**Comments of UWC Strategic Services on Unemployment & Workers' Compensation in Response to the Notice of Proposed Rulemaking**
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**By the**
**U.S. Department of Labor, Employment and Training Administration**
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Thank you for the opportunity to comment on the interpretation of Section 2105 of Public Law 112-96, the Middle Class Tax Relief and Job Creation Act of 2012, which addressed drug testing of applicants for unemployment compensation. These comments are in response to the notice of proposed rules published in the Federal Register as well as Unemployment Insurance Program Letter No. 1-15 that expands on the proposed rules as a program letter referenced in the proposed 20 CFR 620.4 (c).

UI PL Letter No. 1-15 was released on the same day as the proposed rules, and addresses substantive detail that is not addressed in the proposed rule.

UWC – Strategic Services on Unemployment & Workers' Compensation is a nationwide not for profit association that counts as members a broad cross section of the nation's employers interested in unemployment insurance issues as well as a number of state workforce agencies. The organization and its predecessor organization have advocated for a sound unemployment insurance system since 1933.

The Middle Class Tax Relief and Job Creation Act of 2012 addressed a number of reforms with respect to unemployment insurance, including the codification of the requirement that individuals applying for unemployment compensation and claiming weekly unemployment compensation must be able to work, available to work and actively seeking work as a condition of being paid unemployment compensation for a week or weeks claimed.

Although it had long been considered a matter of policy interpretation that individuals were required to meet the able, available and actively seeking work test, the Act for the first time clearly made it a condition of approval of grants to states that this requirement be followed as a matter of state law to conform with federal requirements.

Section 2101 of the Middle Class Tax Relief and Job Creation Act of 2012 requires that

(a) IN GENERAL.—Section 303(a) of the Social Security Act is amended by adding at the end the following:

''(12) A requirement that, as a condition of eligibility for regular compensation for any week, a claimant must be able to work, available to work, and actively seeking work.''.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply to weeks beginning after the end of the first session of the State legislature which begins after the date of enactment of this Act.

Clearly this fundamental provision along with other integrity provisions, including the drug testing provision in Section 2105, were intended to improve the integrity of the UI system and assure that only individuals who were able to work, available to work and actively seeking work were to be paid unemployment compensation.

The drug testing provision was added as an optional tool that could be used by agencies administering unemployment compensation to assure that individuals who were terminated due to drug testing who became applicants for unemployment compensation could be subject to testing by the agency to assure that they were able and available to work on a continuing basis.

As a specific optional tool, the statutory language of Section 2105 was narrowly drawn in recognition of the fact that drug testing by state UI agencies had not previously been permitted and that no additional resources were provided to states to enable a significant expansion in administering drug testing.

The proposed rules noticed by the US Department of Labor are inconsistent with the intent of the statutory language and the Act as a whole and would unduly restrict the application of the statute so as to render it of minimal value.

Specific provisions that should be revised before the rules become final include:

1. **The proposed rules in Section 620.3 would unduly restrict the list of occupations to those identified as of October 9, 2014.**

There is no provision within the statutory language that limits its application to a specific date. The list of controlled substances changes on a continual basis as new substances are identified for regulation and the treatment of existing substances may be changed with use by the public.

The changing nature of the definition of controlled substances should be recognized in the final rules with reference to appropriate agencies and lists to be consulted by states in implementation of drug testing.

2. **The proposed rules in Section 620.4 (a) would unduly limit drug testing to only the period after an applicant applies and before the applicant files a continued claim for unemployment compensation.**

The very purpose of the provision is to enable states to avoid making payment of unemployment compensation to individuals who should not be paid because they are not able to work, available to work or actively seeking work. Drug testing is not intended only as a

condition of an individual establishing a benefit year in which to claim unemployment compensation. If that were the case Section 2105 would not go on in its provision to make the point that the test may be a "condition of receiving" unemployment compensation. As a point of reference the actual statutory language is identified below with emphasis added in bold.

**SEC. 2105. DRUG TESTING OF APPLICANTS.**

Section 303 of the Social Security Act is amended by adding at the end the following:

''(l)(1) Nothing in this Act or any other provision of Federal law shall be considered to prevent a State from enacting legislation to provide for—

''(A) testing an applicant for unemployment compensation for the unlawful use of controlled substances **as a condition for receiving such compensation,** if such applicant—

''(i) was terminated from employment with the applicant's most recent employer (as defined under the State law) because of the unlawful use of controlled substances; or

''(ii) is an individual for whom suitable work (as defined under the State law) is only available in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary of Labor); or

''(B) denying such compensation to such applicant on the basis of the result of the testing conducted by the State under legislation described in subparagraph (A).

