent for State authority, with DOL approval, to carve exceptions to availability requirements. For instance, before Federal law was amended to speak to the issue, 22 States exempted workers who become disabled while unemployed from disqualification due to availability. And, employees on temporary lay-off need not be available for other jobs while on recall status. The advocates argue that while the proposed Massachusetts bill varies from these precedents in some ways, none of the differences distinguishes their validity under Federal law.

Most important, the advocates point to the fact that over one-third of all States cover compelling, personal circumstances as nondisqualifying reasons for leaving work, and these reasons also constitute "good cause" for the refusal of otherwise suitable work. These State laws, they argue, demonstrate that it is well-established that leaving for family and medical reasons render the leaving "involuntary" or not truly "initiated" by the employee.

Finally, the advocates argue that broad State discretion over availability requirements is supported not only by law but by sound public policy considerations, as well. States, they maintain, are best suited to determine their eligibility and disqualification requirements based on their differing economic and social circumstances. And, they argue, this experimentation is consistent with the UI program's underlying mission of employment stabilization.

DOL Briefing Paper 4/28/99 mtg

Dodd
Murray
Leahy
Kennedy

UI FOR FMLA

ISSUE

- Is it permissible under Federal law for states to change their laws so that individuals on FMLA leave qualify to receive unemployment benefits by some change to the UI "availability test"? Do individuals who quit their jobs to care for children following childbirth or adoption meet this test?

BACKGROUND

- In 1997, Vermont introduced legislation which would allow UI payment to individuals who were on leave under Vermont's Family and Medical Leave Act. These individuals would be "deemed" to be available for work. ETA objected, saying that Federal UI law requires individuals to be available for work. "Deeming" an individual to be available simply avoids determining whether the individual actually is available.

- This year four bills have been introduced which would use UI to pay individuals on some form of FMLA. Three of the four States, anticipating conformity problems, have asked for the Department's comments. (Only the Massachusetts and Vermont bills are alive.)

  Massachusetts would, using the "recall" approach, pay UI to individuals who were on leave under the FMLA and the State's maternity law. It would also pay individuals who could not take FMLA because the FMLA did not apply to their employers. A hearing is scheduled April 17. The agency will oppose the bill. The governor is expected to oppose the bill.

  Vermont has introduced a bill that would pay individuals on leave under Vermont's FMLA law. It is similar to last year's, except that it also uses the "recall" approach. It appears that the agency will oppose the bill, but the Governor may not take any position at this time.

  Maryland has introduced a bill that would pay individuals who quit their jobs to take care of a newborn or adopted child. Under the bill, individuals would be "deemed" to be available. A hearing is scheduled for March 16. The agency is opposing the bill. The governor has not taken any position. (scroll over now)

  Washington has introduced a bill that would pay individuals 4 weeks of benefits if they are on leave following giving birth.

UI vs FMLA - A BRIEF COMPARISON

- UI is an **insurance** program that insures against the risk of **involuntary** unemployment. The worker loses employment through no fault of his/her own and continues to be unemployed through no fault of his/his own because no other work is available.

- Employers pay taxes which fund the system and pay benefits. Employers willingly pay these when payment is made for involuntary unemployment. Employers object to being "charged" for benefits for workers on leave.

- Workers who leave jobs voluntarily due to good personal cause may receive UI. However, these workers must also be available for new work.

- Under the FMLA, the unemployment is not involuntary. The worker makes a choice between unemployment and work. The worker is generally not available for work. The employer is holding a job for the worker. When a worker quits to care for a child following childbirth or adoption, the worker is generally not available for work.

FEDERAL LAW AND AVAILABILITY

- Two provisions of Federal law have long been interpreted to require that the worker be available for work to receive UI:

  1. The **"withdrawal standard"** limits the use of unemployment fund moneys to payments with respect to an individual's unemployment. We have interpreted "unemployment" to be limited to that which is involuntary and due to a lack of work. This means the individual must be "able and available" for work to receive UI benefits.

  2. UI must be paid through public employment offices. This requirement is not just organizational: since the earliest days of the program, it has been interpreted to require that the worker be "available"--the employment office finds work for the available worker. Otherwise, the requirement would not amount to much.

- The Senate Committee Report for the 1935 the Social Security Ac (SSA), which created the Federal-State UI program, is a basis for these interpretations:

  > The essential idea in unemployment compensation is the creation of reserves . . . from which compensation is paid to workmen **who lose their positions when employment slackens and cannot find other work.** Unemployment compensation . . . payments are made . . . **only while the worker is involuntarily unemployed.** [Emphasis added.]

- The 1935 legislative history is replete with similar statements. In addition, subsequent Congressional actions also indicate UI is to be paid only to individuals who are unemployed due to lack of work. For example, in 1939 Senator Wager (who introduced the SSA in the Senate) introduced a bill to pay individuals with temporary disabilities because UI was paid only to workers who "unemployed due to a lack of a job."

ARE THERE ALREADY EXCEPTIONS TO THE AVAILABILITY REQUIREMENT?

- Some argue that the Department has in cases "waived" the availability requirement. Three of these are:

  Payments to Ill Claimants. In 11 States claimants who are ill may receive UI. This occurs only if the individual is initially available following separation **and** there is no work for the individual to perform. The notion is that an individual who is involuntarily unemployed should not be disqualified if no work is available. There is still an "availability" test since the individual must accept any offered work which is suitable.

Life threatening conditions. The Federal Extended Benefit (EB) law contains an exception to its work search requirement for claimants who are hospitalized for an emergency or life-threatening condition. This is an exception to the EB work search requirement only. It does not authorize an exception to the availability requirement. Like payments to ill claimants, the individual must accept any offered work which is suitable.

Jury Duty. The Department has approved waiving work search for claimants on jury duty and the Federal EB law also provides for this. The notion is that the individual who is involuntarily unemployed should not be denied for failing to look for work when the failure is created by the government. This is an exception to the work search requirement only. Availability for jury duty has been accepted as proof of availability for work. This is reasonable since employed individuals (who are certainly available) must go on jury duty.

- **Lay-offs and Recalls.** Some also argue that workers on "recall" are not available. There are differences between traditional recall situations and the FMLA situation:

In lay-offs, unemployment generally is caused by lack of work. The employer initiates the unemployment and the individual must be available for recall. For example, auto workers on lay-off must be available--if their recall date is moved up, they must report immediately. In FMLA situations, the worker initiates the unemployment and is responsible for its continuation. Also, the employer has no option to recall the worker and the individual is not available for other work. Although laid off auto workers may not be required to actively seek work, they are still available for recall. In FMLA situations, the individual never has to be available for work even though the employer is holding a position open.

Employers are willing to pay workers on lay-off to preserve their work force. This is consistent with the UI principle that employers bear the cost of unemployment they create. In FMLA situations, the employer obtains no benefit since it has created no unemployment and must hold the job open for the worker.

IMPLICATIONS

- Allowing payment in FMLA-type situations is a major change to the UI availability requirement. By setting this precedent, it may be difficult to prevent other types of payments from the unemployment fund where no current labor market attachment exists. For example: individuals on vacation, sick leave or sabbatical, or retirees. Eroding this basic tenet of the program would generate opposition by employers who may seek some program limitations in response--for example, a Federal definition of availability or means testing.

- DOL has consistently held that exceptions to the "withdrawal standard" may only be made by Congress. Congress amended Federal law to allow payments for temporary disability and self-employment which suggests Congress reserves to itself "waivers" of the availability requirement.

ALTERNATIVES

- States could establish a separate tax used to fund these payments. DOL has already presented this option to Vermont. The payments could be delivered through the UI system. DOL could provide "model legislation" for the States. This approach is disfavored because of the concern that legislatures would balk at setting up a new program.

- If the State has a temporary disability system, the State could use that system. However, only six States have such systems. Last year, California introduced a bill which would use its temporary disability system for FMLA purposes.

- Potentially, a pilot program to pay the administrative costs could be funded from the $10 million FY 2000 request.

- Federal UI law could be amended to allow for a limited pilot authorizing payment of benefit from UI funds in FMLA-type situations. This would be similar to the self-employment pilot from several years ago. Consideration must be given to the policy statement this would make, however, and the strong opposition this would generate from stakeholders at a time when we are engaging them to help us develop a comprehensive, bi-partisan legislation reform proposal.

DECISIONS NEEDED

- Whether the Administration wants to change the UI policy on availability to enable States to use the UI trust fund to pay benefits to workers on FMLA.

- Whether some other option should be pursued to encourage paid leave for FMLA.

