



655 15th Street, N.W.
Washington, DC 20005-5701
Tel: (202) 452-8444
Fax: (202) 429-4519
E-mail: fmi@fmi.org
Website: www.fmi.org



May 28, 2002

Via Facsimile

Mr. John Morrall
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB Room 10235
725 17th Street, NW
Washington, DC 20503

Re: Comments on Draft Report to Congress on the Costs and Benefits of Federal Regulations

Dear Mr. Morrall,

The Food Marketing Institute (FMI)¹ is pleased to respond to the Office of Management and Budget's (OMB's) request for comments on the draft report to Congress on the costs and benefits of federal regulations. 67 Fed. Reg. 15014 (March 28, 2002). Specifically, this letter addresses OMB's request for comments on reforms to specific regulations that extend or expand existing regulatory programs. In this regard, we would like to draw your attention to the regulation adopted in June 2000 by the Department of Labor that allows states to pay unemployment compensation to parents who choose to leave work on a temporary or permanent basis after the birth or adoption of a child. 20 CFR Part 604; 65 Fed. Reg. 37210 (June 13, 2000). The birth/adoption unemployment compensation regulation is an extreme extension of the agency's authority in this area. Accordingly, as discussed more fully in the enclosed letter to Secretary of

¹ FMI conducts programs in research, education, industry relations and public affairs on behalf of its 2,300 member companies — food retailers and wholesalers — in the United States and around the world. FMI's U.S. members operate approximately 26,000 retail food stores with a combined annual sales volume of \$340 billion — three-quarters of all food retail store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms and independent supermarkets. Its international membership includes 200 companies from 60 countries.

Twenty-Five Years of Leadership

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Labor **Elaine Chao** and the comments **that FMI** filed **in** response to the **regulatory proposal**, we urge **OMB** to encourage **the** Department of Labor to **review this** regulatory program **and** initiate the procedures **necessary** to **revoke** the Department's regulations on this matter.

We appreciate **OMB's efforts** to obtain **information** from **the public** **on** regulations that **are overly burdensome** and **look forward to a** continuing **dialog with** the **agency**. **In** the interim, if **we may provide** you **with** further information **on** this matter, **please** do not **hesitate to** contact **us**.

Sincerely,



Tim Hammonds
President and CEO

Enclosures



February 14, 2001

655 15th Street, N.W.
Washington, DC 20005-5701
Tel: (202) 452-8444
Fax: (202) 429-4519
E-mail: fmi@fmi.org
Web site: www.fmi.org

The Honorable Elaine Chao
Secretary of Labor
Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

**Re: Birth and Adoption Unemployment Compensation Final Rules; 20
C.F.R., Part 604**

Dear Madam Secretary,

On behalf of the Food Marketing Institute (FMI) and our members, I am writing to convey our strong concerns with the final rules issued by the Department of Labor (DoL) last June that allow states to pay unemployment compensation to parents who choose to leave work on a temporary or permanent basis after the birth or adoption of a child. 20 C.F.R., Part 604; 65 Fed. Reg. 37210 (June 13, 2000). As discussed more fully below and in the enclosed copy of the comments we filed in response to the proposal, we urge you to initiate procedures to revoke the Department's regulations on this matter because they set forth a vaguely defined and ill-conceived experimental program that sets a poor policy precedent and violates both the Federal Unemployment Tax Act (FUTA) and the Social Security Act (SSA).

As you may recall, FMI is a non-profit association that represents supermarkets and food wholesalers, as well as their customers, in the United States and around the world. FMI's domestic member companies operate approximately 21,000 retail food stores with a combined annual sales volume of \$300 billion. American supermarkets employ approximately 3.5 million people.

As a leading provider of jobs, FMI members are sensitive to the needs of their employees, and are pleased to offer progressive parental leave programs on a voluntary basis. The supermarket industry's role as a significant employer also means that food retailers contribute substantial resources to state Unemployment Insurance (UI) trust funds and, therefore, have a keen interest in the way in which UI funds are disbursed.

In this case, the Department's rules authorizing the payment of so-called birth and adoption unemployment compensation (BAA-UC) will result in the reckless expenditure of UI funds that were collected from employers for the purpose of compensating people who are involuntarily unemployed. The UI trust funds were never intended to provide compensation to individuals who chose not to work. Although an employer might arguably be expected to provide compensation to an employee through the UI system if the employee is without wages as a result of the employer's economic decision-making,



655 15TH STREET, N.W. SEVENTH FLOOR
WASHINGTON, D.C. 20005-5701
TELEPHONE 202-452-8111
FAX 202-429-4519
E-MAIL FMI@FMI.ORG
WEBSITE WWW.FMI.ORG

