



# Issues Arising From Federal and State Statutes and Regulation

by

**Douglas J. Holmes, President**

**UWC – Strategic Services on Unemployment &  
Workers' Compensation**

**[holmesd@uwcstrategy.org](mailto:holmesd@uwcstrategy.org)**

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# Key Federal Conformity and Compliance Provisions

- Able to Work, Available to Work and Actively Seeking Work
- Federal Disqualification Limitations
- Drug Testing Limitations
- Between Terms Disqualifications
- Prohibition Against Relief from Charges



## Able to Work, Available to Work and Actively Seeking Work

- Long held interpretation of federal law as fundamental tenet that individuals could not maintain that they were unemployed from the workforce if they were not able to work, available to accept work and actively seeking work.
- A individual must be available for work to maintain eligibility.
- Integrity was viewed as being lacking in enforcement.
- Congress enacted federal statutory requirement, but left interpretation of the terms to the states.
- States vary in definition and enforcement of the requirement.
- US DOL elected not to modify federal regulations previously based on interpretation despite stronger statutory change.

# Able to Work, Available to Work and Actively Seeking Work



- The Middle Class Tax Relief and Job Creation Act of 2012 added a new statutory requirement for state laws to meet in order to conform with the requirement of administrative funding for the UI program.
- **SEC. 2101. CONSISTENT JOB SEARCH REQUIREMENTS.**
- **(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.

# Able to Work, Available to Work and Actively Seeking Work



- **20 CFR 604.5(h) provides that “The requirement that an individual be available for work does not require an active search for work on the part of the individual.**
- **The plain language of the Act now is clear that individuals must be “actively seeking work” as a conditional of eligibility.**
- **Notwithstanding the federal statutory requirement, the President continues to promote benefit expansions that permit individuals to be eligible while choosing to be available for only part time work or limit availability and work search to work they view as suitable.**
- **The free labor market relies on individuals being available and actively seeking work -- without the availability of workers the labor market cannot function.**



# Limitations on Disqualification

Many states attempt to enact statutes to disqualify applicants for fraud or dishonesty or theft only to find that there is a federal condition of a state receiving full FUTA offset credit for employers. The primary provision limiting disqualification is 26 USC 3304 (a) (10) which provides:

(10) compensation shall not be denied to any individual by reason of cancellation of wage credits or total reduction of his benefit rights for any cause other than discharge for misconduct connected with his work, fraud in connection with a claim for compensation, or receipt of disqualifying income;

What constitutes “misconduct”? When is it “connected with his work? What constitutes fraud?

State legislative language must fit within this provision not to have an issue raised.



# Limitations on Disqualification

States seek to improve work search requirements and recognize that individuals often travel to work longer distances or accept work that is available that the individual is able to perform. Such legislation or administrative practice may raise an issue under 26 USC 3304 (a) (5) (B) which provides;

- (5) compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:
- (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;
- An individual may choose not to accept a job he is able to perform that is available even when the pay is greater than he was earning in previous work because of an analysis of prevailing wage.



# Between Terms Disqualifications

Prior to 1977 state UI laws were not required to cover educational employees for unemployment compensation. Legislation to cover them included exclusions due in part to the financial impact on schools who would be obligated to reimburse for benefits.

Since 1977, many educational employers have elected to contract for services, yet the federal statute has not been amended. States seeking to treat contract workers who are not school employees similarly to school employees between terms may be notified of a federal issue under 26 USC 3304 (a) (6) which provides:

- (6) (A) compensation is payable on the basis of service to which section [3309 \(a\)\(1\)](#) applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law; except that— (ii) with respect to services in any other capacity for an educational institution to which section [3309 \(a\)\(1\)](#) applies— (I) compensation payable on the basis of such services may be denied to any individual for any week which commences during a period between 2 successive academic years or terms if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms, except that



# UI Agency Drug Testing to Determine Eligibility

- Authority enacted in Section 2105 of the Middle Class Tax Relief and Job Creation Act of 2012.
- Authority limited to circumstances where
  - 1) applicant for benefits was terminated from most recent employer because of unlawful use of controlled substances, or
  - 2) is an individual for whom suitable work is only available in an occupation that regularly conducts drug testing (as determined by the Secretary of Labor)
- Already narrow authority made narrower by Regulations and UI-PL
  - Restricting the list of occupations for which drug testing is regularly conducted
  - Limit the period for drug testing to the period after application and before a continued week claim is filed
  - Requiring the agency to determine that a suitable occupation for the individual is not available in the labor market
  - Requiring that the drug test meets standards for Mental Health Services or US DOT



# Employer Penalty for Failing to Respond

- In response to concern about the quality of adjudication when employers did not respond to requests and the likelihood of subsequent reversal , US DOL developed language to impose employer penalties in federal law.
- The language was not taken seriously until it was identified as pay for as part of the 2011 Trade Adjustment Assistance Extension Act.
- No employer organizations were consulted and it was inserted without opportunity for hearing.
- The requirement is said to be a response to high error rates in benefit determinations computed based on Benefit Accuracy Measurement survey data.
- The provision became federal law and is now being interpreted and applied differently state by state.



# Employer Penalty for Failing to Respond

- Trade Adjustment Assistance Extension Act of 2011 (PL 112-40)
- Section 252 created new requirement that state UI laws must include a provision that employer accounts be charged for benefits erroneously paid if
  - 1) the overpayment was caused by the employer or employer's agent by failure to provide timely or adequate information in response to a request related to benefits, and
  - 2) the employer or agent had a pattern of failing to respond.
- The new requirement did not preclude states from prohibiting relief from charges or imposing other sanctions on employers and agents for only one failure to respond.
- Some states have used this provision as the basis for expanded penalties beyond the federal minimum requirement.

# Issues for 2015 and 2016



- NASWA training about federal conformity and compliance issues should be helpful.
- State legislatures continue to introduce state legislation based on constituent requests or their view of common sense and surprised when federal issues raised.
- Employers and legislators could benefit from briefings.
- Some federal requirements may be amended in 2015 or 2016