Greater Boston Legal Services

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March 16, 1999

Ms. Kitty Higgins
Deputy Secretary of Labor
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210

Re: The Massachusetts Unemployment Insurance\Family Leave Recall Bill

Dear Deputy Secretary Higgins:

I am writing to bring to your attention our response to the issues raised by Grace Kilbane after our meeting in your office. After thorough research, we are pleased to report that the Massachusetts legislation falls within the states' prerogative to determine unemployment eligibility including amending "availability" under specific circumstances as presented in our proposed legislation. This conclusion is supported after a careful review of federal law, legislative history, and state precedents which have received prior DOL approval.

In addition to a growing coalition in Massachusetts, several other partners in this initiative, including the offices of Senator Kennedy and Senator Dodds, the AFL-CIO, the National Partnership for Women and Families and others look forward to your response. As indicated in our letter to Ms. Kilbane, we are hopeful that a meeting can be quickly arranged to resolve any outstanding issues.

I have enclosed our letter to Ms. Kilbane and the memorandum setting forth our research and our conclusions. Thank you again for your interest in and assistance with this matter which is so critical to working families.

Sincerely,
The Family Leave Coalition
On their behalf
Monica Halas
Monica Halas
Senior Attorney

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March 15, 1999

Grace A. Kilbane
Director, Unemployment Insurance Service
Employment and Training Administration
Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Grace:

I am writing once again on behalf of my colleagues Ann Bookman, Maurice Emsellem and Linda Johnson, to continue our correspondence concerning the proposed Massachusetts law which provides time-limited partial wage replacement through the unemployment system to individuals who must temporarily leave employment for family or medical reasons. As we indicated in our prior letter, we appreciate your thoughtful response to the issues we had discussed and your invitation to engage in further dialogue about how best to proceed.

Although we are late in reply, and we apologize for this, we felt your letter deserved the most careful review and a response based on thorough research of all materials relevant to the issues you addressed. We appreciate your understanding that the ability to enact this or similar legislation is so critical for working families. We took most seriously the charge to essentially look afresh at unemployment law and make sure that our approach is consistent with federal law.

To address the issues you raised, we reviewed the original Social Security Act, its legislative history, including statements of the drafters, opinions of the Department's chiefs of the former Bureau of Employment Security, and the opinions of legal experts including a comprehensive published work on the availability for work requirement. We also searched for examples where current state law waives availability as an eligibility criteria. In addition to our combined over 35 years of experience with unemployment law, we consulted other legal experts in this field. This in-depth research has resulted in some new conclusions that can be made about whether the concept of availability is a creature of federal or state law.

As the enclosed memorandum details, all of these sources definitively document the conclusion that the availability test is one that is determined by state law rather than federal law. None of the original or secondary sources controverts this conclusion in any way. In addition, over the years there have been numerous examples where states have waived availability as a factor in determining eligibility, and in each instance, DOL has not found an inconsistency with its directives. This is very good news for us all, as it permits the unemployment laws to continue to

operate on the local level, responding to the needs of the states' particular economic condition and, in that context, their ability to best address the needs of its unemployed workers.

However, we recognize that on an issue of such importance to the underlying policies of unemployment insurance, the Department's role in guiding the states is vitally important. As you are aware, the Massachusetts statute is just one approach to this issue and at least Vermont, Maryland, and Washington have also filed legislation which suggests that other approaches are possible.

We look forward to your response to our memorandum and, more importantly, to your suggestions as we continue our work on this type of legislation. We believe that another face-to-face meeting would facilitate coming to agreement on the parameters of state legislation. Thank you.

Sincerely,

Ann Bookman (MH)

Professor Ann Bookman
Holy Cross College

Maurice Emsellem (MH)

Maurice Emsellem
National Employment Law Project

Monica Halas

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Greater Boston Legal Services

Linda Johnson (MH)

Linda Johnson
Women's Statewide Legislative Network

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cc: Cathy Curran, Wage & Hour Division
Suzanne Day, Office of Senator Chris Dodd
Cheryl Dorsey, Women's Bureau
Robert J. Haynes, President, Massachusetts AFL-CIO
Jonathan Hiatt, AFL-CIO General Counsel
Donna Lenhoff, National Partnership for Women and Families
Senator Stephen Lynch, Massachusetts Joint Committee on Commerce and Labor
Representative Anne Paulsen, Massachusetts House of Representatives
Stephanie Robinson, Democratic General Counsel
Bill Samuel, Associate Deputy Secretary

March 15, 1999

MEMORANDUM IN SUPPORT OF MASSACHUSETTS BILL AMENDING ITS UNEMPLOYMENT COMPENSATION LAW TO INCLUDE ELIGIBILITY FOR FAMILY AND MEDICAL LEAVE

Prepared by
Greater Boston Legal Services
National Employment Law Project[1]

Executive Summary

The Massachusetts Legislature has introduced a bill that would provide unemployment insurance (UI) for no longer than 12 weeks to workers who are separated from their jobs for reasons that qualify for protection under family and medical leave laws. Similar legislation has been introduced in Maryland, Vermont and Washington, raising the issue of whether federal UI law imposes any obligations on the states that would interfere with their broad discretion to enact this UI legislation.

This memorandum seeks to advance the on-going dialogue with DOL that has been extremely valuable to the development and improvement of the proposed state laws. As a result of these communications, the legal issues also have been significantly clarified. The question now boils down to whether the DOL has the authority to impose limitations on a state's eligibility requirements -- in particular a state's determination whether an individual must always be "available" for work at the time she applies for benefits. Based on the research described below, we conclude that the Massachusetts bill is consistent in all respects with the intent of the federal law (allowing states' broad authority to expand UI eligibility) and with past precedents in state UI laws.

We also believe that the state family leave bills are consistent with DOL's interpretation of the federal UI law. The proposed laws retain a genuine test of availability, as required by DOL, but allow for exceptions in particular circumstances just as the states have routinely done in other areas of UI eligibility. We therefore look forward to a continuation of the dialogue, informed by this most recent research, to address DOL's remaining concerns and to modify the Massachusetts proposal if necessary.

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[1] For further information, please contact Maurice Emsellem, NELP, 212/285-3025, ext. 106, or email: emsellem@nelp.org; or Monica Halas, GBLS, 617/371-1234, ext. 621, or email: mhalas@gbls.org.

- **The legislative history of the Social Security Act does not require states to adopt any particular definition of availability for work and grants broad discretion to states to develop their eligibility requirements.**

Neither the plain language of the Social Security Act nor its legislative history provides any basis for a federal restriction on states' prerogatives to determine availability requirements. Ralph Altman, a senior official of the Bureau of Employment Security in 1950, provides the most comprehensive published survey of the availability for work requirement and concludes that "determination of availability for work under American unemployment compensation laws is *exclusively a state function*." This conclusion is supported by numerous statements from the initial drafters and enforcers of the federal unemployment laws, including the President, legislators, the Committee on Economic Security, and the Social Security Board itself. *Additionally, legislation which would have injected a federal availability requirement into the unemployment laws was rejected by Congress.*

- **The states' adoption of numerous exceptions to their availability requirements with prior DOL approval demonstrates that states have the authority to enact these exceptions.**

There is ample precedent for states' authority, with DOL approval, to carve exceptions to their availability requirements. Even before federal law was amended to speak to the issue, 22 states exempted trainees from the availability requirement. Numerous states have at one time or another exempted workers who become disabled while unemployed from disqualification due to unavailability. Most importantly, employees on temporary lay-off need not be available for other jobs while on recall status. The proposed bill varies from these precedents in some ways, but none of the differences distinguishes their validity under federal law. The leave bill maintains the state's availability requirement and preserves the unemployment system's focus on involuntary unemployment, applying a genuine test of availability. DOL's approval of this bill would thus be entirely consistent with past practice.

- **We have addressed the concerns that DOL has raised in connection to the scope of the bill and its relation to existing recall statutes and have provided analogous examples under numerous state precedents.**

DOL has raised concerns about the scope of the bill and seeks to explore several distinctions between the Massachusetts bill and other recall statutes. We conclude that these concerns and distinctions, where they exist, do not vitiate the legality of the Massachusetts bill under the federal/state statutory scheme, as they do not affect the fundamental availability requirement nor Massachusetts' ability to create exceptions to that requirement. For example, DOL questions the distinction between an employer initiated layoff as opposed to a family leave taken by the employee. However, federal law does not limit unemployment compensation to only those cases where an employer initiates the layoff. Over one-third of all states, including Massachusetts, cover compelling, personal circumstances as nondisqualifying reasons for leaving work, and these reasons also constitute "good cause" for the refusal of otherwise suitable work.

