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Recent Legislative and Regulatory Developments in States' Ability to Drug Test Unemployment Compensation Applicants and Beneficiaries

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Related Authors

- Julie M. Whittaker
- Katelin P. Isaacs

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Julie M. Whittaker, Specialist in Income Security (jwhittaker@crs.loc.gov, 7-2587)
Katelin P. Isaacs, Specialist in Income Security (kisaacs@crs.loc.gov, 7-7355)

Federal law permits states to restrict an individual's Unemployment Compensation (UC) benefit eligibility for certain circumstances related to the "fact or cause" of unemployment; this includes situations in which an individual was fired for drug use or refusing to take a drug test. Most states have specific disqualifications for drug-related job loss (see Table 5-8 in the hyperlink), including reporting to work under the influence of drugs/alcohol; violating the employer's drug policy, including refusing to undergo drug or alcohol testing; or having tested positive for drugs or alcohol under certain circumstances. Proposals to expand drug testing in the UC program have been considered in recent (113th, 114th, and 115th) Congresses. Interest in these proposals has been balanced by concerns that federal or state laws may be subject to a constitutional challenge if UC eligibility determination or ongoing receipt of UC benefits requires passing drug tests without taking into account individualized suspicion of illicit drug use.

Recent developments to expand the states' ability to drug test UC applicants and beneficiaries include the enactment of a law permitting two new types of drug testing, the issuance of guidance and regulations to support the implementation of the law, the overturning of these regulations, and the notice of proposed rulemaking announcing a reissued drug testing rule.

New Permissible Types of Drug Testing: P.L. 112-96

Section 2105 of the Middle Class Tax Relief and Job Creation Act of 2012 (P.L. 112-96; February 22, 2012) amended federal law to allow states to conduct two types of drug testing. First, it expanded the longstanding state option to disqualify UC applicants who were discharged from employment with their most recent employer (as defined under state law) for unlawful drug use by allowing states to drug test these applicants to determine UC benefit eligibility or disqualification. Second, it allowed states to drug test UC applicants for whom suitable work (as defined under state

law) is available only in an occupation that regularly conducts drug testing, to be determined under new regulations issued by the Secretary of Labor.

Program Guidance

In response to P.L. 112-96, the U.S. Department of Labor (DOL) released guidance—Unemployment Insurance Program Letter (UIPL), No. 1-15, "Permissible Drug Testing of Certain Unemployment Compensation Applicants Provided for in Title II, Subtitle A of the Middle Class Tax Relief and Job Creation Act of 2012—on October 9, 2014. This guidance (which remains in effect at this time) provided states direction on how to conduct drug testing of UC applicants who are discharged from employment with their most recent employer because of illegal use of controlled substances. States are permitted to deny benefits to individuals under these circumstances. According to DOL, three states have enacted such laws: Mississippi, Texas, and Wisconsin (see pp. 5-19 and 5-20 in the hyperlink).

2016 Rule

As called for in P.L. 112-96, on August 1, 2016, DOL promulgated 20 C.F.R. Part 620, a new rule to implement the provisions of the law relating to the drug testing of UC applicants for whom suitable work (as defined under state law) is available only in an occupation that regularly conducts drug testing. The rule provided a list of the applicable occupations (20 C.F.R. §620.3) that regularly conduct drug testing. Significantly, the section of the regulations following this list (20 C.F.R. §620.4) limited a state's ability to conduct a drug test on UC applicants to those individuals who are only available for work in an occupation that regularly conducts drug testing under 20 C.F.R. §620.3. Thus, although an individual's previous occupation may have been listed in 20 C.F.R. §620.3, as long as the individual was currently able, available, and searching for work in at least one occupation not listed in 20 C.F.R. §620.3, the individual could not be subject to drug testing to determine eligibility for UC (unless the individual had been discharged because of a drug-related discharge).

Repeal of 2016 Drug Testing Rule Using Congressional Review Act: H.J.Res. 42/P.L. 115-17

Various stakeholders have voiced concerns about the UC drug testing provisions enacted under P.L. 112-96 and about the DOL rule finalized under 20 C.F.R. Part 620. For example, advocates for UC beneficiaries claimed that drug testing applicants did not address any policy problem, while a state administration stakeholder group, as well as some Members of the House Ways and Means Committee, pushed for a broader interpretation and more flexibility in implementing drug testing than was offered under the DOL rule. On September 7, 2016, a hearing on Unemployment Insurance included statements by Representative Kevin Brady that expanded upon his disagreement with the DOL rule and its narrow interpretation.

Policy consideration then turned to using the Congressional Review Act (CRA) to overturn 20 C.F.R. Part 620. On January 1, 2017, Representative Kevin Brady introduced such a CRA resolution: H.J.Res. 42, which was passed by the House on February 15, 2017, and passed by the Senate on March 14, 2017. President Trump signed H.J.Res. 42/P.L. 115-17 on March 31, 2017. Since a list of occupations that requires drug testing no longer exists within the *Code of Federal Regulations* (on account of P.L. 115-17), the ability to prospectively test UC claimants based upon occupation is no longer available to states. Without this rule, states currently may drug test UC claimants only if they were discharged from employment because of either unlawful drug use or for refusing a drug test.

On February 15, 2017, in the *Congressional Record*, several members provided justification for their support or opposition of the measure. Representative Kevin Brady, among others, supported the measure. He argued the intent of P.L. 112-96 was to provide states the ability to determine how to best implement drug testing programs but the final regulation narrowed the law to circumstances where testing is legally required (rather than the broader definition of generally required by employer) and removed state discretion in conducting drug testing in their UC programs. Representative Richard E. Neal, among others, argued in opposition of the measure, stating there was no evidence that unemployed workers have higher rates of drug abuse than the general population and that it appeared that some states may be trying to limit the number of workers who collect UC benefits.

2018 Proposed Drug Testing Rule

On November 5, 2018, DOL published a Notice of Proposed Rulemaking (NPRM) to reissue the rule identifying occupations that regularly conduct drug testing for purposes of Section 2105 of P.L. 112-96. Section 2105 of P.L. 112-96 allows states to drug test UC applicants for whom suitable work (as defined under state law) is available only in such occupations. Because the 2016 regulation on this issue was repealed using the Congressional Review Act, this new rule is subject to the reissue requirements of the CRA. The CRA prohibits an agency from reissuing the rule in "substantially the same form" or issuing a "new rule that is substantially the same" as the disapproved rule, "unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."

According to this 2018 NPRM, DOL has addressed the reissue requirements of the CRA by proposing

a substantially different and more flexible approach to the statutory requirements than the 2016 Rule, enabling State to enact legislation to require drug testing for a far larger group of UC applicants than the previous Rule permitted. This flexibility is intended to respect the diversity of States' economies and the different roles played by employment drug testing in those economies.

The 2018 proposed rule includes the same occupations listed in the repealed 2016 rule (20 C.F.R. §620.3(a)-(h)) and also provides for two additional types of occupations: those identified by state laws as requiring drug testing (20 C.F.R. §620.3(i)) and those where states have a "factual basis for finding that employers hiring employees in that occupation conduct pre- or post-hire drug testing as a standard eligibility requirement for obtaining or maintaining employment in that occupation" (20 C.F.R. §620.3(j)).

Comments on this proposed rule must be submitted by January 4, 2019. For more information on potential implications for this reissued rule stemming from the disapproval of the 2016 rule under the CRA, see CRS Insight IN10996, *Reissued Labor Department Rule Tests Congressional Review Act Ban on Promulgating "Substantially the Same" Rules*, by Maeve P. Carey.