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The Department of Labor's Failed Attempt at Birth and Adoption Unemployment Compensation: A View Through the Eyes of Texas

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I. INTRODUCTION

In 1993, Congress passed the Family Medical Leave Act (FMLA) in an attempt to ensure that employees are able to obtain time off from work for family and health related reasons.[1] Congress found that the number of two-parent households with both parents working, as well as single-parent households in which the sole parent worked, had increased significantly.[2] It also found inadequate employment policies and a lack of job security to accommodate working parents when domestic needs arose.[3] Though the purpose of FMLA is to help parents "balance the demands of the workplace with the needs of the family," as well as "to promote the economic stability and economic security of families" facing domestic circumstances,[4] it does not provide payment to employees during this time off.[5] Even the original FMLA bill sponsor made it clear that employees taking family and medical leave would not be eligible for compensation: "The leave is unpaid, so your paycheck will stop. *There is no federal compensation such as unemployment.*"[6]

A lack of compensation during the leave period, coupled with the eligibility requirements of the Act, either discourages or simply excludes many employees from taking advantage of FMLA. Congress was well aware of the possible financial impact to businesses, especially small businesses, by requiring them to offer family and medical leave to their employees.[7] In partial response to the financial concerns of small business, Congress built certain eligibility requirements into the Act.[8] To receive FMLA protection, employees must be employed by a *covered employer*—a category limited to public agencies and private employers with fifty or more employees.[9] As mentioned previously, these eligibility requirements exclude many workers from FMLA protection. A 1996 study conducted by the Commission on Family and Medical Leave found that lost pay was the most significant

1. 29 U.S.C. § 2601(b) (2000).

2. *Id.* § 2601(a)(1).

3. *See id.* § 2601(a).

4. *Id.*

5. Sylvia Law, *Access to Justice: The Social Responsibility of Lawyers: Families and Federalism*, 4 WASH. U. J.L. & POL'Y 175, 197 (2002).

6. 139 CONG. REC. E201019,519 (daily ed. Aug. 5, 1993) (statement of Rep. Schroeder) (emphasis added).

7. *See* 139 CONG. REC. S1260-61S1334-01 (daily ed. Feb. 4, 1993) (statement of Sen. Dorgan).

8. *Id.*

9. 29 U.S.C. § 2611 (2000). In addition to the employer requirements, employees must also meet several eligibility requirements, such as completing twelve months of service with the covered employer and working at least 1,250 hours during the most recent twelve-month period. *Id.* § 2611(2)(A). Furthermore, employees are covered only if there are fifty or more employees at their worksite or within a seventy-five-mile radius of their worksite. *Id.* § 2611(2)(B)(ii).

barrier to parents taking advantage of unpaid leave after the birth or adoption of a child.[10]

In response to the findings of the 1996 commission[11] and to the legislative efforts of some states to provide compensation to parents in the form of unemployment insurance benefits,[12] President William J. Clinton directed the Secretary of Labor to issue a regulation that allowed state unemployment trust fund moneys to be used to provide partial wage replacement to parents on approved leave following the birth or adoption of a child.[13] President Clinton discussed the importance of providing partial wage replacement during a commencement address at Grambling State University.[14] In the speech, he stated that "those first few weeks of life are critical to the bonding of parents and children, and they can have a long-term positive development for the children. No parent should have to miss them."[15] The President also noted "the current law [FMLA] just meets a fraction of the need. Too many people, too many family obligations aren't covered at all. Too many people can't take advantage of the law because they can't afford to take time off because they can't live without their paychecks."[16] To support his proposal, President Clinton sent an executive memorandum to the executive department heads.[17] The memorandum directed the Secretary of Labor to draft regulations as well as model state legis-

10. COMM'N ON FAMILY AND MEDICAL LEAVE, U.S. DEP'T OF LABOR, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 99–100 (1996) (on file with the Texas Wesleyan Law Review). A recent U.S. Department of Labor survey also found that the fifty-employee requirement coupled with the employee service and hours criteria resulted in less than 59% of U.S. employees working in FMLA covered establishments; *see* WESTAT, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS, 3-3 (2001), *available at* http://www.dol.gov/asp/fmla/main.htm (on file with the Texas Wesleyan Law Review). The survey also found that of the employees that reported needing leave covered under FMLA, 77.6% stated that they could not afford the time off without pay. *Id.* at 2-16, tbl 2.17. It also showed that 87.8% reported that they would have taken the leave if they could have received some additional pay. *Id.* at 2-17, tbl 2.18.

11. COMM'N ON FAMILY AND MEDICAL LEAVE, *supra* note 10, at 1 (Letter to the Committee on Labor and Human Resources from Chairman for the Commission on Leave, Christopher J. Dodd) (on file with the Texas Wesleyan Law Review). "The Commission was created with the enactment of the Family and Medical Leave Act of 1993 and was charged with examining the impact of this new law and other family and medical leave policies on workers and employers across the country." *Id.*

12. *See* Curtis Carpenter, *LPA, Inc. v. Herman's Unanswered Question: Is the Clinton Administration's Birth and Adoption Unemployment Compensation Regulation Consistent with the Federal Unemployment Tax Act?*, 37 NEW ENG. L. REV. 63, 68–69 (2002).

13. *See* President's Commencement Address at Grambling State University in Grambling, Louisiana, 1 PUB. PAPERS 836, 839 (May 23, 1999).

14. *See id.* at 838–39.

15. *Id.* at 839.

16. *Id.* at 838–39.

17. President's Memorandum on New Tools to Help Parents Balance Work and Family, 1 PUB. PAPERS 841, 841 (May 24, 1999). This proposed regulation allowed states to experiment with and develop their own programs for providing unemploy-

lation to enable states to develop their own methods and legislation to use their unemployment insurance systems to provide partial wage replacement.[18] In response to the executive memorandum, the Department of Labor (DOL) published for comment in the Federal Register of Proposed Rulemaking its proposal of Birth and Adoption Unemployment Compensation (Notice of Proposed Rulemaking, (NPRM)) along with a proposed state legislation model.[19] After a sixty-day comment period, which allowed the public time to provide feedback and comment on the proposed regulation, the DOL issued 20 C.F.R. Part 604 as its final rule on Birth and Adoption Unemployment Compensation, effective August 14, 2000.[20] Birth and Adoption Unemployment Compensation[21] (BAA-UC) granted states the opportunity to provide partial wage replacement on an experimental basis to parents who took approved leave or who otherwise left employment following the birth or adoption of a child.[22] The rule defined approved leave as "a specific period of time, agreed to by both the employee and employer . . . during which an employee is temporarily separated from employment . . . after which the employee will return to work for that employer."[23] The rule defined a new-born child as "children up to one year old,"[24] a newly adopted child as "children age 18 . . . or less, who have been placed within the previous 12 calendar months,"[25] and parents as "mothers and fathers (biological, legal, or who have custody of a child pending their adoption of that child)."[26]

While BAA-UC provided model legislation that states could have chosen to enact if they wished, they were not required to do so.[27] States were free to create their own BAA-UC programs and use unemployment trust fund moneys to fund those programs as long as they followed the guidelines in the rule.[28] Perhaps the most significant aspect of the rule was that states could choose whether to accept the voluntary experimental program.[29] As a result, it was up to state leg-

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ment insurance compensation to parents who have left their jobs voluntarily to care for their newly-born or newly-adopted children. *See id.*

18. *See* President's Memorandum on New Tools to Help Parents Balance Work and Family, 1 PUB. PAPERS 841, 841 (May 24, 1999).

19. Birth and Adoption Unemployment Compensation, 64 Fed. Reg. 67,972 (proposed Dec. 3, 1999) (to be codified at 20 C.F.R. pt. 604).

20. Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37,210 (June 13, 2000) (to be codified at 20 C.F.R. pt. 604).

21. 20 C.F.R. pt. 604 (2002).

22. *See id.* § 604.1.

23. *Id.* § 604.3(a).

24. *Id.* § 604.3(d).

25. *Id.* § 604.3(e).

26. *Id.* § 604.3(f).

27. Birth and Adoption Unemployment Compensation, 64 Fed. Reg. 67,972 (Dec. 3, 1999) (to be codified at 20 C.F.R. pt. 604) (Model state legislation was published as Appendix A.).

28. *Id.* at app. B.

29. *Id.*

islatures to decide whether to propose legislation designed to carry out the BAA-UC experiment.