These state laws demonstrate that it is well-established that leaving for family and medical reasons --- the same reasons that qualify employees under the proposed Massachusetts law for family and medical leave --- render the leaving "involuntary" or are not truly "initiated" by the employee. Consequently, the fundamental availability requirements remain intact.

- **Compelling policy considerations support deference to the right of states to expand UI eligibility under their availability rules without federal restraints.**

Broad state discretion over availability requirements is supported not only by law but by sound public policy considerations as well. States are best suited to determine their eligibility and disqualification requirements based on their differing economic and social circumstances. Experimentation among states is not only allowed by the unemployment scheme but encouraged to discover new ways to adapt unemployment laws to further the goal of employment stabilization. Now more than any time in recent history, the opportunity exists for states to promote long-overdue reforms in the UI system, as reserves in UI trust funds have increased with the sustained decline in unemployment. Finally, the proposed bill itself furthers important federal and state policy interests, including the unemployment scheme's goals of employment stabilization and the FMLA's goals of providing access to family and medical leave.

I. Introduction

The Massachusetts Legislature has introduced a bill that would provide unemployment insurance (UI) for no longer than 12 weeks to workers who are separated from their jobs for reasons that qualify for protection under family and medical leave laws. Similar legislation has been introduced in Maryland, Washington and Vermont, raising the issue of whether federal UI law imposes any obligations on the states that would interfere with their broad discretion to enact this UI legislation.

This memorandum seeks to advance the on-going dialogue with DOL that has been extremely valuable to the development and improvement of the proposed state laws. As a result of these communications, the legal issues have also been significantly clarified. The question now boils down to whether DOL has the authority to impose limitations on a state's eligibility requirements – in particular a state's determination whether an individual must always be "available" for work at the time she applies for benefits. Based on the research described below, we conclude that the Massachusetts bill is consistent in all respects with the intent of the federal law (allowing states' broad authority to expand UI eligibility) and with past precedents in state UI laws.

We also believe that the state family leave bills are consistent with DOL's interpretation of the federal UI law. The proposed laws retain a genuine test of availability, as required by DOL, but allow for exceptions in particular circumstances just as the states have routinely done in other areas of UI eligibility. We therefore look forward to a continuation of the dialogue, informed by this most recent research, to address DOL's remaining concerns and to modify the Massachusetts proposal if necessary.

II. Federal Law Grants States the Authority To Define Availability in Seeking to Expand UI Eligibility.

A. The Plain Wording Of The Applicable Federal Statutes Does Not Require States To Adopt Any Particular Availability Requirement.

No federal statute or regulation requires states to adopt any particular availability requirement. The applicable federal unemployment insurance laws, the Federal Unemployment Tax Act (FUTA) and the Social Security Act (SSA), contain no provisions regulating the substantive eligibility and disqualification requirements to be included in state unemployment legislation. *See* 26 U.S.C. §§ 3304, 3306; 42 U.S.C. §§ 503, 504 (1998). As Dr. Edwin Witte, Executive Director of the Committee on Economic Security, whom President Roosevelt appointed to draft the Social Security Act, points out, "[a]t the very outset of its final deliberations, the committee decided against federal dictation regarding the content of state unemployment compensation laws. It reached the conclusion that the federal bill should contain only a few necessary standards. . . ." Edwin Witte, *The Development of the Social Security Act* 125 (1962). These standards do not include any definition of availability for work to be followed by the states.

B. The Early History Of The Unemployment Laws Demonstrates That Availability Requirements Were Intended To Be Defined Solely By The States.

Despite the absence of statutory language authorizing federal control over state laws, DOL suggests that a federal availability requirement can be implied from the overall structure of the statutes and their legislative history. However, a review of the legislative history of FUTA and the SSA and contemporaneous commentary by those responsible for enforcing the newly-enacted laws demonstrates that states were intended to possess complete discretion in defining their eligibility and disqualification requirements. Federal law was envisioned as providing only a floor on the coverage and amount of unemployment benefits a state could grant; it was never intended to create a ceiling limiting a state's ability to provide for its citizens under its unemployment laws.

Indeed, availability for work is one area of law over which states have vast discretion. Ralph Altman, a senior official of the Bureau of Employment Security in 1950 (and with the Unemployment Insurance Service for many years thereafter), provides the most comprehensive published survey of the availability-for-work requirement and concludes that states can define availability for work in whatever manner they wish. He writes:

> "The Social Security Act and the federal unemployment tax provisions of the Internal Revenue Code, which prompted almost all the state unemployment compensation laws, make no provision for payment of benefits to claimants. Neither do they establish any eligibility requirements which claimants must satisfy. . . . [T]he only [provisions] that affect state laws and administration on availability problems are those which protect labor standards . . . and those which provide that all compensation must be paid through public employment offices or such other agencies as the Labor Department may approve. *The practical result is that determination of availability for work under American unemployment compensation laws is exclusively a state function.*" Ralph Altman, *Availability for Work* 74-5 (1950) (emphasis added).

1. Congress Expressly Rejected On Numerous Occasions The Imposition Of Specific Federal Definitions And Standards On State Eligibility And Disqualification Rules.

Notably, legislation imposing specific federal requirements on state unemployment laws was proposed and rejected on numerous occasions during the formative years of the unemployment scheme. Senator Woodrum proposed in 1939 a number of specific requirements in connection with new unemployment legislation that would constrain states and the federal government in their ability to grant unemployment benefits, including a requirement that an eligible worker must be available for and seeking work. *See* H.R.J. Res. 151, 76th Cong. (1939) (printed in 84 Cong. Rec. 1160 (1939)). Senator Murray proposed a bill in 1940 which would have amended the Social Security Act to require states to follow specific guidelines in making

determinations of whether work is suitable. *See* S. 3365, 76th Cong. (1940). Other proposals would have imposed varying specific requirements on state unemployment laws. *See* S. 2203, 76th Cong. (1939) (Byrne amendments); H. R. 7762, 76th Cong. (1940) (McCormack bill).

All of these proposals were rejected in favor of maintaining a system of minimal federal control over state eligibility standards. *See* Edwin E. Witte, *Development of Unemployment Compensation*, 55 Yale L.J. 21, 46-7 (1945). While the Woodrum proposal arose in the context of a Works Progress Administration appropriation, it is notable that a comparable availability requirement never made its way into the general federal unemployment laws. Since Congress expressly declined at the outset to limit states' discretion over the details of their unemployment laws, including the specific area of availability for work, it would be inappropriate for a federal agency to adopt a contrary view sixty years later. *See Johnson v. Mississippi*, 421 U.S. 213, 228 (1975) ("[t]he absence of any evidence or legislative history indicating that Congress intended to accomplish . . . what it has failed or refused to do directly through amendment . . . necessitates our considered rejection of the [asserted claim] in this case.").[2]

2. The Initial Drafters And Enforcers Of The Unemployment Laws Believed That States Alone Should Define Eligibility And Disqualification Requirements, Including Availability For Work.

The Social Security Board recognized early on that in constructing the federal-state unemployment scheme, Congress required only a limited number of specific standards to be satisfied for state unemployment laws to be approved, and that all of those standards ensured only that states provide adequate compensation. In its first annual report, the Board explained that "[t]he amount of assistance and practically all the conditions under which assistance is granted are determined by the States. In unemployment compensation *the primary role of the Federal Government is to remove obstacles to State action.*" United States Social Security Board, *Annual Report* 8 (1936) (emphasis added). In a 1936 circular, the Board outlined the main features of the federal-state relationship in administering unemployment laws. Notably, in a section entitled "Essential Features of Unemployment Compensation," the Board never even hints at a federal requirement that states define availability to work in a particular manner. To the contrary, the Board goes on to conclude that "It is desirable that a State law should be at least as broad in its coverage as the Federal act. . . . *The State may, of course, go further and adopt a*

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[2] There were also sound practical reasons why Congress would choose to leave the issue of availability for the states to decide. Although the Department's objection in the current controversy centers on a specific piece of proposed legislation, its interpretation necessarily entails a dramatic expansion in federal jurisdiction over state unemployment disputes. DOL argues that federal law imposes a requirement that individuals seeking unemployment compensation must be available for work in order to receive benefits. If valid, this rule applies not only to proposed legislative enactments but also to individual benefits determinations. The consequence is that a federal question potentially arises in any state unemployment dispute where availability for work is at issue. A federal question definitely arises in a case where a worker is erroneously deemed available for work, giving the U.S. Supreme Court jurisdiction over appeals from decisions of the Massachusetts Supreme Judicial Court on these issues. Absent an express statutory mandate, a federal agency should not adopt an interpretation of federal law which would inject federal courts into the review of state benefits determinations.

wider coverage . . . This is a matter of policy for the State to decide." United States Social Security Board, *The Federal-State Program for Unemployment Compensation* 5, 9 (1936) (emphasis added).