''(2) For purposes of this subsection—

''(A) **the term 'unemployment compensation' has the meaning given such term in subsection (d)(2)(A)**; and

''(B) the term 'controlled substance' has the meaning given such term in section 102 of the Controlled Substances Act (21 U.S.C. 802).''

Under subsection (d)(2)(A), "unemployment compensation" means "any **unemployment compensation payable** under the state law (including amounts payable pursuant to an agreement under a Federal unemployment compensation law).

The interpretation suggested by the proposed rules would result in no individual being denied payment of unemployment compensation after the initial application when a continued weekly claim is filed even though such a denial is exactly what is intended by the plain meaning of the statute. Unemployment compensation does not become "payable" until a week of unemployment compensation is claimed.

An applicant does not cease being an individual subject to denial of payment by claiming continued weeks of unemployment compensation. An applicant may be tested immediately upon application and in the course of the benefit period during which he or she may claim weeks of unemployment compensation to be paid.

Unlike federal public assistance programs that provide for entitlement to payments based on an application and required continued payments on a regular basis unless an eligibility arises, the federal/state UI system requires first that there be a determination of benefit rights for a benefit period and then that the individual meet specific requirements each week as a condition of being paid unemployment compensation.

The proposed rules appear to fail to recognize this substantive difference.

The plain meaning of the statutory language and consistent with the intent of the overall Act is that if an applicant tests positive for controlled substances that the agency may deny the payment of unemployment compensation as it may be claimed on a week by week basis.

3. **The proposed rules and UI PL No. 1-15 would impose an unnecessary burden on the agency to determine whether "suitable work" in a specific occupation is not available in the local labor market.**

The proposed rule and UI PL No. 1-15 would effectively require before a state agency conducts a test that the agency determine whether the individual's occupation is **not** available in the local labor market. If not available a drug test would not be permitted.

Obviously, the occupation of an applicant is available in the local labor market (at least up until the point at which the individual was terminated) as he or she was employed in the occupation. Are there really labor markets in which there is only one individual in an occupation and when that individual is terminated the occupation is eliminated from the labor market? Why impose such an unnecessary exercise on state agencies?

Even if such a fact were possible, the individual should obviously be searching for work in other occupations or seek work in another labor market that includes the occupation the applicant is seeking.

Again, the base line requirement is that the individual must be able to work, available to work, and actively seeking work to be eligible to be paid unemployment compensation. The fact that a particular occupation is or is not available in a particular local labor market is not determinative of the individual's eligibility to be paid. An individual whose suitable work is only in a particular occupation is required to search for work in that occupation and may be drug tested under the new statute.

4. **The proposed rule and UI PL No. 1-15 unduly mandate that states follow drug testing guidelines that meet standards by the Mental Health Services Administration or the U.S Department of Transportation.**

There is no reference to federally mandated drug testing standards in the statute and the US Department of Transportation and the Substance Abuse and Mental Health Services Administration have no authority with respect to the administration of unemployment insurance.

The UI program is state administered and the states should determine the appropriate standards for drug testing. They may take note of best practices in the private sector or state or federal agency guidelines. DOT and MHSA guidelines may not be appropriate for the full range of occupations from which individuals become unemployed.

5. **The proposed rules, and by reference UI PL No. 1-15, fail to recognize that Section 303(a) of the Social Security Act, as amended particularly by the Middle Class Tax Relief and Job Creation Act of 2012 in Section 2101, substantively changed federal requirements with respect to "timeliness" and "due process".**

The "timeliness" and "due process" issues were addressed in the case of California Department of Human Resources Development v. Java, 402 U.S. 121 (1971). The Java decision construed the provisions of Section 303(a) of the Social Security Act then in effect that have since been substantively amended. The promptness regulations in 20 CFR part 640 based on the Java case are now inconsistent with the statute and UI_PL No. 787 that transmitted the Secretary's decision in a 1964 South Dakota conformity case is likewise inconsistent with Section 303 (a) as amended. The new statute specifically requires that the state determine that an individual is able to work, available to work and actively seeking work as a condition of being paid unemployment compensation.

These out of date and inconsistent references should not be used as the basis upon which to unduly restrict the states from choosing to conduct drug testing an applicant as a condition of being paid unemployment compensation BEFORE the applicant is paid for any week within a benefit period.