On December 4, 2002, the DOL, under a different administration, reversed its position during a department-wide review of all regulations and issued a Notice of Proposed Rule Making to repeal 20 C.F.R. Part 604.[30] The decision was based mainly on the insolvency of many states' unemployment trust funds, which had been substantially depleted since promulgation of BAA-UC.[31] The DOL also determined that the regulation was a misapplication of federal unemployment compensation law relating to the requirements for qualification for unemployment insurance benefits.[32] The review was also conducted in the context of a legal challenge to BAA-UC in federal district court.[33] Although the case was dismissed on procedural grounds for lack of standing,[34] it provided an additional catalyst for the DOL to examine the underlying statutory authority for BAA-UC. Finally, on November 10, 2003 the DOL repealed BAA-UC, reverting back to the law as it existed prior to its promulgation.[35] The repeal allows states to implement a BAA-UC like program as long as such a program is not funded by states' unemployment funds.[36] Though no state was successful in passing BAA-UC legislation, many states introduced the legislation.[37]

While there are other published articles and comments on the BAA-UC experiment,[38] this Comment will provide an analysis of the

30. *See* Press Release, U.S. Dep't of Labor, U.S. Department of Labor Takes Action to Protect Integrity of the Unemployment Trust Funds (Dec. 3, 2002), *at* http://www.dol.gov/opa/media/press/opa/OPA2002672.htm (on file with the Texas Wesleyan Law Review).

31. *Id.*

32. Unemployment Compensation—Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations, 67 Fed. Reg. 72,122, 72,122 (proposed Dec. 4, 2002) (to be codified at 20 C.F.R. pt. 604).

33. LPA Inc. v. Chao, 211 F. Supp. 2d 160, 161–63 (D.D.C. 2002).

34. *Id.* at 166.

35. Unemployment Compensation—Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations, 68 Fed. Reg. 58,540 (proposed Oct. 9, 2003) (to be codified at 20 C.F.R. pt. 604) (noting that the unemployment system was designed to provide temporary wage replacement to individuals unemployed due to lack of work and that awarding wages to parents on approved leave would be contrary to policy, and that the BAA-UC regulation was legally flawed in that it did not require recipients to meet the classic able and available requirements as construed in federal law).

36. *See* Unemployment Compensation—Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations, 68 Fed. Reg. 58,540, 58,541 (proposed Oct. 9, 2003) (to be codified at 20 C.F.R. pt. 604).

37. *See, e.g.*, Tex. H.B. 240, 77th Leg., R.S. (2001); H.B. 2458, 45th Leg., Reg. Sess. (Ariz. 2001); S.B. 500, 33rd Leg., Reg. Sess. (Fla. 2001).

38. *See generally* Curtis Carpenter, *LPA, Inc. v. Herman's Unanswered Question: Is the Clinton Administration's Birth and Adoption Unemployment Compensation Regulation Consistent with the Federal Unemployment Tax Act?*, 37 NEW ENG. L. REV. 63 (2002); Erin P. Drew, Comment, *The Birth and Adoption Compensation Experiment: Did the Department of Labor Go Too Far?*, 106 DICK. L. REV. 367 (2001); Em-

federal-state unemployment system as it relates to the failed BAA-UC experiment and argue that the DOL should have never promulgated the BAA-UC regulation. The regulation was legally flawed from the beginning, and the unemployment compensation system was not an appropriate tool for providing partial-wage replacement to parents who take leave. Furthermore, payment of unemployment compensation under BAA-UC failed to comply with the Federal Unemployment Taxation Act (FUTA), Supreme Court precedent, and the Texas Unemployment Compensation Act (TUCA), and would have depleted an already overtaxed unemployment trust fund. In consideration of the failed BAA-UC program, this Comment asserts that Texas should still adopt a similar method of funding partial wage replacement to parents who take approved leave following the birth or adoption of a child.

Part II of this Comment will discuss the history, development, and purpose of state and federal unemployment insurance law. Part II will also discuss judicial and administrative interpretation, as well as enforcement of the law. Part III will analyze the legality of the failed BAA-UC experiment and its conflict with federal law and United States Supreme Court precedent. Part IV will discuss the Texas Unemployment Compensation System, and why the BAA-UC model state legislation conflicted with state and federal law. Part V will discuss the financial impact that a BAA-UC program would have on the federal-state and Texas unemployment trust funds. Finally, Part VI will propose that, in light of the lessons learned from the failed BAA-UC program, Texas should analyze California's solution to providing temporary partial-wage replacement to families on leave following the birth or adoption of a child and seek an alternate program to fund a paid leave program.

II. THE FEDERAL AND STATE UNEMPLOYMENT COMPENSATION SYSTEM

In 1935, Congress enacted federal unemployment compensation laws in an effort to encourage states to pass similar legislation.[39] The federal government became involved in compensating unemployed workers in response to extensive unemployment in the wake of the

ily A. Hayes, *Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993*, 42 WM. & MARY L. REV. 1507, 1508 (2001); Katherine Elizabeth Ulrich, *Insuring Family Risks: Suggestions for a National Policy of Wage Replacement*, 14 YALE J.L. & FEMINISM 1 (2002).

39. *See* Social Security Act of 1935 §§ 301–303, Pub. L. No. 74-721, 49 Stat. 620 (codified as amended at 42 U.S.C. §§ 501–503 (2000)); *see also* Charles C. Steward Machine Co. v. Davis, 301 U.S. 548, 587–88 (1937) (noting that federal legislation ensured that states adopting unemployment insurance laws would not be placed at an economic disadvantage).

Great Depression.[40] The purpose of the government involvement was to provide benefits to the newly unemployed worker "at a time when otherwise he would have nothing to spend."[41] By maintaining the unemployed worker's purchasing power while he searched for another job, the economy could be stabilized during periods of high unemployment.[42]

The unemployment compensation system is instituted through a cooperative federal-state system in which a federally collected employer tax is used to finance state unemployment insurance compensation programs that must comply with certain minimum federal requirements.[43] Under this system, a nation-wide tax is imposed upon employers for the purpose of funding a nation-wide unemployment trust fund.[44] If state law requires employers to contribute to its own state unemployment fund, as does Texas,[45] federal law permits a ninety percent credit against the federal tax.[46] The taxes collected by the federal government under 26 U.S.C. § 3301 are distributed to states to help offset the costs of administration of the state unemployment compensation laws and for the operation of state employment offices.[47] In every state, unemployment compensation is dispensed by individual state agencies financed and supervised by the federal government.[48]

In order for states to receive the federal tax credits and grants that fund the state unemployment compensation programs, they must receive certification of their programs by the federal government.[49] Although federal law leaves many of these details to the states in administration of their programs, it does impose certain minimum standards designed in part to ensure that each state program is functioning as an unemployment compensation program in "substance as well as name" and that federal funding is only expended "in the administration of genuine unemployment compensation laws."[50] One of

40. Note, *Denial of Unemployment Benefits to Otherwise Eligible Women on the Basis of Pregnancy: Section 3304(a)(12) of the Federal Unemployment Tax Act*, 82 MICH. L. REV. 1925, 1930 n.35 (1984).

41. *Id.* at n.36, (quoting *Economic Security Act: Hearings on S. 1130 Before the Senate Comm. on Finance*, 74th Cong., 99, 119 (1935) (statement of Frances Perkins, Secretary of Labor)).

42. *Id.*

43. 26 U.S.C. § 3301 (2000) (imposing a tax on employers to fund the Unemployment Compensation System); *see* 42 U.S.C. §§ 1101, 1103 (explaining the administration of the Unemployment Compensation System by the federal government).

44. *See* 26 U.S.C. § 3301 (currently imposing an excise tax on all employers covered under 26 U.S.C. § 3306(a) of 6.2% of the total wages as defined in 26 U.S.C. § 3306(b) paid with respect to employment covered under 26 U.S.C. § 3306(c)).

45. *See* TEX. LAB. CODE ANN. § 204.022 (Vernon 1996).

46. 26 U.S.C. § 3302 (2000).

47. *See* 42 U.S.C. § 1101 (2000).

48. *See, e.g.*, Cal. Dep't of Human Res. Dev. v. Java, 402 U.S. 121, 125 (1971).

49. *See* 26 U.S.C. § 3302 (tax credits); *see also* 42 U.S.C. §§ 501–04 (2000) (administration expenses).

50. Steward Machine Co. v. Davis, 301 U.S. 548, 575, 578 (1937).

the standards that states must maintain in order to receive federal funds is the condition that any money collected by the state for unemployment compensation must "be used solely in the payment of unemployment compensation."[51]

Under FUTA, states are free to govern their own unemployment compensation programs within certain guidelines.[52] All states have, at minimum, a three-part test to determine a claimant's eligibility to receive unemployment compensation.[53] "First, all states require claimants to earn a specified amount of wages or to work a specified number of weeks in covered employment during a one-year base period."[54] Second, all states require that the claimant be able and available for work.[55] Third, claimants who qualify under the first two prongs of the requirements may be held ineligible because of the reason causing their unemployment.[56] This three-part test stems from a long-standing interpretation of FUTA as well as the legislative history surrounding the original Social Security Act.[57] Some of "the most common reasons for disqualification [under the test] include voluntarily leaving the job without good cause, discharge for misconduct, and refusal of suitable work."[58] In summary, all states require that the claimants be monetarily eligible, which is determined by examining the wages or number of weeks worked in the base period, as well as meet the non-monetary requirements of having lost their job involuntarily or by voluntarily leaving for good cause connected with the

51. 26 U.S.C. § 3304(a) (2000); *see also* 42 U.S.C. § 503(a)(5).