Thus, the constraints that federal law placed on state action were viewed as creating select minimum standards, not maximums limiting states' abilities to provide benefits. President Roosevelt transmitted this very message to the Senate during the floor debates on the SSA: "[i]n order to encourage the stabilization of private employment Federal legislation should not foreclose the States from establishing means for inducing industries to afford an even greater stabilization of employment." 79 Cong. Rec. 545 (1935) (introduced by Sen. Smith).

Federal officials recognized from the very beginning that states enjoy considerable discretion in crafting eligibility guidelines, including availability for work. In its report to the president, the Committee on Economic Security recommended that any federal unemployment legislation give states near-total discretion over their unemployment laws. The Committee stated that "[t]he plan for unemployment compensation that we suggest contemplates that the States shall have broad freedom to set up the type of unemployment compensation they wish. We believe that all matters in which uniformity is not absolutely essential should be left to the States." Committee on Economic Security, Report to the President 20 (1935) (quoted in Murray Rubin, *Federal-State Relations in Unemployment Insurance* 22 (1983)). Ten years later, in its 1945 Annual Report, the Social Security Board reviewed the contents of all the states' laws and similarly concluded that "[t]he extent to which . . . claimants received benefits, and the amount and duration of their payments, depended entirely on the applicable State law," including whether "*a claimant was considered unavailable for work.*" United States Social Security Board, *Annual Report* 87 (1945) (emphasis added).

The U.S. Supreme Court acknowledged the broad discretion enjoyed by states in enacting unemployment laws in one of its decisions upholding the constitutionality of the federal-state unemployment system. In *Steward Machinery Co. v. Davis*, 301 U.S. 548, 593 (1937), the Court found that "[a] wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books." Though the Court conceded that states may not "depart from those standards which in the judgment of Congress are to be ranked as fundamental," *id.* at 594, the standards deemed "fundamental" in this case were those explicitly codified by Congress.

State courts adopt the same position. In *Teledyne Columbia-Summerill Carnegie v. Unemployment Compensation Board of Review*, 634 A.2d 665 (Pa. Commw. Ct. 1993), the court upheld an order by the state unemployment compensation board of review determining that amounts received by employees in liquidation of pension benefits when a plant closed were not to be offset against unemployment benefits. In reaching this result, the court held that absent explicit federal definitions, states are free to define FUTA requirements as they see fit: "Beyond meeting these minimum standards, a state is free to design its unemployment compensation law and establish its own eligibility requirements. . . . [Federal statutes do not define] 'pension,' 'retirement pension,' or 'annuity,' and Employer does not cite any authority for the proposition that a state may not define these terms or that the Board's regulation is in direct conflict with

Section 3304(a)(15)." *Id.* at 669.

III. State Precedents Supporting the Massachusetts Bill Have Broadly Defined Availability For Work to Expand UI Eligibility.

Numerous states have enacted UI laws broadly defining their availability requirements, thus establishing ample precedent for the state family leave recall proposals. These state laws have been left undisturbed by DOL even where states enacted provisions eliminating their availability requirement in particular circumstances.

A. Recall.

The precedents in UI state laws that are the most directly analogous to family and medical leave are the recall statutes authorizing workers who are temporarily laid off from their jobs to be exempted from the state's availability rules. The Massachusetts bill is thus modeled on the state recall statutes and on Massachusetts' recall policy.[3] These statutes, which exist in seven states (Arkansas, Delaware, Michigan, Missouri, New Mexico, Ohio and South Dakota), vary significantly in scope.[4] Some states statutes, including the Michigan law and Massachusetts recall policy, are worded such that they allow for a waiver not only of the work-search obligations but also of the entire "availability" requirement. Thus, the state recall statutes and policies clearly illustrate the vast authority that states have to determine their availability rules. These states have concluded that it is bad policy to force workers to search for work or be available for work when they are only temporarily separated from their jobs. The Department has conceded that these state recall statutes, which provide the model for the Massachusetts bill, comply with federal UI law.

B. Training.

States have also dramatically altered their availability requirements to extend benefits to individuals in approved training programs. Prior to 1976, FUTA did not contain its current provision prohibiting states from disqualifying otherwise eligible workers from unemployment eligibility on the basis of their participation in a vocational training program. *See id.* at 549-50. Nevertheless, by 1966, twenty-two states had enacted provisions exempting unemployed workers in training or retraining programs from availability requirements if otherwise eligible. *See*

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[3] "A claimant who is temporarily unemployed because of a vacation shutdown or a brief layoff not to exceed four weeks with a definite date to return to work with the same employer *is not required to be available for work* or actively seeking work with other employers..." (Emphasis added). *See* Massachusetts Division of Employment and Training, *Service Representative Handook, section 1051,* Vacation Shutdown or Brief Layoff (Rev. 10/96).

[4] *See* Ark. Stat. Ann. sec. 11-10-507 (3)(E); 19 Del. C. sec. 3314(3)(1997); MSA sec. 17.531 (1998), sec. 23(1)(a); R.S. Mo. sec. 288.040.1(2)(1997); N.M. Stat. Ann. sec. 51-1-5-A. (1998); ORC Ann. 4141.29 (1996); ARSD 47:06:04:11.

William Haber & Merrill G. Murray, *Unemployment Insurance in the American Economy* 114 (1966). These states chose this policy based on their view of "unemployment insurance as part of a comprehensive labor market program." *Id.*

Such workers were clearly not available for work in any literal sense, since they were allowed to turn down work during their training periods. They were certainly no more available for work than an individual taking leave under the proposed Massachusetts bill. With over twenty state training laws already on the books, Congress amended FUTA to expressly require such availability exceptions to be followed in each state. This demonstrates not only that the availability requirement has been sharply limited by states in the past, but also that Congress limits state discretion only where it wishes to provide certain minimum benefit coverage, not to prevent higher levels of coverage from being granted. States are free to develop "comprehensive labor market programs" such as that implemented in part by the proposed Massachusetts bill.

C. Disability.

States are currently allowed to exempt disabled workers from availability requirements if the disability or illness arises after the worker applies for benefits.[5] The only difference between these laws and the proposed Massachusetts legislation is that the proposed bill would exempt workers from the availability requirement at the time they apply for benefits. However, it is not clear why this difference should determine the legality of the state scheme under federal law. If states' abilities to define availability for work are constrained by federal law, then that constraint should presumably apply at any time the worker is receiving benefits. Under federal law, a state cannot provide benefits to a healthy worker who has become fully employed after applying for benefits; the law does not change merely because the worker has already applied for benefits. Similarly, if states may make disability and illness exceptions applicable after a worker applies for benefits, as DOL concedes they may, there is no appropriate basis for imposing a different standard at the benefits application stage.

D. Inverse Seniority Layoff.

Another relevant precedent in state law supporting the validity of the Massachusetts bill is the exemption that applies to workers who "choose" a layoff as authorized by a collective bargaining agreement. These laws, which exist in at least three states (Pennsylvania, Ohio and Michigan), typically apply where a collective bargaining agreement gives senior employees the option to choose a layoff and permits less senior employees to continue to work. Normally,

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[5] Notably, according to a study of utilization of leave under the federal Family and Medical Leave Act (FMLA) by the Commission on Family and Medical Leave, the major reason for leave-takers was the individual's own illness (59%) followed by 13.3% of all leave-takers where the individual left due to childbirth, adoption or placement of a foster child. These numbers were closely mirrored in non-covered worksites where 56.1% of all individuals left due to their own illness, and 14.7% left due to childbirth, adoption or foster child placement. *See* Commission on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 93 - 96 (1996).

these are used in temporary layoff situations, and they give workers input into which specific employees are going to be laid off in a particular layoff situation. The employer "initiates" the layoff and determines the overall number of employees laid off, but the employees' seniority system and individual choice determines which employees are laid off. The state statutes (and case law in selected states) exempt those workers who "choose" to be laid off in these situations from the "voluntary" quit disqualification. While not addressing the "availability" requirement per se, these state statutes make clear that not all layoffs can be neatly characterized as either employer or employee "initiated". As discussed below, the same is true in the case of workers taking family and medical leave.[6]

IV. Responses to DOL Questions Raised In Prior Correspondence

A number of concerns were raised in the letter from Grace Kilbane, Director of UIS, dated January 15, 1999, regarding the scope of the proposed bill and its relation to existing recall statutes. We will address each of these considerations in turn.