February 2, 2000

Ms. Grace A. Kilbane
Director
Unemployment Insurance Service
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room S-4231
Washington, D.C. 20210

**RE: Comments on Birth and Adoption Unemployment Compensation
Proposed Rule**

Dear Ms. Kilbane:

The Food Marketing Institute (FMI) **appreciates** the opportunity to submit the following comments in **response** to the proposed rule issued by the Employment and Training Administration (ETA) of the U.S. Department of Labor (DoL) entitled, "Birth and Adoption Unemployment Compensation." **64 Fed. Reg. 67971** (December 3, 1999). FMI strongly **opposes** the proposed extension of unemployment compensation to those **who** choose to leave the workforce voluntarily. ETA's proposal violates the spirit **and** the letter of the fundamental principle that UI benefits should be reserved for those **who** are involuntarily separated **from** the workforce.

FMI is a non-profit association **that** conducts **programs** in research, education, industry relations **and** public affairs on behalf of its 1,500 **members** and their **subsidiaries**. Our membership includes **food** retailers **and** wholesalers, **as well as** their customers, in the **United States and** around the **world**. FMI's domestic **member** companies operate approximately **21,000** retail food stores **with a** combined **annual sales volume** of \$220 billion, **which** accounts for more **than** half of all **grocery store sales** in the United States. FMI's retail membership is composed of large **multi-store chains, small regional firms,** and independent supermarkets. Our international membership includes **200 members** from **60** countries.

American supermarkets employ approximately 3.5 million people. **As a leading** provider of jobs, FMI members **are** sensitive to the needs of their employees, **and** are pleased to offer progressive parental leave **programs** on a **voluntary** basis. The

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supermarket industry's role as a significant employer **also** means that food retailers contribute substantial resources to state Unemployment Insurance (UI) ~~Trust~~ Funds, **and**, therefore, have a **keen** interest in the way in which UI funds are disbursed. **We** are especially concerned that the Department has **set** forth a vaguely justified proposal that will undoubtedly increase UI expenditures **and**, therefore, increase the UI taxes imposed upon the food distribution industry, without accomplishing the **ill-defined** goal it purports to seek. Accordingly, we respectfully request that the Department withdraw the proposal.

A. ETA's Birth-Adoption Compensation Proposal

The Employment and Training Administration (ETA) has proposed to **amend** Title 20 of the Code of **Federal** Regulations to add **rules** that **would** allow states to pay unemployment compensation (UC) to **parents** who choose to leave **work** on a temporary or permanent basis after the birth or adoption **of** a child. 64 Fed. Reg. **67972** (Dec. **3, 1999**). The proposal **defines** a newborn child as a child who is **less** than one year old; newly adopted children **are** those who have been placed **with** their new families within the previous **year**, regardless of age. Individual states would **be permitted** to determine the length of **paid** leave for which parents would be eligible. The **model** state legislation drafted by the Department **would allow** parents to receive compensation for **12** weeks, although the **terms** of the Department's regulations would **allow** States to **offer** parents unemployment compensation for **as long as one year**.

The experimental program does not specify an end point, nor does it include a methodology or a specific goal. **After** four states have operated such a program for at **least three years**, the agency will conduct a "comprehensive evaluation" of the programs' implementation. **64 Fed. Reg. at 67974**. The Agency hopes to compile information on the following issues: workforce availability of employees receiving birth-adoption compensation; the effects on employers who bear the costs of birth-adoption compensation; **and** the effects on the **states'** unemployment **funds**. **64 Fed. Reg. at 67974**.

5. Proposal Will Consume Substantial Resources from State UI Trust Funds, Many of Which Are Insufficiently Funded for Their Primary Purpose

The potential cost of the proposed policy is enormous. **The** Department estimates a maximum cost of \$68 million, which is "based on the expressed interest of a **small** number of **States**." **64 Fed. Reg. at 67975**. The agency indicates that it does not **know** how **many** States **will** participate in the "experiment" and **thus cannot** adequately estimate the true cost. **Nonetheless, \$68 million is a substantial expenditure of UI funds**.

Moreover, the ultimate expenditures are likely to be **far greater than** \$68 million. Current average weekly UI benefits are approximately \$200. If states **pass** legislation allowing qualified parents to receive **up to 12 weeks of UI** benefits, as recommended in the agency's model state legislation, the total direct cost per claim **would** be \$2,400. **One** administration estimate indicates that **as many as six million** workers need parental leave

for childbirth or adoption. In **that** case, the true cost of DoL's "experiment" will actually be more than \$14 billion dollars.