52. Wimberly v. Labor & Indus. Relations Comm'n, 479 U.S. 511, 515 (1987) (holding that apart from minimum standards set forth in 26 U.S.C. § 3304(a), states have discretion in governing their unemployment insurance compensation programs); *see also Steward Machine Co.*, 301 U.S. at 577–78, 594–95. However, states may not deny a claimant compensation when the claimant is enrolled in a state approved training program, 26 U.S.C. § 3304(a)(8), or on the basis of pregnancy or termination of pregnancy. *Id.* § 3304(12); *Wimberly*, 479 U.S. at 515–16 (holding that Congress intended that pregnant women not be singled out under 26 U.S.C. § 3304(a)(12)).

53. *See Wimberly*, 479 U.S. at 515.

54. *Id.* In most states, the base period is the first four out of the last five completed calendar quarters immediately preceding the filing of an unemployment claim—each quarter equaling three calendar months. Some states allow claimants to use an alternate base period that includes more recent earnings. *Id. See* Drew, *supra* note 38, at 367–68; *see also* Texas Workforce Comm'n Appeals Policy and Precedent Manual, § 1.4 (Definitions), *at* http://www.twc.state.tx.us/ui/appl/app_manual.html (last revision June 19, 2003) (on file with the Texas Wesleyan Law Review); EMPLOYMENT & TRAINING ADMIN., U.S. DEP'T OF LABOR, STATE UNEMPLOYMENT INSURANCE § 305, *at* http://atlas.doleta.gov/unemploy/pdf/2001ch305.pdf (last visited Nov. 5, 2003) (on file with the Texas Wesleyan Law Review).

55. *Wimberly*, 479 U.S. at 515.

56. *See id.*

57. *See Denial of Unemployment Benefits to Otherwise Eligible Women on the Basis of Pregnancy: Section 3304(a)(12) of the Federal Unemployment Tax Act*, *supra* note 40, at 1929 nn.21–24 (explaining the meaning, purpose, and background of each part of the three-part test for unemployment insurance qualification).

58. *Id.* at 1929 nn.25–28.

work, and that the claimants be actively engaged in job search activities and be able and available to work.[59]

III. Analysis of the Legality of the BAA-UC Experiment

A. *The BAA-UC Experiment's Conflict with the Plain Meaning of Federal Unemployment Compensation Law*

Under FUTA, a state's unemployment compensation program will only be certified by the DOL if the state's trust fund is used solely for the payment of *unemployment* compensation.[60] Accordingly, in order for a state to pay unemployment compensation to claimants, the claimants must be *unemployed* (jobless), able and available to work, and separated from their last job either through no fault of their own (involuntary) or have good cause connected to the job for leaving voluntarily.[61]

In *Moskal v. United States*,[62] the U.S. Supreme Court held that when an agency interprets a statute, it must normally "look first to its language, giving the 'words used' their 'ordinary meaning.'"[63] In ordinary usage, *unemployment* indicates a condition in which a person does not have a job.[64] Black's Law dictionary, defines unemployment as "[t]he state or condition of being unemployed."[65] The DOL's own Bureau of Labor Statistics uses the term "*unemployed persons*" to describe persons who have no job.[66] The DOL also recognized another definition of "*unemployed*" prior to promulgation of BAA-UC. The Current Population Survey (CPS) represents those who are "out of work who are seeking jobs" including: "all jobseekers, regardless of whether they lost or left previous jobs, whether they were reentering the labor force or entering it for the first time, whether their labor force attachment could be described as strong or tenuous, and whether their period of unemployment was [one] week or several

59. *See* Marice Emsellem et al., Failing the Unemployed: A State by State Examination of Unemployment Systems 4–5 (2002).

60. *See* 26 U.S.C. § 3304(a)(4) (2000); *see also* 42 U.S.C. § 503(a)(5) (2000) (permitting certification of an unemployment compensation program only if it provides for "[e]xpenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation, exclusive of expenses of administration").

61. *See* Marice Emsellem et al., Failing the Unemployed: A State by State Examination of Unemployment Systems 4–5 (2002).

62. 498 U.S. 103 (1990).

63. *Id.* at 108 (citations omitted); *see also* Metro. Stevedore Co. v. Rambo, 515 U.S. 291, 295 (1995) (noting that judicial inquiry is all but finished when a statute is clear).

64. *See* The American Heritage Dictionary 1320 (2d College ed. 1982).

65. Black's Law Dictionary 1529 (7th ed. 1999).

66. U.S. Census Bureau, U.S. Dep't of Commerce, Statistical Abstract of the United States § 13 (1998) (noting that the Bureau of Labor Statistics defines "unemployed persons" as *inter alia*, "all civilians who had no employment during the reference week").

years."[67] Accordingly, it is clear that when FUTA refers to "*unemployment*," it is referring to the payment of compensation to an individual who is jobless.

Individuals who take approved leave following the birth or adoption of a child have a job they voluntarily leave, and because the leave is approved, they are usually guaranteed their job back after conclusion of the leave.[68] The DOL argued that this is similar to claimants who have lost their jobs under a temporary layoff.[69] However, there is a major difference between these two situations. Claimants that temporarily lose their jobs due to a temporary layoff are separated from their last jobs *involuntarily*, as opposed to claimants who are temporarily out of work due to a *voluntary* leave of absence to care for a child.[70] Also, employees on a temporary layoff are not on an approved leave at the request of the employee based on their social situation.[71] They are temporarily laid off based on the employer's business situation.[72] Hence, these individuals are truly temporarily jobless. Furthermore, if the business situation does not change, employees on temporary layoff may not be called back to work.[73]

It is difficult to reconcile payments for birth and adoption with the requirement that compensation be "used solely in the payment of unemployment compensation."[74] Individuals who voluntarily take leave from their jobs to care for a newborn or adopted child are not jobless. They are on approved leave.[75] The DOL did not cite any authority in its BAA-UC NPRM supporting the proposition that employees on approved leave are unemployed for purposes of receiving unemployment compensation.[76]

Individuals who take approved leave to care for a newborn or adopted child are analogous to individuals who have an expectation of periods without wages. For example, school teachers between school years and athletes during the off-season are not entitled to receive

67. Stephen A. Wanderer & Thomas Stengle, *Unemployment Insurance: Measuring Who Receives It*, MONTHLY LAB. REV. July 1997, at 15, 15.

68. *See* Birth and Adoption Unemployment Compensation: Proposed Rule, 64 Fed. Reg. 67,972, 69,977 (proposed Dec. 3, 1999) (to be codified at 20 C.F.R. pt. 604).

69. *See* Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37,210, 37,213 (June 13, 2000) (to be codified at 20 C.F.R. pt. 604).

70. *See id.*; Birth and Adoption Unemployment Compensation, 64 Fed. Reg. at 69,977.

71. *See* Birth and Adoption Unemployment Compensation, 65 Fed. Reg. at 37,213.

72. *See id.*

73. *See id.*

74. *See* 26 U.S.C. § 3304(a)(4) (2000); Birth and Adoption Unemployment Compensation, 64 Fed. Reg. at 67,972.

75. *See* Birth and Adoption Unemployment Compensation, 64 Fed. Reg. at 67,972.

76. *Id.*

benefits under FUTA.[77] The act specifically bars these individuals from claiming unemployment during these periods.[78]

B. *The BAA-UC Experiment Did Not Require That a Claimant be "Able and Available" for Work*

One longstanding requirement of a claimant's ability to receive unemployment compensation is that the claimant be "able and available" to work.[79] Individuals who take leave to care for a newborn or adopted child are not available for work. They are also not required to register with the local employment office.[80] The DOL even conceded that a payment of benefits under BAA-UC would be a "departure from past interpretations."[81] As far back as 1939, the Social Security Board interpreted FUTA to require that unemployment funds only be paid to those "who are able to work and are unemployed by reason of lack of work."[82] As recently as 1997, the DOL denied Vermont's request to use unemployment funds to pay individuals while out on family and medical leave.[83] Furthermore, the DOL conceded in its repeal of the BAA-UC regulation that the federal able and available requirement is used to test whether claimants involuntarily did not work for any week due to the unavailability of work.[84]

Since the BAA-UC experiment did not examine the federal able and available requirement from this perspective, it permitted the payment of unemployment insurance to individuals for whom suitable work may exist. Thus, it contradicted the basic purpose of the able and available requirement and established a regulation that was later conceded to be unlawful.[85]

Individuals who take leave to care for a newborn or adopted child are not available for work. The DOL argued that it had made exceptions to the able and available requirement in the past by broadening its interpretation of the requirement.[86] The DOL specifically mentioned approved training, temporary layoff, illness, and jury duty in its

77. 26 U.S.C. § 3304(a)(6)(A), (a)(13).