A. Query: For the purposes of a state's availability requirement, is there a relevant distinction between an employer initiated layoff as opposed to a family leave taken by the employee?[7]

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[6] There are several other relevant precedents worth noting. First, there is the deduction for retirement pay from UI that is required by federal law in specific circumstances. Although receipt of retirement pay while unemployed would appear to raise a question whether the individual is available for work, Congress focused instead on other objections. "Under these amendments, Congress appeared less interested in the retirement payment as a test of availability than with preventing duplicate payments attributable to the same employer." Gerald Hildebrand, *Federal Law Requirements for the Federal-State Unemployment Compensation System: Interpretation and Application*, 29 U.Mich.J.L. Ref. 527, 557 (1996). Second, DOL has authorized unemployed seasonal workers to refuse work that would interfere with their ability to return to their seasonal jobs. Department of Labor Manual of Precedent Decisions, AA 450.45© ("A seasonal worker who regularly works for one employer in one industry and who has definite prospects of recall to work may restrict the employment acceptable to him during the off-season to work which will permit him to return to his regular employment when the season begins."). Other examples that exist in Massachusetts and elsewhere include exemptions for acceptance of suitable work for workers receiving UI in work-sharing situations, the provisions allowing workers to recover UI on jury duty and refuse an offer of suitable work, and the part-time worker availability rules allowing workers to limit their availability to part-time rather than full-time work. For example, the Massachusetts statutory law provides that "[a]n otherwise eligible affected individual shall not be denied worksharing benefits for any week *by reason of application of provisions relating to availability for work, active search for work or applying for or accepting suitable work* with other than the worksharing employer. (Emphasis added). Massachusetts General Laws ch. 151A, §29D(h)(1). Under Massachusetts policy, the statutory provision which requires availability for work is deemed satisfied when an otherwise eligible claimant is summoned for jury duty during a period of unemployment. *See* Massachusetts Division of Employment Security, *Service Representative Handbook*, section 1039, Jury Duty (Rev. 10/96). Under recently promulgated Massachusetts regulations, various provisions are set forth as "conditions for limiting availability" to part-time employment which include a history of part-time work for "good cause" encompassing family and medical reasons. 430 Code of Massachusetts Regulations 4.42 - 4.45 (4/5/96).

[7] This statement paraphrases DOL's letter, dated January 15, 1999, which specifically states: "[W]e would like your views on the distinctions between employees on temporary lay-off, where the employer initiates the (continued...)

First, it is well established that federal law does not limit unemployment compensation only to cases where an employer terminates its relationship with an employee. There are countless examples of state laws deeming an employee's initiation of his separation from work involuntary under certain circumstances, expanding unemployment coverage beyond the category of workers laid off through no fault of their own. Over one-third of the states cover compelling personal circumstances requiring an individual to leave his or her job, and such circumstances are not limited to those directly connected with the employment. *See* Advisory Council on Unemployment Compensation, *Unemployment Insurance in the United States: Benefits, Financing, Coverage* 110-2 (1995). These laws, conceded to be valid, cover claimants who leave their jobs due to compelling family circumstances. Another twenty-three states have special provisions for employees who quit work due to an illness or disability not necessarily connected with the individual's employment. *See* United States Department of Labor, *Comparison of State Unemployment Insurance Laws* Table 401.1 (1996). Thus, an employee-initiated temporary leave should not automatically be invalid under federal law when employees in so many other circumstances are allowed to collect benefits despite their employers playing no role in their separation from work.

Furthermore, the distinction between layoffs initiated by an employer and those initiated by an employee is ambiguous at best. For example, as described above, several states have laws that specifically allow workers to choose to take a lay-off and still qualify for unemployment benefits, as occurs with many layoff schemes authorized by collective bargaining agreements. The cases on this issue also make the point that states have vast discretion to fashion different solutions to the same problem. *Compare Ford Motor Co. v. Ohio Bureau of Employment Services*, 571 N.E.2d 727, 729 (Ohio 1991) (holding that an employee who elects voluntary termination under a plan or policy adopted by the employer to reduce the number of employees due to a lack of work in the employer's overall work force is entitled to unemployment compensation) *with Goewert v. Anheuser Busch, Inc.*, 919 P.2d 106, 111 (Wash. 1996) (holding that early retirement, even after a 10 percent reduction-in-force announcement, constitutes a voluntary quit without cause). The *Ford* case illustrates that a quit is sometimes considered involuntary even where the employee accepts, and even formally initiates, the separation. This demonstrates further that whether an employer or employee initiates a layoff is not the *sine qua non* of an employee's eligibility under *federal* law for unemployment benefits.

Lastly, it is inappropriate to characterize family and medical leave as always being "initiated" by an employee. In fact, it is unfortunately quite common for employers to coerce workers into taking family leave. For example, this often occurs when pregnant women seek an accommodation to stay on their jobs during the course of their pregnancy rather than go on unpaid family leave. The employer then denies the accommodation and the worker is forced to

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[7](...continued)
unemployment and the employee must return to work upon recall or have his or her UC terminated, and those on family leave, where the individual initiates the unemployment and is unavailable to return to work until the leave ends."

take unpaid family leave or else lose her job. See, e.g., *Harvender v. Norton Co.*, 4 Wage & Hour Cas.2d (BNA) 560 (N.D.N.Y. 1997) (holding that there is no right under FMLA to bring an action against an employer for placing an eligible employee on leave in a case where the employer denied a pregnant worker an accommodation to avoid being exposed to chemicals during her pregnancy and instead placed her on 12 weeks unpaid FMLA leave which ended four months before her due date). Employees take family and medical leave in many, if not most, cases due to circumstances beyond their control. Allowing employees to receive unemployment compensation during such leaves is thus fully consistent with the goals of compensating involuntary unemployment.

B. Query: Under what circumstances is an employee on temporary lay-off with no available work and a definite recall date required to return to work pursuant to federal UI law, and are the employee's obligations under federal UI law any different when the leave is based on the FMLA?[8]

Here, it is necessary to distinguish between what states are permitted to do under federal UI law and what current state laws require under their recall statutes. As described above, many states provide that employees are exempt from work-search requirements if they are on temporary layoff and will be recalled within a certain period of time. In certain circumstances, the recall statutes also allow for the availability requirements to be waived. The rationale for such an exception parallels that justifying the proposed recall bill. *See* Olga S. Halsey, *Claimants Awaiting Recall - Their Special Problems of Availability and Suitability for Work*, Social Security Bulletin, Oct. 1946, at 13 (evaluating state unemployment laws deeming employees on recall to be unavailable for work and finding that "[t]he practical result for the claimant is a denial of benefits which places economic pressure on him to sever an employment relationship, perhaps of years' standing, which has proved satisfactory to both the worker and his employer."). Such employees clearly need not seek work from other employers during this period or accept an offer of work, even of a vastly better paying job, from another employer.

Despite these very broad state statutory limitations on the availability rules, the question is whether federal law still requires that the workers be available during their layoff to return to work with their existing employer. This question appears to presume that an obligation exists under federal law to require availability in all circumstances. We, of course, take issue with this premise, as described in Section II. Nonetheless, there are indeed precedents in state law allowing workers who refuse suitable work to continue receiving UI benefits. For example, while not specific to the recall situation, the state training laws described above exempted workers in approved training from having to accept an offer of suitable work. *See, e.g., Alaska Department of Labor v. Boucher*, 581 P.2d 660 (Alaska, 1978) (quoting Alaska's 1974 training

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[8] Specifically, the DOL letter dated January 15, 1999, states: "In the case of employer initiated lay-offs, it has always been the Department's position that the individual must be available to return to work with the employer, particularly if the lay-off ends earlier than assumed. We are not aware of any State which does not require this of the individual. There is no similar requirement in the family leave recall proposals, and in fact, the employer is prohibited from recalling the employee for a minimum period."

provision as exempting "workers attending a training or retraining course with the approval of the employment security division or because, while attending the course, he is not available for work *or refuses an offer of work.*") (Emphasis added). The Massachusetts bill, like the state training statutes, simply makes adjustments to its suitable work requirements as permitted by federal law.