However, the state UI Trust Funds are not prepared for this dramatic increase in claims. Even in the current period of unprecedented economic expansion **and** consistent low unemployment, the UI Trust Fund balances of 20 states and the District of Columbia are currently below the Department of Labor's solvency test, known as the "average high cost multiple." Many of these 20 states are large states **such as California**, Illinois, Michigan, **New York**, Ohio and Texas. Accordingly, these 20 states already have inadequate reserves, by the Department's own standard, in what **is** unquestionably a strong **economy**.

Employers will be required to make **up** the shortfall. Employers currently pay approximately \$30 billion annually in UI payroll taxes. Strategic Services on Unemployment and Workers' Compensation estimates that employers **will** pay an additional \$3000 in **payroll** taxes for each employee who collects UC under **the** proposal because increased UC **claims** may require the employer to pay more moneys into **the** state UI trust **funds**. Conservatively assuming that only 1% of the 3.5 million people that U.S. supermarkets employ file claims for birth-adoption Compensation annually, the cost to this industry **alone** will be **more** than \$100 million in additional payroll **taxes**. **An** excess tax of this magnitude may require employers - especially smaller retailers - to **curtail** current **benefits** **and** will certainly limit their ability to add benefits that may be used by a broader cross-section of employees.

To help offset these costs, employers **should** be allowed to require employees to use **all** accrued **paid** time before filing a claim for UC. This approach is consistent with DoL's **FMLA** regulations. See 29 **C.F.R.** § 825.207.

C. "Able and Available" Requirement Cannot Be Met by Individuals Who Voluntarily Choose To Leave Work and Remain Unemployed

1. Involuntary Unemployment and the Meaning of "Able and Available"

The UI program **was** created in 1935 to provide income assistance to unemployed **workers who** lost their **jobs through** no fault of their own. "Supplementary Social Insurance Information," **OIG** Report No. 12-99-002-13-001 at 6.3. Benefits under the unemployment compensation laws are not payable to **all** persons who are out of employment, but **only** to those who are qualified in accordance **with** the prescribed requirements and conditions. 81 **C.J.S.** § 212. Statutes providing for unemployment benefits are not intended to **serve as** insurance for all **who** are **without** wages. See 81 **C.J.S.** § 261.

Rather, unemployment compensation **is** designed to provide a source of **income** in the case of *involuntary* unemployment, which is unemployment resulting **from a failure**

approved leave, thereby underscoring the point that the claimant has chosen to be unavailable for work. Accordingly, ETA's proposal runs afoul of the fundamental principle of unemployment compensation that the claimant **must** be able to and available for work.

2. **Current Exceptions to "Able and Available" Requirement Do Not Justify Extending UC To New Parents**

Four exceptions to the "able and available" requirement have been recognized over the years by DoL; these exceptions have generally been undergirded with specific statutory authority and, thus, do not depend solely on an administrative interpretation of the existing law. ETA attempts to justify the instant birth-adoption compensation proposal by arguing that it is **analogous** to the existing exceptions because it **would** promote a "continued connection to the workforce." However, as explained more fully below, the existing exceptions differ significantly from the proposed exception and, therefore, do not provide sufficient justification.

The first exception DoL cites is for "approved training;" the exception was ultimately codified into the law. Under this provision, individuals do not lose their eligibility for UC while in approved training because training is recognized as an effective remedy for unemployment. Training courses are directly related to an individual's ability to obtain employment because increasing an individual's job-specific skills will render the individual a more desirable and more competent employee. DoL has not asserted that parental leave will provide individuals with job-related skills.

For the illness or jury duty exceptions, the state effectively "steps into the shoes" of the employer for short periods of time during the individual's unemployment. And, there lies the key: for both of these exceptions, the **individual must already have established that s/he meets the able and available requirements**. That is, an individual who initially meets the able and available requirements, but then becomes ill or is called to jury duty, remains eligible to receive UC payments without interruption, provided that no suitable work is offered and refused. 64 Fed. Reg. at 67973. In these instances, the state serves as an approximate surrogate for an employer, since employers ordinarily provide reasonable sick leave and jury duty pay for employed workers. However, these exceptions are intended to provide UC during a short period of a pre-existing involuntary unemployment situation.

The existing exception closest in scope to the proposed birth-adoption exception is the "temporary layoff" exception. An employee who must stop working for a specific employer for a period of time may receive UC, even though both the employer and the employee expect that the employee will return to work on a specific date in the future. The key difference here is that a "temporary layoff" arises if the employer is unable to provide work to the employee for a short period of time. 64 Fed. Reg. at 67973.

In that case, the employer has made a business decision to cease paying an individual's wages, but intends to pay the individual for his/her services **again** when the economic opportunity **arises**. **Although** an employer might **arguably** be expected to provide compensation to **an** employee through the UI system if the employee is without wages as a result of the employer's economic decision-making, employers should not be required to subsidize the personal choices of their employees via the UI system, especially when those choices are unrelated to the work force or the employers' decisions. If paid birth or adoption compensation is socially desirable, such a determination should be made by Congress through the legislative process, and the costs of the program should be allocated across the public accordingly.

