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United States Senate

COMMITTEE ON SMALL BUSINESS

WASHINGTON, DC 20510-6350

February 2, 2000

BY FACSIMILE: (202) 219-8506

Ms. Grace Kilbane, Director
Unemployment Insurance Service
Employment and Training Administration
U.S. Department of Labor
Room S-4231
Washington, DC 20210

**RE: Proposed Rule on Birth and Adoption Unemployment Compensation
(See, 64 *Federal Register* 67972, December 3, 1999)**

Dear Ms. Kilbane:

The Department of Labor's proposed rule that would allow states to use their unemployment insurance funds to provide paid leave for new parents is an exercise in legislative restructuring masquerading as regulation. This proposal is contrary to the intent of Congress expressed in the Family and Medical Leave Act (FMLA) and the Federal Unemployment Tax Act (FUTA) and represents an attempt by this Administration to achieve through regulation what could never be achieved through legislation. The proposal also undermines the financial solidarity of these funds so that they may not be able to provide the economic support in the situations for which they were intended. Finally, the Department has misstated and ignored their obligations under the Regulatory Flexibility Act by stating that the rule will have no impact on small entities. This proposal should be withdrawn.

The Department's proposal is a tapestry of legislative interpretation that is stitched together from presumptions and gaps using the thread of an expansive view of entitlements. From the authority delegated to the Department of Labor under the Federal Unemployment Tax Act to implement and administer unemployment compensation, the Department divines the prerogative to adjust the long standing concept that workers must be "able and available" for work to qualify for unemployment compensation, to include those who voluntarily take leave to be with their newborn or newly adopted children (See, 64 *Fed. Reg.* 67972.). From the Family and Medical Leave Act, the Department lifts the notion that Congress has said it is important for parents to be with their newborns or newly adopted children. Finally, the Department packages

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all of this as an “experiment” to determine if providing this paid leave will “promote a continued connection to the workforce” and nothing more than providing states with an option to pursue this approach. The bottom line is that the Department of Labor has created an entitlement to a federal benefit where none existed or was authorized previously.

Although the funds for this come from the FUTA revenues, the intent and purpose of this proposal draws more directly from the FMLA. Indeed, there is a fundamental confusion of terms to say that a worker who is “taking leave” to be with a newborn child should be considered under an act that provides compensation to those who are unemployed. The FMLA requires employers to provide up to 12 weeks of leave and to maintain an employee’s position when they take leave to be with a new born child, newly adopted child, or for other family related reasons. When Congress passed the FMLA in 1993 it specified merely that an employee was entitled to leave totaling 12 weeks within the first 12 months following the birth or placement of the child. It allowed for this leave to be unpaid and for any accumulated paid leave such as vacation to be counted towards this total. (See, 29 U.S.C. § 2612 (a)(1),(2).) The legislation does not further address whether this leave should be paid. Congress clearly stopped short of providing for paid leave for parents of newborns or newly adopted children.

The Department of Labor also seems to be making an arbitrary distinction between those workers who would take leave to be with a newborn child or newly adopted child and those who would need to take leave under the other provisions of the FMLA. Why should having or adopting a child be the only category for providing paid leave? This arbitrary distinction between the arrival of a new child and the need to care for a sick one or an ill parent which are also covered in the FMLA is no more supportable than the Department’s desire to make this leave paid and thus overrule Congress’ intent expressed in the law. Indeed, this proposal looks very much like the first step to providing paid leave for all of these categories.

Under FUTA, many states have developed a requirement that workers be “able and available” for work as a test for receiving UC benefits. The Department has previously allowed four exceptions to this test: training, illness, jury duty, and temporary layoffs. These exceptions are justified as either out of the control of the worker (illness, temporary layoffs), “enhancing their connection to the workforce” (training), or serving a greater social end (jury duty). Based on this precedent, the Department now

wants to test whether providing parents with the [UC benefits for birth and adoption] at a point during the first year of a newborn’s life, or after placement for adoption, will help employees maintain or even promote their connection to the workforce by allowing them 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. (See, 64 *Fed. Reg.* 67973.)

While providing paid leave for new parents is an admirable goal, it is not supported by

this expansive interpretation of the FUTA, or the Department's attempt to camouflage this effort as an "experiment." Clearly, if Congress wanted new parents to be eligible for UC benefits or to receive paid leave, this would have been provided for under the FUTA or FMLA or subsequent amendments to these laws.