The case of *U.S. Steel v. Unemployment. Compensation Bd. of Review*, 389 A.2d 249, 250 (Pa. Cmwlth. 1978), involved a collective bargaining agreement which also allowed the workers to turn down certain offers of suitable work while on recall. In *U.S. Steel*, the court found that a collective bargaining agreement which restricted the employer's ability to recall workers during their vacation period while on an indefinite recall did not disqualify the workers from receiving benefits. The court noted that although the employees were to be deemed available unless they turned down an offer of suitable work, the collective bargaining agreement precluded any offer of suitable work during their vacation period. In holding that the employer's argument that the claimants were "unavailable for suitable work" was not dispositive of the claimants' eligibility for benefits while receiving vacation pay, the Court relied on the "social purposes" of the state's unemployment law. The social purposes behind providing unemployment outweigh the fact that during the vacation period the employees are, in fact, available. 389 A. 2d at 252. Similarly, under the family leave provisions, the goal of partial wage replacement (for a limited set reasons and limited period of time) satisfies the availability criteria.

C. Query: For the purposes of determining availability, is there a relevant distinction between a leave required by law and a leave authorized by the employer?[9]

As the purpose of the Massachusetts legislation is to provide partial wage replacement for reasons that satisfy the criteria of the Family and Medical Leave Act, we believe that it is unnecessary to distinguish between statutorily required leave and employer-provided leave as the defining issue in both is the *reason* for the leave. This is certainly consistent with current Massachusetts unemployment law. Both statutory and case law provide that an individual does not leave employment for disqualifying reasons where the *reason* for leaving is for an "urgent, compelling, and necessitous nature." *See* Massachusetts General Laws, chapter 151A, § 25(e). It is well-established that this provision includes child care and family responsibilities. *Manias v. Director of Div. of Employment Sec.*, 445 N.E.2d 75 (Mass. 1983).

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[9] The DOL letter states: "We would also appreciate your thoughts on the distinctions between leaves required under family leave laws and leaves merely authorized by employers. Is it your assumption that the fact that the leave is granted under a leave law creates a statutory presumption of availability? If so, how does this carry over into cases where an employer authorizes leave without a statutory requirement to do so?"

D. Query: Does the proposed exemption for workers on family and medical leave effectively eliminate a genuine test of availability under Massachusetts UI law?[10]

Massachusetts currently applies a genuine test of availability, and the proposed bill does not interfere with such a test. Federal law permits states to make generalized determinations concerning eligibility disqualifications in the interests of efficiency and administration so long as the unemployment laws target involuntary unemployment. The training and disability precedents in the various states demonstrate that such determinations are acceptable. Massachusetts as well has exercised a great deal of latitude in this area, including adjustments to availability covering training, illness, temporary lay-offs, jury duty, and other selected circumstances.[11] Furthermore, the proposed legislation contains such an individualized test. Though the bill itself creates a statutory presumption of availability, this presumption only arises if a variety of individual factors specified in the relevant leave legislation is satisfied (i.e., a worker must qualify for reasons acceptable under the FMLA leave first, which entails an individualized determination of the worker's circumstances).

Finally, it is important to emphasize that the proposed leave bill does not eliminate the state's general availability for work requirement. It leaves the existing structure in place, adjusting it to allow benefits to be granted in particular situations and simply creating time-limited exceptions based on illness or disability and family circumstances.

E. Query: What does federal UI law say specifically about compensation for individuals who are "involuntarily unemployed", defined by DOL to include a "suitable work" requirement?[12]

We have explained and illustrated previously in this memorandum that states are free to define what constitutes "involuntary" unemployment and have adopted broad definitions in a variety of circumstances. The suggestion that federal law requires a suitable work standard *in all circumstances* is not supported by either an explicit statutory mandate or legislative history.

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[10] In response to a memorandum written in support of the proposed Vermont law, DOL wrote a letter dated July 17, 1997. The letter restates the memorandum's conclusion ("States have latitude to determine what constitutes availability for work") and continues as follows: "Although this is true, States must still have a genuine test of availability. The Vermont proposal eliminates any test for workers on family leave by substituting a conclusive statutory presumption of availability even where facts demonstrate the individual is unavailable. No examination of the individual's circumstances is made."

[11] *See* Massachusetts General Laws, chapter 151A, §§ 24(c), 30 waiving availability requirements for participation in an approved training program or due to illness; and note 4, *infra*.

[12] In its letter dated January 15, 1999, DOL stated: "Lastly, Federal UC law limits withdrawals from a State's unemployment fund to 'compensation' for 'unemployment.' (Sections 3304(a)(4) and 3306(h) of the Federal Unemployment Tax Act and Section 303(a)(5) of the Social Security Act). We believe the legislative history of the original Social Security Act is clear that only involuntary unemployment, that is, where no suitable employment is available, is to be compensated."

As required by the basic rules of statutory construction, it is necessary to rely primarily on the plain language of the statute to determine its legislative intent. The main provisions of the federal law relied on by DOL are Section 3304(a)(4) of FUTA, which states that "all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation," and Section 3306(h) defining "compensation" to mean "cash benefits payable to individuals with respect to unemployment." These limited statutory references to "unemployment" certainly do not rise to the level of a federal mandate preventing the states from waiving their suitable work requirements in selected circumstances. If anything, we believe these references to "unemployment" in the federal law support our position since it is conceded by DOL that states have the authority to define "unemployment" under state law.

Furthermore, it is notable that FUTA alludes to suitable work only once, in Section 3304(a)(5). Consistent with other aspects of federal UI law, Section 3304(a)(5) works to *prevent* states from denying compensation where no suitable work is available, again establishing a floor rather than a ceiling on state benefits. In addition, as discussed earlier, the Murray bill would have imposed specific standards for suitable work upon the states, but this bill was rejected, indicating congressional reluctance to dictate state policy in this field. Relying then on legislative history, DOL quotes from the draft state laws prepared by the Committee on Economic Security. However, as the Committee itself concluded, these provisions were absolutely never intended to constrain the states.[13]

Even if the federal law could be interpreted to impose a suitable work requirement on the states despite this limited statutory authority, nowhere has the case been made that the states must also require all workers to accept suitable work in all circumstances. To be clear, the Massachusetts bill should not be interpreted by DOL to eliminate the state's "suitable work" requirement. Therefore, we believe it is entirely consistent with DOL's interpretation of the federal law. In this sense, the Massachusetts bill is no different from the many other examples

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[13] In its letter to Senator Patrick Leahy, dated July 17, 1997, DOL references provisions of the Committee on Economic Security's original draft of a state unemployment statute as if they were substantive limitations on state legislative discretion. This draft was never enacted. Moreover, even if the draft had been enacted, as the Committee itself points out, these provisions were never intended to constrain the states:

> "This draft is merely suggestive and is intended to present some of the various alternatives that may be considered in the drafting of the State unemployment compensation acts. Therefore, it cannot properly be termed a 'model' bill or even a 'recommended' bill. This is in keeping with the policy of the Social Security Board of recognizing that it is the final responsibility and the right of each state to determine for itself just what type of legislation it desires and how it shall be drafted." United States Social Security Board, *Draft Bills for State Unemployment Compensation of Pooled Fund and Employer Reserve Account* Types 1 (1937) (quoted in Rubin at 23-4).

Although most states enacted the provisions of the draft bill, they did not do so because they thought the draft was binding. Rather, the enactment of the federal unemployment legislation was such that states had to move extremely quickly and had no alternative but to adopt the federal government's suggestions to assure compliance within the required time. *See* Raymond C. Atkinson, *The Federal Role in Unemployment Compensation Administration* 30 (1941).

of state legislation that define the contours of what is "involuntary unemployment" and whether an individual must accept all suitable work.

In fact, in Massachusetts as in many other states, the concept of suitability already covers most FMLA situations. For example, Massachusetts law allows a worker to refuse an offer of work for "good cause", which is defined to cover appropriate family circumstances.[14] And the Massachusetts law permits workers to refuse an offer of work that does not meet the State's high standards of "health, safety and morals," which is entirely consistent with the concept of partial wage replacement for individuals on family and medical leave.[15]

As described above, there are also selected state laws that allow workers to refuse *any* offer of suitable work. For example, in some states, a worker on temporary lay-off with a definite date of recall has the right to reject any offer of work from another employer, even the most generous offer of employment. The state training exemptions in effect before the 1976 Amendments also allowed workers in approved training to refuse all suitable work. Here too, the Massachusetts bill would still retain its general requirement that UI claimants accept suitable work. In choosing where to draw the line to expand eligibility for a select group of workers, the Massachusetts Legislature would thus be exercising its clear authority under the federal-state UI scheme.