78. *Id.*

79. *See* Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37,210 (June 13, 2000) (to be codified at 20 C.F.R. pt. 604); *see also* Wimberly v. Labor & Indus. Relations Comm'n, 479 U.S. 511, 515 (1987) (holding that claimants must be able and available to work to be eligible to receive unemployment compensation).

80. Birth and Adoption Unemployment Compensation, 65 Fed. Reg. at 37,217.

81. Birth and Adoption Unemployment Compensation, 65 Fed. Reg. at 37,213.

82. Unemployment Compensation—Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations, 67 Fed. Reg. 72,122, 72,123 (proposed Dec. 4, 2002) (to be codified at 20 C.F.R. pt. 604).

83. Birth and Adoption Unemployment Compensation, 65 Fed. Reg. at 37,213.

84. Unemployment Compensation—Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations, 68 Fed. Reg. 58,540 (proposed Oct. 9, 2003) (to be codified at 20 C.F.R. pt. 604).

85. *Id.*

86. *See id.*

BAA-UC NPRM.[87] Payment of benefits to claimants under each of these scenarios or circumstances differs significantly from payment of benefits to claimants out of work due to the adoption or birth of a child.

The DOL did not have to "interpret" the able and available requirement of a claimant in an approved state training program. FUTA states "compensation shall not be denied to an individual for any week because he is in training with the approval of the State agency (or because of the application, to any such week in training, of State law provisions relating to *availability* for work, active search for work, or refusal to accept work)."[88] This FUTA provision clearly supports the proposition that claimants must be able and available to work.[89] By not denying individuals benefits simply because they are in a state approved training plan, this exemption assumes the existence of an able and available requirement because there would be no need for the exemption without the requirement. Analyzing this section alone leads to the conclusion that states are required to impose an availability requirement.[90] Furthermore, the DOL does not have to interpret this requirement because it is clearly stated in the law.[91]

The DOL also argued that the other three interpretations, which include temporary layoff, illness, and jury duty, are situations "in which the classic definitions of . . . [able and available] should not apply."[92] The Department's position on the departure from the classic definition was based on what it called a "natural progression evolving from our prior interpretations" based on the "realities of working life."[93] It also admitted that able and available is a natural test of a person's attachment to the labor force, but a strict interpretation is not warranted in situations such as approved training, temporary layoff, and illness because people can still be attached to the labor market in these situations.[94] However, as mentioned above, there was no need for the DOL to muddy the waters by stating that it had adopted a "flexible" interpretation of able and available in approved training circumstances.[95] The rule is clearly stated in FUTA.[96]

Illness, temporary layoff, and jury duty are situations in which individuals are still considered able and available for work because they

87. *Id.*

88. 26 U.S.C. § 3304(a)(8) (2000) (emphasis added).

89. *See id.*

90. *See id.*

91. *See id.*

92. *See* Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37,210, 37,213 (June 13, 2000) (to be codified at 20 C.F.R. pt. 604).

93. *Id.*

94. *Id.*

95. *Id.*

96. *See* 26 U.S.C. § 3304(a)(8).

are still "attached to the workforce."[97] Comparing a person in these circumstances with a person who voluntarily leaves employment due to the birth or adoption of a child results in a very attenuated connection. Individuals out of work for jury duty or temporary layoff are still able and available for work following their temporary absence.[98] Many states require that when individuals are out of work due to a temporary layoff, they must be ready and able to return to work when called back by their employer.[99] Many states also place a limit on the number of weeks an employee can be out of work due to a temporary layoff before he will be compelled to search for work.[100] It does not make sense to require a person out of work due to a temporary layoff to search for work, or be available for other work because it is likely the employee has a recall date. Compelling individuals to be able and available for employment outside their "current" employer would be counterproductive from an economic standpoint because these individuals are more than likely still attached to the workforce through their current job. Likewise, individuals out of work due to jury duty are also required to return to their current employer as soon as their service is complete. Compelling these individuals to be able and available for other work would be counterproductive as well as illogical. Again, the DOL muddied the waters by referencing flexible requirements and loose interpretations of able and available.

Perhaps the best argument the DOL made for a waiver of the able and available requirement for birth and adoption was the agency's interpretation of able and available as it relates to illness.[101] The DOL argued that terminating or denying individuals compensation simply because they are unable to work for a short amount of time due to illness would deprive the individuals of benefits "without regard to the realities of working life."[102] However, Texas does not disqualify individuals from receiving benefits because they left work due to a medically verifiable illness, but will hold the individuals ineligible to receive payment until they are physically able to return to work or

97. Birth and Adoption Unemployment Compensation, 65 Fed. Reg. at 37,213.

98. *See id.*

99. *See, e.g.*, ARK. CODE ANN. § 11-10-507(3)(E) (Michie 1987 & Supp. 2002) (ten weeks); DEL. CODE ANN. tit. 19, § 3314(3) (1995) (forty-five days in general and sixty-three days for "employers who close down for annual model changes or retooling"); MICH. COMP. LAWS ANN. § 421.28(1)(a) (West 2001) (forty-five days); MO. ANN. STAT. § 288.040(2)(b) (West 1993 & Supp. 2003) (eight weeks); N.M. STAT. ANN. § 51-1-5(A) (Michie 1978) (four weeks); OHIO REV. CODE ANN. § 4141.29(A)(4a) (Anderson 2001) (forty-five days); S.D. CODIFIED LAWS § 47:06:04:11 (Michie 1995) (ten weeks).

100. *Id.*

101. *See* Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37,210, 37,213 (June 13, 2000) (to be codified at 20 C.F.R. pt. 604).

102. *See id.*

released to work from their doctor.[103] In other words, the individuals will be held to have left work for good cause due to no fault of their own, but will not be able to receive compensation until they are able and available to work.[104] The same would be true of individuals who left work due to the birth or adoption of a child. Even if it is held that leaving work under these circumstances is for good cause, the individuals are still unable to meet the able and available for work requirement, and thus, using the same rationale, would be ineligible to receive payment until able and available.

There are also other FUTA provisions that similarly assume that individuals eligible for unemployment compensation must be able to work. For example, one provision of the act states that "compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work" if a position is vacant due to a strike, lockout, or other labor dispute; if wages offered are substantially less than prevailing wages for similar work; or if the position requires joining or resigning from a union.[105] This FUTA provision assumes that claimants seeking unemployment compensation must usually accept suitable work.[106] In other words, claimants seeking unemployment compensation must be "available" for work.[107] The FUTA provision requiring unemployment compensation to be paid "solely through public employment offices"[108] lends weight to the notion that unemployment compensation goes hand in hand with an individual's availability to work because the purpose of the public employment offices is to help individuals find jobs.[109] Hence, the statutory context of FUTA and related acts confirms that one of the requirements for claimants to receive unemployment compensation is that they remain available for work.

C. *The BAA-UC Experiment Did Not Require That Claimants be Separated from Their Last Jobs Involuntarily, or Through No Fault of Their Own*

The final requirement of unemployment is separation from the claimants' last job through no fault of their own or involuntarily.[110]

103. *See* TEX. LAB. CODE ANN. § 207.045(d) (Vernon Supp. 2003) (stating that an individual who is "available" for work may not be disqualified for benefits because the individual left work due to a medically verifiable illness).

104. *See id.* § 207.045 (meaning that the claimant would be deemed to have left his or her job voluntarily for good cause, but would be ineligible to receive benefits until he or she is "able" to work).

105. 26 U.S.C. § 3304(a)(5) (2000).

106. *See id.*

107. *See id.*

108. *Id.* § 3304(a)(1); *accord* 42 U.S.C. § 503(a)(2), (5) (2000).

109. *See* Birth and Adoption Unemployment Compensation, 64 Fed. Reg. 67,972 (proposed Dec. 3, 1999) (to be codified at 20 C.F.R. pt. 604).

110. *See* Wimberly v. Labor & Indus. Relations Comm'n, 479 U.S. 511, 515 (1987).

Most states require that in order for claimants to qualify for unemployment compensation, they must have separated from their last job due to no fault of their own or involuntarily.[111] However, there are variations from state to state on what constitutes good cause and when separation from a job is involuntary.[112] By extending unemployment compensation to parents who leave work voluntarily after the birth or adoption of a child,[113] the DOL encouraged state legislation that is inconsistent with basic unemployment requirements. Individuals that seek and accept approved leave to care for a newborn or adopted child are not involuntarily out of work.