The Department also takes a very expansive view of what type of leave should qualify for these benefits. The proposal provides benefits "to parents on approved leave or *who otherwise leave employment to be with their newborns or newly-adopted children.*" (See, 64 Fed. Reg. 67977, Proposed § 604.3 (b), emphasis added.) This raises immediate questions about what circumstances would cause an employee to "otherwise leave employment" that would not be approved. This terminology suggests that an employee who decided to quit voluntarily to be with a newborn would also qualify for UC benefits. Such a possibility contradicts the basic premise of the various state UC programs which typically only provide benefits for workers who were released by their employers other than voluntarily.

The Department has misconstrued its obligation under the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act (SBREFA) and consequently has wrongly decided not to determine the consequences of this rulemaking on small businesses. The Department has certified that the proposed rule will not have a "significant economic impact on a substantial number of small entities" because they claim that the rule will only affect states who are not part of the definition of small governmental entities under the Regulatory Flexibility Act. However, as described below, this rule has a potentially very serious impact on virtually all small businesses which should have triggered a regulatory flexibility analysis as required by the RFA.

Similarly, because a Regulatory Flexibility Act analysis should have been conducted, the Department was also obligated to comply with the requirements for involving small businesses in this rulemaking as described in the Small Business Regulatory Enforcement Fairness Act as codified at Section 609 (a) of the Regulatory Flexibility Act. The Department is wrong to assert that whether they must comply is governed by the definition of a "major rule" in Section 804 of SBREFA. That definition is relevant only to Subtitle E of SBREFA, Congressional Review of Agency Rulemaking. Whether a rule qualifies as a "major rule" is irrelevant to whether it triggers a regulatory flexibility analysis or the small business outreach requirements of SBREFA under Section 609 (a). The only determinant for these requirements is whether a rule would have a "significant economic impact on a substantial number of small entities."

While the proposed rule provides a framework that allows states to implement this approach, ultimately, the effects would be borne by businesses and especially small businesses. Because the proposal flows from the FUTA, the exemption for businesses with 50 or less employees, contained in the FMLA, do not apply. This means that any employer that is subject to the federal unemployment tax will be covered and would be obligated to provide this leave if the state in which the employer operates implemented this provision. More importantly, this

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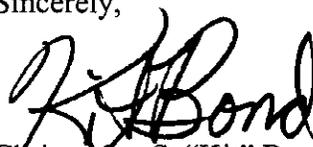
proposal has the potential to exhaust the UC funds so that they would not be available for those who were actually intended by Congress to be covered, i.e. truly unemployed workers needing this insurance. If this becomes the case, the only remedy will be to raise the unemployment tax. This will certainly affect small businesses contributing to their overhead expenses and possibly impacting their competitiveness or ability to expand and hire more employees.

Beyond the above questions of whether the Department has the authority to propose this rule, I must note further that this is also a poorly drafted proposal. Since the proposal is presented as an “experiment”, it calls for the testing of whether providing these benefits “promotes a continued connection to the workforce in parents who receive such benefits.” (See, 64 *Fed. Reg.* 67977.) This is an unmeasurable, wholly subjective concept. The Department compounds the problem by admitting that it does not have an evaluation framework developed by which to determine the answer to this question. (See, 64 *Fed. Reg.* 67974). It further states that only if the evaluation process and information collection instructions “[are] subject to the Paperwork Reduction Act, [will they] be published for public comment in the *Federal Register*.” (See, 64 *Fed. Reg.* 67974.) In the interest of getting valuable input from small businesses and other effected employers, these items should be put out for comment regardless of whether they are covered by the Paperwork Reduction Act.

Furthermore, calling this an “experiment” suggests that it is far more temporary than it would end up being once implemented. If this were to go into effect, removing it would be extremely difficult and politically unpopular. Thus, the Department is being disingenuous in presenting this as merely an “experiment” for the purpose of testing a proposition. It is clear that this is the Administration’s desired goal and once in place it could be expected to remain in place. This approach further suggests that the Department is trying to get through a regulation what it could never get through legislation.

The Department of Labor is attempting to create an entitlement without sufficient legislative authority, through a redefinition that would disrupt many years of settled practice in the states, and in doing so would jeopardize the financial security of funds that need to be available for those who will be unemployed in the future. The Department of Labor is proposing this without having satisfied the requirements of the Regulatory Flexibility Act or the Small Business Regulatory Enforcement Fairness Act, and without any indication of concern for the impact on small businesses. Finally, the proposal is poorly drafted and is disingenuously offered as an “experiment.” For all these reasons, I request that this proposal be withdrawn promptly.

Sincerely,

A handwritten signature in black ink that reads "Kit Bond". The signature is stylized and cursive.

Christopher S. “Kit” Bond