V. The Massachusetts Bill Significantly Advances the Basic Goals of the UI and FMLA Programs

A. States Need Flexibility to Fit Their Particular Unemployment Laws and Labor Policies to Meet the Economic Needs of Their Particular Economy

State discretion over availability standards is appropriate because states have different economic structures, budget surpluses or deficits, and job markets, and they should thus be allowed latitude to design unemployment laws which best serve their individual needs. A state with an unemployment funds surplus and many workers left uncovered when taking leave should be able to decide what scope of unemployment compensation coverage is appropriate. Thus, while DOL should continue to vigilantly guard against new state interpretations of availability

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[14] *Conlon v. Director of Div of Employment Sec.*, 413 N.E.2d 727 (Mass. 1980) (holding that good cause for the refusal of "suitable work" under Massachusetts law includes the refusal of work to the day shift in order to permit a claimant to fulfill her responsibilities to her children.)

[15] *See* Massachusetts General Laws chapter 151A, §25(c); *see also: Carney Hospital v. Director of the Div of Employment Sec.*, 414 N.E. 2d 1007 (Mass. 1981) (holding as sufficient to overturn a disqualification of benefits that an employee had a reasonable belief that a severe skin infection was caused by the work environment; the claimant did not have to prove that this was in fact the case.)

laws that lower the floor,[16] expansions of UI eligibility should be encouraged as recognized by the Social Security Board. United States Social Security Board, *The Federal-State Program for Unemployment Compensation* 5, 9 (1936) ("It is desirable that a State law should be at least as broad in its coverage as the Federal act . . . The State may, of course, go further and adopt a wider coverage.")[17]

Part of the rationale for implementing a federal-state unemployment compensation system rather than a completely federalized system was to encourage state experimentation with various compensation systems so that various methods could be tried and tested. In President Roosevelt's message to Congress during the SSA floor debates, he explained: "We believe, further, that the Federal act should require high administrative standards, but should leave wide latitude to the States in other respects, as we deem varied experience necessary within particular provisions in unemployment compensation laws in order to conclude what types are most practicable in this country." 79 Cong. Rec. 546 (1935).

Murray A. Rubin, former chief of the Division of Program Policy and Legislation of the Labor Department's former Bureau of Employment Security, offers the following observations based on his 29 years of government service: "An important advantage of a dual system was that it permitted wide latitude for experimentation by the states, needed because of the nation's lack of experience with unemployment insurance at the time. In the process, mistakes made by individual states could be confined within the boundaries of those states, while successful measures could be adopted and shared elsewhere." Rubin at 13. The benefits of such experimentation are great, and the costs are borne only by the experimenting states. Indeed, "[t]he entire unemployment insurance system would not be damaged if ideas which are tried out in individual states do not work." Haber & Murray at 441.

Massachusetts unemployment compensation law, which has as its statutory purpose "to lighten the burden on the worker and his family," exemplifies the beneficial result of permitting state experimentation in order to best serve the needs of unemployed workers. Massachusetts General Laws, chapter 151A, §74. Not only does Massachusetts law provide for the longest duration of benefits (30 weeks) and one of the most generous amounts (currently $402 a week, plus a potential addition of $200 in dependency allowance), it has long provided benefits for

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[16] *See, e.g.*, Letter from Larry Heasty, Regional Director, U.S. Department of Labor, Employment Services and Unemployment Service to Videna Crosley, Director, State or Oregon, Employment Department, dated September 25, 1998 (correspondence discussing the legality of restrictions on UI under the state's JOBS Plus program); Unemployment Insurance Program Letter 41-98, dated August 17, 1998 (describing the minimum federal standards under which a claimant shall be denied UI for refusing to accept new work under Section 304(a)(5)(B)).

[17] The Social Security Board held this view during the formative years of unemployment legislation. In its first annual report, the Board noted that "[t]he several State laws reflect the needs of a particular State, the manner of administering other labor laws within a State, the character of State government, and the demands of local public opinion." United States Social Security Board, *Annual Report* 44 (1936). That same year, the Board also explained that "[t]he State may enact the type of law which it judges best designed for the local conditions within the State." United States Social Security Board, *Functions and Progress of the Social Security Board* 36 (1936).

leaving for non-work connected reasons, including domestic responsibilities. Individuals are not only exempt from availability requirements while participating in approved training, but up to an additional eighteen times the weekly benefit amount are available for continued participation in training. Massachusetts General Laws, chapter 151A, § 30(c).

Although many states have closed offices for intake of claims, recently enacted state law requires that regional offices remain open and that multilingual orientations and forms are provided to facilitate access to newcomers. Massachusetts General Laws, c. 151A, §62A. In addition, interpreters are provided at no cost to claimants for all unemployment hearings concerning eligibility for benefits. Eligibility and higher benefits for low-wage workers is assured by both requiring a movable base period, and by including the most recent earnings in the calculation of the weekly benefit amount if the result is a 10% or greater amount. *See* Massachusetts General Laws, chapter 151A, §§ 1(a), 24(b), 25(e), 30. Benefits are provided to workers who reduce hours to preserve jobs through worksharing[18] and benefits are also provided to workers who reduce their hours because of new or worsening disabilities. Massachusetts General Laws, chapter 151A, §29D; 430 Code of Massachusetts Regulations 4.45 (4/5/96).

Massachusetts is also the only state to provide health insurance benefits for unemployed workers and their families through a modest tax on employers. Massachusetts General Laws, chapter 151A, § 14G(j). Although the medical security plan is paid for out of a separate trust fund, it is administered by the Massachusetts Division of Employment Security as a needs based program of COBRA continuation benefits or direct coverage available to those families with an unemployed worker whose income is 400% or less of the federal poverty guidelines. And most recently, a portion of the employer tax was diverted to provide incumbent worker training targeted to low-wage, low-skilled workers. Massachusetts General Laws chapter 29, § 2RR; 430 CMR § 8.01 *et seq.* These numerous provisions, like the proposed benefits for family and medical leave further the purpose of the Massachusetts law to benefit "the worker and his family."

Experimental programmatic additions to the Massachusetts unemployment scheme are possible due to the solvency of the Massachusetts unemployment trust fund. Currently, the Massachusetts Trust Fund has a balance of $1.694 billion. According to John King, Deputy Director of the Massachusetts Division of Employment and Training, this balance "represents far and away the largest balance the Fund has ever attained. Reserves are now large enough, even after excluding all anticipated 1999 contribution income, to pay benefits for twenty-nine month at current levels of unemployment and for more than one year at a severe recessional level."[19] This is precisely the time for the state to expand its efforts to help workers during times of difficulty. The trust fund is solvent, yet at the same time, there are sobering statistics that the

[18] The administration is currently proposing providing lump sum unemployment benefits to individuals seeking self-employment. *See* Massachusetts House Bill No. 590 (filed 12/2/98).

[19] Letter to Monica Halas, Greater Boston Legal Services, from John A. King, Deputy Director of Massachusetts Division of Employment and Training dated February 17, 1999.

Massachusetts boom economy has not reached all its citizens, particularly low wage workers. Added to this fact is the impact of the state's two-year time limit on welfare which means that many working poor heads of households will no longer be able to rely on public assistance when they are forced to take an unpaid leave. All of these factors, unique to the state, are best resolved at the state level where the needs of workers can be evaluated in the context of the particular state's economic condition.

The case for experimentation is particularly strong as applied to the proposed recall bill. The FMLA is a fairly recent federal enactment, and even more recent are findings that the FMLA's benefits are not enjoyed by a substantial number of the citizens the Act targets.[20] The proposed Massachusetts bill is an ideal opportunity to test a creative and innovative means for implementing the letter and spirit of the federal mandate. Just as Massachusetts was on the cutting edge as the first state to consider unemployment legislation in 1916, its willingness to consider such a bold modification constitutes exactly the type of experimentation that the federal-state scheme is designed to encourage.