This voluntary versus involuntary condition can be best described by discerning who initiates the employment separation.[114] The initiating party is the party that institutes the job separation.[115] For example, individuals who leave work to care for a child are the parties who initiate the separation because they have *voluntarily* left work due to a family situation.[116] Conversely, an employer who terminates or lays off an employee based on a business decision or situation would make the employer the initiating party, thus deeming the individual's separation *involuntary*.[117] Though there are situations when a voluntary separation is deemed to be for "good cause" and compensable, these situations are the exception rather than the rule.[118] For example, the Texas Workforce Commission has determined that for a voluntary separation to be compensable, the reason for separation from employment must have been urgent, compelling, and so necessary as to make separation involuntary.[119]

One could argue that the birth or adoption of a child falls under this "urgent and compelling" exception to the involuntary rule. Certainly, the bringing of a child into the world or into a new family creates immediate and compelling needs. However, the birth and adoption of a child should not be construed under unemployment compensation law as to make separation "involuntary" thereby placing the burden of childcare on employers. A parent who leaves work due to the birth or adoption of a child is clearly leaving work on a voluntary basis. Creating an exception to a longstanding unemployment requirement

111. *See id.*
112. *See id.*
113. *See* Birth and Adoption Unemployment Compensation, 64 Fed. Reg. at 67,977.
114. *See* TEXAS WORKFORCE COMM'N, ESPECIALLY FOR TEXAS EMPLOYERS 71, *at* http://www.twc.state.tx.us/news/efte/tocmain.html (last revision June 19, 2003) (on file with the Texas Wesleyan Law Review).
115. *See id.*
116. *See id.*
117. *See id.*
118. *See id.* at 116.
119. *See* TEXAS WORKFORCE COMM'N, PARTICULARLY FOR EMPLOYERS: UNEMPLOYMENT COMPENSATION AND TAXES, *at* http://www.twc.state.tx.us/ui/bnfts/employer2.html (last revision June 19, 2003) (on file with the Texas Wesleyan Law Review).

undermines the purpose of unemployment and directly conflicts with FUTA.

D. *The BAA-UC Experiment Was Not Consistent with the Supreme Court's Interpretation of Federal Unemployment Compensation Law*

The Supreme Court recognized and approved the involuntariness requirement of the Federal Unemployment Compensation System in *Baker v. General Motors Corp.*,[120] the leading case in the area of unemployment compensation and involuntariness requirements. The Court held that one of the fundamental principles of unemployment is the involuntary nature of a claimant's separation.[121] In this case, the Court found that a Michigan statute, which denied unemployment compensation to employees who participated in financing a strike, was consistent with federal unemployment laws.[122] The Court also characterized the importance of the distinction between involuntary and voluntary separation from the job as the "key to eligibility."[123] The Court concluded: "The involuntary character of the unemployment is thus generally a necessary condition to eligibility for compensation."[124] Therefore, the DOL had no authority to overrule the Supreme Court's interpretation that voluntary unemployment will generally bar payment of compensation.[125]

In summary, the DOL did not have the authority to publish the BAA-UC rule because it conflicted with the plain meaning of the Federal Unemployment Compensation Act. BAA-UC did not require that claimants be without a job, separated from their jobs on an involuntary basis or due to no fault of their own, and able and available to work. The BAA-UC rule also conflicted with long-standing interpretations of unemployment compensation law by the United States Supreme Court and the DOL.

IV. The Texas Unemployment Compensation System and the BAA-UC Experiment

On February 8, 2001, Texas Representative Glen Lewis introduced House Bill 240 (H.B. 240) into the 77th Texas Legislature.[126] H.B. 240 was based on the model state legislation contained in the BAA-UC

120. 478 U.S. 621, 633 (1986).
121. *See id.*
122. *See id.* at 637–38.
123. *Id.* at 633 (quoting Ohio Bureau of Employment Servs. v. Hodory, 431 U.S. 471, 482–83 (1977)).
124. *Id.*
125. *See generally* Lechmere, Inc. v. NLRB, 502 U.S. 527, 536–37 (1992) (noting that "once [the court has] determined a statute's clear meaning, [it] adhere[s] to that determination under the doctrine of stare decisis, and [it] judge[s] an agency's later interpretation of the statute against [its] prior determination").
126. Tex. H.B. 240, 77th Leg., R.S. (2001).

Final Rule.[127] The proposed legislation would have amended Chapter 207 of the Texas Labor Code[128] by adding section 207.026.[129] This section is notably similar to the proposed model state legislation in the BAA-UC Final Rule.[130] The stated purpose of the bill was to "[e]xtend[ ] eligibility for unemployment benefits to persons who voluntarily leave the workforce to care for a child in the first year following the child's birth or adoption."[131] Despite the best efforts of the legislature, however, Texas H.B. 240 never made it out of the House of Representatives.[132]

This part of the Comment will examine the BAA-UC experiment on a state level and argue that not only did the proposed state legislation not conform with federal law, it also did not conform with TUCA, and a paid leave program that relies on the unemployment trust fund is economically and socially inappropriate for passage into Texas law.

A. *The History of the Texas Workforce Commission*

The Texas Legislature passed the Texas Unemployment Compensation Act in October of 1936.[133] This Act was a direct result of the Federal Social Security Act,[134] which established a federal-state cooperative unemployment compensation system,[135] and established the Texas Unemployment Compensation Commission.[136] Payroll taxes on covered employers began on January 1, 1936[137] with compensation to unemployment recipients beginning on January 1, 1938.[138]

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127. *See id.*; Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37,210, 37,225 (June 13, 2000) (to be codified at 20 C.F.R. pt. 604) (noting the "Model State Legislation" format).

128. *See* TEX. LAB. CODE ANN. §§207.001–.101 (Vernon 1996).

129. Tex. H.B. 240, 77th Leg., R.S. (2001).

130. *See id.*; Birth and Adoption Unemployment Compensation, 65 Fed. Reg. at app. A.

131. HOUSE COMM. ON ECONOMIC DEVELOPMENT, BILL ANALYSIS, Tex. H.B. 240, 77th Leg., R.S. (2001).

132. *See* Tex. H.B. 240, 77th Leg., R.S. (2001), *at* http://www.capitol.state.tx.us (on file with the Texas Wesleyan Law Review).

133. Texas Unemployment Compensation Act, 44th Leg., 3rd C.S., ch. 482, § 2, 1936 Tex. Gen. Laws 1993; John G. Johnson, *Texas Employment Commission*, in TEXAS STATE HISTORICAL ASS'N, THE HANDBOOK OF TEXAS ONLINE, *at* http://www.tsha.utexas.edu/handbook/online/articles/view/TT/mdt13.html (last updated Dec. 4, 2002) (on file with the Texas Wesleyan Law Review).

134. *See* John G. Johnson, *Texas Employment Commission*, in TEXAS STATE HISTORICAL ASS'N, THE HANDBOOK OF TEXAS ONLINE, *at* http://www.tsha.utexas.edu/handbook/online/articles/view/TT/mdt13.html (last updated Dec. 4, 2002) (on file with the Texas Wesleyan Law Review).

135. *See id.*

136. *See* Texas Unemployment Compensation Act, 44th Leg., 3d C.S., ch. 482, § 2, 1936 Tex. Gen. Laws 1993.

137. John G. Johnson, *Texas Employment Commission*, in TEXAS STATE HISTORICAL ASS'N, THE HANDBOOK OF TEXAS ONLINE, *at* http://www.tsha.utexas.edu/handbook/online/articles/view/TT/mdt13.html (last updated Dec. 4, 2002) (on file with the Texas Wesleyan Law Review).