3. Birth-Adoption Compensation May Diminish Connection to the Workplace

The Department states that one of the purposes of the proposal is to rest whether providing new parents with unemployment compensation will improve or maintain their availability. DoL theorizes that UC will maintain or even promote parental connection to the workforce by allowing parents time to bond with their children and to develop stable child care systems while adjusting to the accompanying changes in lifestyle before returning to work. 64 FR at 67973. ETA has not considered the possibility, however, that the proposed birth-adoption compensation might actually diminish **an** individual's connection to the workplace on **at least a temporary** basis.

Since an important reason that many individuals work is to earn **an** income, one reasonable result of replacing wages **with** unemployment compensation would be **an** actual reduction in attachment to the workforce. For example, if a state passed legislation authorizing birth-adoption compensation to be paid for **the** first full year of a newborn's life, one or both parents might be encouraged to leave the workforce for the full year, even though they might not have chosen to leave the workforce for this period if UC **had** not been available. Although eventually one or both parents might decide to return to work, they may not have both been able to remove themselves from the workforce for a **year** without the subsidy **provided** by unemployment compensation. **Thus**, UC may decrease worker availability. DoL's proposal has not considered or even **admitted this possibility**.

D. ETA Experiment Is Flawed

The proposal is intended to establish an "experiment" that is "[d]esigned to test whether expansion of its interpretation of the able and available requirements would promote a continued connection to the workforce in parents **who** receive such payments." 64 FR at 679731. However, as **an** experiment, the ETA **proposal is poorly designed**. **The** proposal includes only a vague **standard** for success, no methodology **for** determining whether the program is successful, **and no means** of accountability **should** it prove unsuccessful.

The standard DoL adopts is whether the program will increase parents' connection to the workforce. Given the vagueness of the standard, it is little wonder that the Agency has not been able to specify a method to determine whether the experiment has been successful. Thus, states will be allowed to make payments to an entirely new class of beneficiaries and will only be restricted by the knowledge that they will be judged at some unspecified time in the future by the vague standard previously mentioned.

However, what if the method ultimately chosen by the Agency reveals that parents' attachment to the workforce is decreased in the states that employ the experiment? If the "experiment" must continue until four States have implemented the legislation for at least three years, the experiment will last for at least three years and possibly twice as long or longer since four states must each separately enact and implement legislation. Over the course of the experimental period, millions, if not billions, of taxpayer dollars will be drained from UI trust funds to pay for an "experiment" that may ultimately prove to decrease employee attachment to the workforce.

Moreover, the proposal requires states to amend their statutes in order to participate. State legislation will serve as an obstacle to the removal of the program if the data collected from the experiment demonstrate that birth-adoption compensation decreases work availability. Thus, the "experiment" seems intended to ensure that the payment of birth-adoption compensation is ultimately adopted nationally, rather than to establish an unbiased system for gathering data.

E. Extending UC to New Parents Will Set Poor Policy Precedent

ETA should abandon the proposed rule because it will establish a poor precedent for the use of UI funds in the future. As discussed more fully above, the proposed rule violates longstanding principles that go to the core of the unemployment compensation system. Eroding the "able and available" requirement to justify paying unemployment compensation to new parents will open the door for the use of UI funds for other projects unrelated to the core purpose of the UI system. For example, the instant proposal claims to be a vehicle to allow more new parents to take advantage of the leave provided for under the Family and Medical Leave Act (FMLA) however, the proposal might just as well have included all of the various types of family and medical leave for which the FMLA provides, e.g., family leave to care for elderly parents, or medical leave for the worker or the worker's family members. Indeed, both President Clinton and the Department suggest that compensating new parents is simply the first in what may be a long line of additional social programs that the Administration would like to underwrite with the funds American businesses have set aside in the UI Trust Funds.

The U.S. economy is undergoing its longest period of prosperity, however, it is unreasonable to expect the economic expansion to continue indefinitely. If the UI funds that have been set aside to serve as an economic safety net for persons who find

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themselves involuntarily unemployed are used instead on a variety of other social programs, those funds will not be available when they are most needed. On behalf of the companies in the food industry that help to fund the unemployment system, we strongly believe that this money must be reserved only for those who find themselves without jobs despite the fact that they are able to and available for work. The funds should not be used to further unrelated social goals; rather, the money must be reserved for the truly unemployed.

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We appreciate the opportunity to provide our comments on the proposed birth-adoption compensation plan. Based on the foregoing discussion, however, we urge the Department to withdraw the proposal.

Sincerely,



Tim Hammonds
President and CEO