B. The Proposed Legislation Furthers Important Federal Policies And Promotes The Exercise Of Federal Rights.

Extending unemployment compensation to workers on unpaid leave promotes stability in employment and strengthens the national economy, two key policy objectives of the unemployment system, since workers are able to return to work rather than be forced to search for new jobs. *See* Advisory Council on Unemployment Compensation, *Defining Federal and State Roles in Unemployment Insurance* 27. The policy underlying such legislation parallels the justification for defining availability to account for workers on recall status. The proposed recall bill effectively creates less unemployment by allowing workers to keep their jobs while on leave

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[20] Other states are also attempting to pick up where the FMLA left off. For example, under proposed legislation introduced in Vermont, individuals who are eligible for leave under Vermont state law, as well as individuals who work for smaller employers who are not required to give leave who intend to return to employment within the timeframe of the leave are eligible for unemployment benefits. *See* Vermont Senate Bill 179. The statement of purpose which addresses the critical need to provide unemployment benefits for family and medical leave provides:

> "The General Assembly finds that many low wage employees, those most in need of the protection of family leave laws, are least able to afford to take time from work without pay. These employees effectively are presented with the Hobson's choice of either taking unpaid leave from work for the birth of a child or the illness of themselves or a family member or having enough employment income to pay for basic necessities of life. Therefore, it is the purpose of this act to provide a real choice for these employees by making unemployment compensation available to those for whom family and parental leave has been merely an illusory right."

Under legislation proposed in the state of Maryland, an individual who voluntarily leaves employment immediately following the birth or adoption of a child has good cause for leaving and is deemed to be in compliance with availability requirements. *See* Maryland House Bill 1124. The State of Washington has pending legislation to qualify for unemployment those individuals who leave to care for a newborn child under one month old and who request reemployment at the end of the leave. *See* Washington House Bill 2074.

and less hardship on those separated from work when necessary to care for themselves or their families.

Furthermore, any doubts as to whether the proposed recall bill complies with federal law should be resolved in favor of the legislation's validity since the bill facilitates the exercise of federally-created rights. The bill is premised on findings that most workers are unable to take advantage of leave available under FMLA since it is currently unpaid and since it applies only to companies of 50 employees or more (a concern which the administration has most recently highlighted). The bill does not create an impediment to any federal right; to the contrary, it removes an obstacle to its exercise, by providing limited compensation to allow medium and low income workers to be able to enjoy family and medical leave as much as higher-income workers. Congress apparently contemplated such state legislation when it included a non-preemption provision in the FMLA. *See* 29 U.S.C. § 2651 (expressly permitting states to provide more protective family and medical leave guarantees, but not less, than that provided by FMLA).

A bipartisan congressional commission reached the same conclusion. According to the Commission on Family and Medical Leave, established by Congress to study the impact of the FMLA, the major reason why employees in FMLA-covered businesses do not take FMLA leave is that they cannot afford to do so. To make it possible for such workers to take needed leave, the Commission recommended that consideration be given to a uniform system of wage replacement. Specifically, the Commission suggested that states extend unemployment compensation qualifications to employees on family and medical leave. *See* Commission on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 199 (1996).[21]

Finally, the approach to availability that we suggest is not without precedent, as other states have carved out similar exceptions based on identical policy considerations. For example, in *Missouri Division of Employment Security v. Jones*, 679 S.W.2d 413, 415 (Mo. App. Ct. 1984), the claimant conceded that she was unable to work for a week due to the sickness and death of her mother. However, the court nonetheless awarded benefits, explaining that "[t]he meaning of 'available for work' varies, depending on the circumstances of each case," and holding that the availability requirement "do[es] not apply when a claimant is not available for work due to an unfortunate family emergency beyond her control. Any other result would be inconsistent with the policy of the Missouri Employment Security Law . . ." *Id.*

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[21] Specifically, the Commission recommended that "States should consider voluntarily extending unemployment compensation qualifications to employees on family and medical leave . . . . " Commission on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 199 (1996). In its letter to Senator Leahy, dated July 17, 1997, DOL narrowly interprets the Commission's statement to cover only those situations in which a worker takes family and medical leave but remains available to accept work and where the individual quits work for family or medical circumstances (i.e., the situation where an individual is most likely separated from the job and is no longer eligible for FMLA leave).

VI. Conclusion

Based on the research described above, we conclude that the Massachusetts bill is consistent in all respects with the broad discretion to fashion state laws guaranteed under federal UI law and with past precedents in state UI laws. We also believe that the state family leave bills are consistent with DOL's interpretation of the federal UI law. The proposed laws retain a genuine test of availability, as required by DOL, but allow for exceptions in particular circumstances just as the states have routinely done in other areas of UI eligibility. We therefore look forward to a continuation of the dialogue, informed by this most recent research, to address DOL's remaining concerns and to modify the Massachusetts proposal if necessary.

PATTY MURRAY
WASHINGTON

COMMITTEES:
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United States Senate

WASHINGTON, DC 20510–4704

April 8, 1999

The Honorable Alexis Herman
Secretary
U.S. Department of Labor
200 Constitution Ave NW
Washington D.C. 20210

Dear Sec. Herman,

I am writing regarding legislation that has been introduced in Washington and other states (Massachusetts, Vermont, and Maryland) to provide for partially paid family and medical leave by expanding the state's unemployment insurance program to cover workers in these situations.

I understand that the Department is in the process of reviewing its policy in this area to determine whether federal law would interfere with the states' traditional discretion to determine unemployment insurance eligibility. I have reviewed the detailed correspondence between the Department and Massachusetts contingent on this issue. Based on my review, I believe that the legislative history of the federal UI law is clear that it is within the purview of the states to define issues of eligibility, including whether individuals on family leave are "available" for work and eligible for UI.

As you know, I have long been involved in the efforts to provide families with assistance in balancing the demands of work with the responsibilities of family. The Washington bill and the other state initiatives offer critical benefits to their citizens as well as a valuable opportunity to experiment in the area of paid leave. I believe the Family Medical Leave Act of 1993, as key as it is to many workers and their families, does not meet the needs of all workers, particularly those at the lower income level. I am committed to finding solutions to this problem to allow all working families to be able to take family leave.

I am excited that so many states are in the process of considering how best to meet this challenge. While states are exploring different mechanisms, in many instances the expansion of the state unemployment insurance systems offers the most viable and affordable approach. It is also consistent with the goals of the unemployment compensation system to stabilize employment and evolve to meet the changing needs of the labor market. I believe that this state experimentation is well within Congress' intent to assist working Americans stay in the workforce through temporary unemployment insurance.

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I hope that your policy review will ultimately allow for state innovation in this key area. I believe it is justified by the law as well as our shared commitment to assisting working families.

Sincerely,

Patty Murray

Patty Murray
United States Senator

PATRICK LEAHY
VERMONT

COMMITTEES:
AGRICULTURE, NUTRITION, AND FORESTRY
APPROPRIATIONS
JUDICIARY

United States Senate
WASHINGTON, DC 20510–4502

April 12, 1999

The Honorable Alexis Herman
Secretary
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Secretary Herman;

In 1997, I wrote to then-Acting Secretary Metzler about the DOL interpretation of a Vermont bill which would have extended unemployment compensation benefits to workers who qualify for coverage under the State family and medical leave law. I am writing to you again because I am concerned that the DOL is inhibiting the States from meeting the needs of an evolving labor market.

Currently, Vermont and several other states, including Washington, Massachusetts, and Maryland, have proposed initiatives to promote unemployment compensation reform to better serve women and working families and to address the limitations of the Family and Medical Leave Act. The cornerstone of this reform would allow states to use unemployment compensation to provide some financial assistance to employees on family and medical leave. When I initially wrote to Acting Secretary Metzler, Vermont was the first state in the nation to propose such an innovative approach to assisting those Vermonters who could least afford to take family and medical leave.

At the beginning of his administration, President Clinton signed into law the Family and Medical Leave Act of 1993. This landmark legislation allows employees at companies with more than 50 employees to take up to 12 weeks of unpaid leave for childbirth or adoption, or because of sickness of the employee or family member. However, this law benefits only the privileged few who can afford to take unpaid leave. Many Vermonters, who would otherwise be eligible for family and medical leave, are unable to enjoy this benefit simply because they cannot afford it. I believe that we need to do more to help these employees and their families.

As you review the Department's policies in this area, I encourage you to allow states the flexibility to try this innovative approach to family and medical leave. Federal unemployment law was designed to give the states significant discretion in determining eligibility and coverage for benefits. I believe that allowing the State of Vermont to make decisions on the use of the trust fund's abundant reserves is in compliance with the Federal Unemployment Tax Act.

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Giving states the flexibility to provide unemployment compensation benefits for employees on family leave would strengthen the Administration's commitment to working families and it would extend family and medical leave benefits to many Vermonters who would otherwise be unable to afford it.

Sincerely,

Patrick Leahy

PATRICK LEAHY
United States Senator