138. *Id.*

The unemployment agency almost ended in 1983 by sunset legislation because the legislature could not agree on a new bill to continue the existence of the agency during the regular session, and thus a special session was needed.[139] At nearly the same time, the unemployment fund went bankrupt, requiring a federal loan to bail it out.[140] Additionally, federal budget cuts forced the agency into laying off employees and closing agency offices in an effort to cut costs.[141] Governor William Clements went so far as to propose that unemployed Texans would be better served by finding jobs in newspaper ads, rather than the Texas Employment Commission.[142] In 1995, the Texas Legislature enacted welfare and workforce reform in House Bill 1863,[143] establishing the Texas Workforce Commission (TWC) and merging employment and training programs as well as the administration of unemployment insurance.[144]

B. *The Texas Unemployment Compensation Act*

TUCA is codified in the Texas Labor Code, Title IV, Subtitle A.[145] The act sets forth three main qualifying criteria for claimants to qualify to receive unemployment compensation: (1) past wages (monetary determination);[146] (2) job separation;[147] and (3) ongoing availability and work search criteria.[148]

To establish a payable claim, a claimant must have earned enough wages in the qualifying base period.[149] Generally, the wages paid to a claimant during the first four out of the last five working quarters (each quarter equaling three months) establishes the claimant's base period.[150] A claimant totally unemployed during a benefit period is entitled to weekly benefits for the benefit period at a rate of 1/25 of

139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *See* Act of May 26, 1995, 74th Leg., R.S., ch. 655, 1995 Tex. Gen. Laws 3543 (stating that this is an "act relating to eligibility for and the provision of services and programs for needy people, including children; to assistance in becoming or remaining self-dependent; and to the responsibility of parents and others to assist needy people, including children, in becoming or remaining self-dependent"); *see also* Act of May 28, 1995, 74th Leg., R.S., ch. 655, § 11.75, 1995 Tex. Gen. Laws 3543, 3621–22 (renaming the Texas Employment Commission to the Texas Workforce Commission).
144. *See* Act of May 28, 1995, 74th Leg., R.S., ch. 655, § 11.75, 1995 Tex. Gen. Laws 3543, 3621–22.
145. *See* TEX. LAB. CODE ANN. § 201.001 (Vernon 1996).
146. *See id.* § 207.021(a)(6).
147. *See id.* § 207.021(a)(7).
148. *See id.* § 207.021(a)(1), (3)–(4).
149. *Id.* § 207.021(a)(5); *see id.* § 201.011(1) (Vernon 1996 & Supp. 2002).
150. *Id.* § 201.011(1)(A), (6) (Vernon 1996 & Supp. 2003) (under section 201.011(1)(B), an alternate base period is allowed for claimants who are precluded from working during the base period under section 201.001(1)(A) due to a medically verifiable illness).

the highest quarter earnings in the claimant's base period.[151] This weekly benefit amount may not exceed the maximum benefit amount or fall below the minimum benefit amount established under subsection (a) of section 207.002.[152] "The maximum weekly benefit amount is 47.6% of the average weekly wage in covered employment in this state."[153] The minimum amount is established at 7.6% of the average wages in covered employment.[154]

In addition to meeting the monetary requirements under § 207.002, a claimant must meet the non-monetary requirements of job separation, ongoing availability, and work search requirements.[155] For claimants to qualify for benefits, they may not have been "discharged for misconduct connected with [their] last work."[156] Claimants will also be disqualified if they voluntarily left their job without good cause.[157] Claimants must also be able and available to apply for, accept, or return to work.[158]

C. *The Model State Legislation's Conflict with the Texas Unemployment Compensation Act*

The BAA-UC model state legislation conflicted with TUCA because claimants receiving benefits under BAA-UC would not have had to meet the longstanding basic requirements of TUCA, such as job separation and the able and available requirement.[159] Texas law disqualifies claimants who leave work voluntarily to care for a child that is not the result of a medically verifiable illness.[160]

Under section 207.45(d)(1), a claimant will not be disqualified for benefits because the claimant voluntarily left work to care for a minor child with a medically verifiable illness if reasonable alternative care was not available to the child, and the employer refused to allow the claimant a reasonable amount of time off of work to care for the child.[161] However, that same claimant must still meet the able and available requirement under TUCA[162] and would not receive benefits until the claimant was able and available to work and seek work.[163] By enacting BAA-UC legislation, claimants leaving work due to the birth or adoption of a child would not have had to meet the able and

151. *Id.* § 207.002(a) (Vernon 1996 & Supp. 2003).
152. *Id.*
153. *Id.* § 207.002(b) (Vernon Supp. 2003).
154. *Id.*
155. *See id.* § 207.021(a)(1), (4), (7).
156. *Id.* § 207.044(a).
157. *Id.* § 207.045(a) (Vernon 1996 & Supp. 2003).
158. *See id.* § 207.047(a)(1)–(3).
159. *See* Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37,210, 37,213, 37,217 (June 13, 2000) (to be codified at 20 C.F.R. pt. 604).
160. *See* TEX. LAB. CODE ANN. § 207.045(d)(1) (Vernon 1996).
161. *Id.*; *see also* § 207.045(e).
162. TEX. LAB. CODE ANN. § 207.021 (Vernon 1996).
163. *Id.* § 207.045(d)(1).

available requirement under TUCA[164] and could have received compensation at the employer's expense while remaining at home.[165] However, claimants leaving work to care for an ill child would not have received compensation under BAA-UC.[166]

1. The Model State Legislation's Conflict with TUCA Job Separation Requirements

TUCA has carved out very few exceptions to the requirement that claimants must have been separated from their jobs involuntarily. The main exception, and probably the most open to interpretation, is that claimants may quit their jobs as long as they quit for good cause connected with the job.[167] Claimants who quit their jobs due to a medically verifiable illness, illness of a minor child, or pregnancy are also not disqualified from receiving benefits.[168] However, claimants seeking unemployment compensation under these circumstances are ineligible for payment until they are able and available to work.[169]

TUCA also allows claimants to quit their job in order to move with a spouse.[170] However, these individuals are held disqualified from a period of not less than six weeks and not more than twenty-five weeks,[171] and again, they must be able and available to work before they are eligible to receive benefits.[172]

Although Texas does recognize certain domestic situations as exceptions from the normal involuntary job separation requirement, such as the provision allowing qualification of individuals who quit to move with their spouse[173] and the exception for parents who must quit work to care for an ill or injured minor child,[174] it does draw a line in the sand. In *Meggs v. Texas Employment Commission*,[175] a Fort Worth appellate court upheld a disqualification of benefits under TUCA section 207.045, where a wife left her last work to care for her sick husband, because her leaving was not good cause connected with the work.[176] Although this case was decided in 1950, it is still used as

164. *Id.* § 207.045(d)(4); Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37,210, 37,213 (June 13, 2000) (to be codified at 20 C.F.R. pt. 604).
165. *See* Birth and Adoption Unemployment Compensation, 65 Fed. Reg. at 37,211.
166. *Id.*
167. *See* TEX. LAB. CODE ANN. § 207.045(a) (Vernon 1996).
168. *Id.* § 207.045(d)(1)–(4).
169. *See id.* § 207.021(a)(3)–(4).
170. *Id.* § 207.045(c).
171. *See id.*
172. *See id.* § 207.021(a)(3)–(4).
173. *Id.* § 207.045(c).
174. *Id.* § 207.045(d)(1), (e).
175. 234 S.W.2d 453, 454 (Tex. Civ. App.—Fort Worth 1950, writ ref'd) (holding that a compensable claim for unemployment benefits must bear "some relation to or connection with the employment which the employee has lost").
176. *Id.*

precedent for administrative rulings made by adjudication officers of the Texas Workforce Commission and is still a part of its published precedent manual.[177] It is clear from this ruling, as well as the fact that the Texas Workforce Commission still includes it in its precedent manual, that Texas courts and the Texas Workforce Commission are committed to limiting domestic exceptions to the "voluntariness" requirement of qualification for unemployment compensation. If the legislature had deemed BAA-UC claimants analogous to an employee who quits to move with a spouse, or better yet, analogous to an employee who quits to care for a child with a medically verifiable illness, then one alternative would have been to hold that these claimants have left work for "good cause," yet hold them ineligible until they are able and available to work. This would have been more consistent with current Texas unemployment law and would remedy BAA-UC's conflict with the able and available requirement.

2. The Model State Legislation's Conflict with TUCA's Able and Available Requirements

TUCA provides that individuals are not eligible to receive benefits unless they are "able to work" and "available for work."[178] Texas Workforce Commission Appeal No. 6315-CA-58 holds that:

> [A] claimant may be considered available for work if he is ready, willing, and able to accept any suitable work and if his employability is reasonably free from handicaps, conditions, or restrictions, self-imposed or otherwise, and there remains after considering such handicaps, conditions, or restrictions, a reasonable expectancy that he might secure and accept such suitable work.[179]

TUCA, like FUTA, carves out an exception to the able and available requirement for individuals enrolled in state approved training programs.[180] Under this exception, individuals will not be denied benefits if they are enrolled in a commission-approved training program,[181] and they will not be required to be "able" to work and "available" for work.[182]

Other than the approved training exception, individuals must meet the able and available requirement as set forth in TUCA.[183] Texas courts have strictly interpreted this able and available requirement in

177. *See* Texas Workforce Comm'n Appeals Policy and Precedent Manual § 207.045 (appendix), at http://www.twc.state.tx.us/ui/appl/app_manual.html (last revision June 19, 2003) (on file with the Texas Wesleyan Law Review).

178. *See* TEX. LAB. CODE ANN. § 207.021(a)(3)–(4) (Vernon 1996).

179. Texas Workforce Comm'n Appeals Policy and Precedent Manual § 5.00(2), Appeal No. 6315-CA-58, *at* http://www.twc.state.tx.us/ui/appl/app_manual.html (last revision June 19, 2003) (on file with the Texas Wesleyan Law Review).

180. *See* TEX. LAB. CODE ANN. §§ 207.022, 207.023(b) (Vernon 1996).

181. *See id.* § 207.022(a).

182. *See id.* § 207.022(b).

183. *Id.* § 207.021.

decisions regarding an individual's "ability" to work and "availability" for work. In *Texas Employment Commission v. Hansen*,[184] the Texas Supreme Court held that any claimants who, for personal reasons, restrict their own availability to work and effectively detach themselves from the labor market, are deemed not available to work under TUCA section 207.021(a)(4), and are therefore ineligible to receive unemployment benefits.[185] This holding applies irrespective of whether the claimant is a student and whether or not the wage credits in the base period were earned in full-time or part-time employment.[186] Additionally, in *Texas Employment Commission v. Holberg*,[187] the Texas Supreme Court held that where a claimant's only work search activity in a four to five month period was to register at a union hall and contact three or four potential employers, the claimant was ineligible for work under TUCA section 207.021(a)(4), and thus ineligible to receive benefits.[188] The court also affirmed that the agency could require a search for work under the broad statutory direction of TUCA section 207.021(a)(4).[189]

The Texas Workforce Commission has also strictly interpreted the able and available requirement in its Appeals Policy and Precedent Manual.[190] This manual contains decisions of hearing officers and court cases that are binding on all agency decisions of monetary and non-monetary eligibility.[191] The following cases are on point, and illustrate that the proposed model state legislation was in direct conflict with TUCA provisions for the able and available requirement.

In Appeal No. 1894-CA-77, the TWC held that due to the claimant caring for her young child, she had not been actively seeking work since March 15, 1977, and thus was held ineligible from that date forward under TUCA section 207.021(a)(4).[192] In Appeal No. 4365-CSUA-76,[193] the TWC held that because the claimant could only work four hours per day since the filing of her initial claim through the date

184. 360 S.W.2d 525 (Tex. 1962).
185. *Id.* at 527.
186. *Id.* at 530.
187. 440 S.W.2d 38 (Tex. 1969).
188. *Id.* at 42–43.
189. *See id.* at 41–42.
190. *See* Texas Workforce Comm'n Appeals Policy and Precedent Manual, *at* http://www.twc.state.tx.us/ui/appl/app_manual.html (last revision June 19, 2003) (on file with the Texas Wesleyan Law Review).
191. *See* Texas Workforce Comm'n Appeals Policy and Precedent Manual (overview of the manual), *at* http://www.twc.state.tx.us/ui/appl/app_manual.html (last revision June 19, 2003) (on file with the Texas Wesleyan Law Review).
192. Texas Workforce Comm'n Appeals Policy and Precedent Manual § 155.10, Appeal No. 1894-CA-77, *at* http://www.twc.state.tx.us/ui/appl/app_manual.html (last revision June 19, 2003) (on file with the Texas Wesleyan Law Review) (citing TEX. LAB. CODE ANN. § 207.021(a)(4) (Vernon 1996)).
193. Texas Workforce Comm'n Appeals Policy and Precedent Manual § 155.10(2), Appeal No. 4365-CSUA-76, *at* http://www.twc.state.tx.us/ui/appl/app_manual.html (last revision June 19, 2003) (on file with the Texas Wesleyan Law Review).

of her return to work, due to the need to care for her children, she was unavailable for work and ineligible for benefits under TUCA section 207.021(a)(4).[194] In Appeal No. 458-CSUA-76, the Commission held that the claimant was available for work under TUCA section 207.021(a)(4) because prior to filing her initial claim, she contacted a child care facility concerning arrangements for her two young children and could have actually placed the children at the facility upon one day's notice.[195]

As the cases above illustrate, Texas courts and the Texas Workforce Commission have consistently and strictly interpreted the able and available eligibility requirement of TUCA. Although an enactment of the proposed model legislation of BAA-UC would have added provisions to the Texas Labor Code,[196] effectively carving out exceptions to the able and available requirement, these exceptions would have directly conflicted with the remaining TUCA provisions of "able and available" resulting in an unemployment compensation system with an exception bigger than the act.

V. THE MODEL STATE LEGISLATION'S EFFECT ON THE FEDERAL AND STATE UNEMPLOYMENT TRUST FUNDS

A. *The Federal-State Unemployment Trust Fund System Was Not an Appropriate Device for Funding and Administering a Paid Leave Program*

The model state legislation proposed by the DOL would have drained state unemployment trust funds and required more state unemployment program personnel to administer the program.

The federal-state unemployment compensation system is designed as a self-funding organization.[197] Funds that accumulate during periods of economic expansion and low jobless rates offset the funds dispersed in periods of economic recession and high jobless rates.[198]

In the past, severe recessions forced many states to quickly deplete their funds, requiring federal bailouts of their programs.[199] For example, during the recession of 1980-1982, thirty-three states were forced to borrow money from the federal government.[200] These bailouts re-

194. *Id.* (citing TEX. LAB. CODE ANN. § 207.021(a)(4) (Vernon 1996)).

195. Texas Workforce Comm'n Appeals Policy and Precedent Manual § 155.10(2), Appeal No. 458-CSUA-76 *at* http://www.twc.state.tx.us/ui/appl/app_manual.html (last revision June 19, 2003) (citing TEX. LAB. CODE ANN. § 207.021(a)(4) (Vernon 1996)).

196. *See* HOUSE COMM. ON ECONOMIC DEVELOPMENT, BILL ANALYSIS, Tex. H.B. 240, 77th Leg., R.S. (2001).

197. Employment Policy Found., *Paid Parental Leave: A $14 Billion to $128 Billion Entitlement*, ECONOMIC BYTES (Sept. 10, 1999), *at* http://www.epf.org/ebyte/eb990910.htm (on file with the Texas Wesleyan Law Review).

198. *See id.*

199. *See id.*

200. *Id.*

sulted in loans of over $20 billion.[201] Even the federal fund went bankrupt in 1977, resulting in a 0.2% surcharge that employers are still paying to this day.[202] Furthermore, when BAA-UC was promulgated in 2000, twenty states were below the DOL's recommended solvency level of twelve months of available reserves.[203] In the past year, thirteen states were forced to increase taxes aimed at mitigating these solvency problems,[204] and the federal government may pour as much as $8 billion into the unemployment system.[205] Yet today, at least twenty-eight states do not meet the twelve-month solvency test, and the DOL estimates that the federal government will be forced to loan money to at least six states to keep their trust funds afloat.[206]

Money to fund the BAA-UC experiment would have had to come from somewhere. Increased eligibility results in increased claims, and increased claims result in increased payouts. Also, an increased number of eligible claimants requires an increased number of state unemployment personnel to administer the program. These increased costs would only drain state unemployment trust funds further, resulting in more borrowing and more costs passed on to employers.

B. *Relying on the BAA-UC's Model State Legislation to Fund a Paid Leave System Was an Experiment Texas Could Not Afford*

The model state legislation proposed by the DOL in its BAA-UC experiment was too expensive for Texans to embrace, especially considering the current economic conditions. According to the fiscal analysis of H.B. 240 proposed by Representative Glen Lewis, the TWC estimated the fiscal impact of the bill to be a $3.2 million per year cost to the state's general revenue related funds.[207] In its forecast, the TWC estimated that fifty percent of all eligible parents would

201. *Id.*

202. *Id.*

203. *See* UI *Data Summary, Unemployment Insurance Service*, U.S. Department of Labor, June 1999.

204. *See* Press Release, U.S. Dep't of Labor, U.S. Department of Labor Takes Action to Protect Integrity of the Unemployment Trust Funds (Dec. 3, 2002), *at* http://www.dol.gov/opa/media/press/opa/OPA2002672.htm (on file with the Texas Wesleyan Law Review).

205. *See id. See generally* Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 209(2)(B)(i), 116 Stat. 21, 31 (2003) (stating that the total amount of transferred funds to states may not exceed $8 billion).

206. *See* Press Release, U.S. Dep't of Labor, U.S. Department of Labor Takes Action to Protect Integrity of the Unemployment Trust Funds (Dec. 3, 2002), *at* http://www.dol.gov/opa/media/press/opa/OPA2002672.htm (on file with the Texas Wesleyan Law Review).

207. *See* FISCAL NOTE, Tex. H.B. 240, 77th Leg., R.S. (2001). The estimated yearly net impact (loss) to General Revenue Related Funds for the bill was $3,290,705 (estimated through 2006).

apply for the benefits.[208] The TWC also forecasted that the administration of BAA-UC claims would have taken longer to investigate than regular claims.[209] This would also have increased the workload of an already overtaxed investigation system, requiring the hiring of additional investigators.[210] This increased cost, coupled with the current number of jobless claims and the unemployment rate,[211] would have seriously jeopardized the solvency of an already overburdened unemployment trust fund.

The TWC study also stated that the increased benefit payout from the unemployment trust fund would have required an increased employment tax assessment of approximately $116 per employee, per year.[212] Furthermore, the Fort Worth Star-Telegram reported in March 2002 that Texas employers were already expecting an average tax of $135 per employee in 2003 compared to $93 in 2002—an increase of more than forty-five percent.[213] A strong argument could be made that employers faced with such increases would more than likely pass this cost on to their employees in the form of a reduction in their payroll budgets, thereby affecting most all workers. In summary, the current economic conditions, coupled with the already overburdened unemployment trust fund and increased costs associated with Birth and Adoption Unemployment Compensation made BAA-UC an experiment that Texas employers could not afford.

VI. FINDING ANOTHER SOLUTION

Although BAA-UC is no longer an option for states wishing to implement a paid leave program, the need for some type of family assistance still exists and states should seek to find lawful and economically feasible solutions. The DOL gave its endorsement to these programs in its repeal by clearly conveying that each state is free to create paid leave programs using funding from sources other than the state unemployment trust fund.[214] To date, only one state, California, has passed such legislation.[215] However, with the recent repeal of BAA-UC,[216]

208. *Id.* This number was based on U.S. census estimates of the number of Texas births between July 1, 1997 and June 30, 1998. These figures would assume an average weekly benefit of $198.78, as well as the additional cost of administration. *Id.*

209. *Id.*

210. *See id.*

211. *See* Press Release, Texas Workforce Commission, Texas Unemployment Rate Declines in September (Oct. 16, 2003), *at* http://www.texasworkforce.org/news/press/2003/101603epress.html (on file with the Texas Wesleyan Law Review).

212. FISCAL NOTE, Tex. H.B. 240, 77th Leg., R.S. (2001).

213. *See* Maria M. Perotin, *Federal Stimulus Bill Boosts State Insurance Fund*, FORT WORTH STAR-TELEGRAM, Mar. 19, 2002, at 1B.

214. *See* Unemployment Compensation—Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations, 68 Fed. Reg. 58,540, 58,541 (proposed Oct. 9, 2003) (to be codified at 20 C.F.R. pt. 604).

215. *See* S.B. 1661, Reg. Sess. (Cal. 2002).

other states could stand ready to follow California's lead—including Texas.

A. *The California Model: S.B. 1661*

On September 23, 2002, California enacted the first program of its type in the nation, which provides temporary wage replacement to parents on approved leave to care for a newly born or adopted child.[217] Under this program, eligible employees may receive up to six-weeks of partial-wage replacement while on approved leave.[218] The funds are not provided by the state's unemployment fund.[219] Rather, the program is funded by payroll taxes through an existing state program that was originally created to provide disability insurance for employees.[220]

In its findings, the California Legislature noted:

> The majority of workers in this state are unable to take family care leave because they are unable to afford leave without pay. When workers do not receive some form of wage replacement during family care leave, families suffer from the worker's loss of income, increasing the demand on the state unemployment insurance system and dependence on the state's welfare system.[221]

Based on this finding, it is apparent that the California Legislature believes that a parent's lack of wages while taking time off to tend to domestic needs results in dependence on the unemployment system. Rather than relying on its unemployment system to fund the solution, the state has protected its unemployment funds by supporting its program through an employee tax.[222] Other than the funding source, the program is similar to the failed BAA-UC regulation.[223] For example, employees are deemed eligible for this paid leave on any day in which those employees are unable to perform their regular or customary work because they are caring for a new child during the first year after

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216. Unemployment Compensation—Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations, 68 Fed. Reg. 58,540 (proposed Oct. 9, 2003) (to be codified at 20 C.F.R. pt. 604).

217. *See* S.B. 1661, Reg. Sess. (Cal. 2002). Employees will begin paying into the fund January 1, 2004 and can began taking leave July 1, 2004. Payments are capped at six weeks over a twelve-month period and at 55% of wages, up to an annually-adjusted maximum of $728 a week in 2004. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Compare* S.B. 1661, Reg. Sess. (Cal. 2002), *with* Birth and Adoption Unemployment Compensation, 64 Fed. Reg. 67,972 (Dec. 3, 1999) (to be codified at 20 C.F.R. pt. 604) (Model state legislation was published as Appendix A.). The repealed BAA-UC Model State Legislation's eligibility standards for new parents are similar.

the birth or placement of a child.[224] Also, similar to unemployment benefits, eligibility for paid family leave is calculated based on the employee's earnings, as determined in the base period.[225] Wages earned approximately five to seventeen months before beginning the leave are included in the base period.[226]

Although California introduced and passed S.B. 1661 prior to the DOL's endorsement of a similar program and the repeal of BAA-UC,[227] Texas could accomplish the same goals of BAA-UC[228] using alternate funding, but it could come at a steep price.

B. *Could a Bill Similar to California's S.B. 1661 Work in Texas?*

By adopting legislation similar to California's S.B. 1661, Texas could establish a paid family leave system that accomplishes the same goals as the BAA-UC experiment[229] without violating the integrity of the federal-state unemployment trust fund and without the need to require employers to pay for the program. However, a program such as this would require some type of state income tax—not something Texans are accustomed to paying.[230]

One argument against the BAA-UC experiment was that employers would have been forced to pay for their employees' leave.[231] By requiring payroll taxes on employees to fund the program, employers would be off the hook financially—at least for the direct benefits of payment to the employee. Furthermore, a portion of these funds would be used to administer the program either under a new state organization or an existing organization such as the Texas Department of Human Services.

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224. *See* S.B. 1661, Reg. Sess. (Cal. 2002); *see also* CAL. UNEMP. INS. CODE § 3301 (West 2002) (providing wage replacement benefits to employees who take time off from work in order to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a new child).

225. *Compare* S.B. 1661, Reg. Sess. (Cal. 2002), *with* Birth and Adoption Unemployment Compensation, 64 Fed. Reg. 67,972 (Dec. 3, 1999) (to be codified at 20 C.F.R. pt. 604).

226. *Id.*

227. *See* S.B. 1661, Reg. Sess. (Cal. 2002) (California Governor Gray Davis signed into law the Family Temporary Disability Insurance program on September 23, 2002 to go into effect on January 4, 2004); *see also* Unemployment Compensation—Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations, 68 Fed. Reg. 58,540 (proposed Oct. 9, 2003) (to be codified at 20 C.F.R. pt. 604).

228. *See* Birth and Adoption Unemployment Compensation, 64 Fed. Reg. 67,972 (Dec. 3, 1999) (to be codified at 20 C.F.R. pt. 604).

229. *Id.*

230. Texas does not have a state income tax.

231. *See generally* Unemployment Compensation—Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations, 68 Fed. Reg. 58,540, 58,542 (proposed Oct. 9, 2003) (to be codified at 20 C.F.R. pt. 604) (noting that 74% of all correspondence received favored removal of the regulation).

There are many options other than the failed BAA-UC to fund a paid leave program. California is just one example of a state, the first state, which has passed legislation implementing such a program. While only time will determine if the California program succeeds, Texas should continue to investigate ways in which to address the issue. It is now clear, however, that paid leave will not be funded by Texas' unemployment trust funds.

VII. CONCLUSION

The DOL's departure from unemployment principles in its initial BAA-UC regulation was not only in direct conflict with the plain language of the Federal Unemployment Taxation Act and the Texas Unemployment Compensation Act, but it also led to rules that were better suited for promulgation by our elected officials in Congress, rather than by DOL regulations. The BAA-UC experiment derived from flawed regulatory rule-making and caused a wave of state legislative action based on unsound policy.

Had Texas adopted the BAA-UC program before it was repealed, Texas would have departed from its long-standing requirement that individuals receiving unemployment compensation be able and available to work. Additionally, BAA-UC cut against the entire purpose of unemployment compensation, which is to provide partial income to those individuals out of work while they look for work.[232]

The BAA-UC experiment, along with its proposed model state legislation, was never an appropriate remedy to provide partial-wage replacement to parents who take leave to care for a new child and the promotion of parents' long-term attachment to the workforce. Though there is little doubt that qualified individuals under the plan would have taken advantage of paid time off, the conflict with federal and state unemployment law and the long-term financial effects of the experiment would have outweighed the benefits derived. Instead, Texas should consider an alternate method of providing temporary wages to new parents using state money from sources other than its unemployment fund.

R. Scott McKee

232. *See Denial of Unemployment Benefits to Otherwise Eligible Women on the Basis of Pregnancy: Section 3304(a)(12) of the Federal Unemployment Tax Act*, *supra* note 40.