

DELIVERED ELECTRONICALLY

Jan. 4, 2018

Ms. Adele Gagliardi
Administrator, Office of Policy Development and Research
U.S. Department of Labor
200 Constitution Avenue NW, Room N-5641

Re: RIN 1205-AB81, Federal-State Unemployment Compensation Program; Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants Under the Middle Class Tax Relief and Job Creation Act of 2012

Dear Ms. Gagliardi:

The National Women’s Law Center writes to comment on the above-referenced Notice of Proposed Rulemaking (“NPRM”) issued by the Department of Labor (“DOL”) and published in the Federal Register on November 8, 2018.

For over 45 years, the Center has advocated to expand opportunities for women and girls in the areas of health and reproductive rights, education and employment, child care, and income security, with a particular emphasis on low-income women and their families. The Center strongly opposes any change in policy or regulation that would undermine access to public benefits, especially when those benefits help to facilitate economic self-sufficiency. For the reasons set forth below, DOL should withdraw its current proposal and instead focus its attention on supporting state unemployment insurance (“UI”) agencies and ensuring that *more* workers have access to UI benefits.

Women and Unemployment Insurance

UI benefits provide temporary support to unemployed workers who have lost their jobs through no fault of their own and meet particular requirements, which vary by state. In October 2018, UI provided assistance to nearly 1.4 million unemployed workers, including more than 661,000 women.¹ In 2017, UI helped keep the incomes of more than 127,000 women above the Federal Poverty Level (FPL).²

Even when unemployment rates are relatively low, as they are today, UI is a critical support for those who lose their jobs and for their families. For women — who are more likely than men to be raising children on their own, and typically experience lower earnings and a higher risk of poverty than their male peers — this support is often particularly vital. While the overall unemployment rate for women 20 years and

¹ U.S. DEP’T OF LABOR, EMPL. & TRAINING ADMIN., *Characteristics of Unemployment Insurance Claimants*,

² Nat’l Women’s Law Ctr. calculations based on U.S. Census Bureau, Current Population Survey, 2018 Annual Social and Economic Supplement Table Creator, <https://www.census.gov/cps/data/cpstablecreator.html> (last visited Dec. 18, 2018).

older is 3.4 percent,³ the rate is significantly higher for Black and Latina women — 4.9 percent and 4.6 percent, respectively.⁴

Despite the critical role that UI plays for women, the overall UI system's eligibility requirements often disproportionately exclude women, in addition to people of color and low-wage workers more generally. For example, the states that base eligibility for UI benefits on earnings rather than hours worked may tend to exclude more women and people of color, whose incomes are typically lower than those of white, non-Hispanic men,⁵ in part because they are disproportionately represented in the low-wage workforce.⁶ One-third of states also categorically deny UI benefits to part-time workers,⁷ a policy that also disproportionately affects women, who are four times more likely to be working part-time during their prime earning years than men,⁸ often due to caregiving responsibilities and the issues associated with them (such as high child care costs and inflexible work schedules).⁹ Women are also much more likely than men to have to leave a job due to domestic abuse-related issues or work-family conflicts such as spousal job relocation or the loss of child care.¹⁰ Currently, only 19 states provide benefits for those who have to leave their jobs under such circumstances, again leaving women less likely to receive UI benefits than men.¹¹ As a result, many women, people of color, and low-wage workers have inadequate access to UI benefits simply because of the characteristics of their jobs,¹² employment patterns, and family responsibilities. Indeed, women are less likely to be eligible for UI than men due to many of the same factors that make them less likely to be paid as much as men.¹³

³ U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *The Employment Situation: November 2018*, Table A-1 (Dec. 2018), <https://www.bls.gov/news.release/empsit.t01.htm> (last visited Dec. 17, 2018).

⁴ U.S. DEP'T OF LABOR BUREAU OF LABOR STATISTICS, *Dec. 2018 National Occupation Employment and Wage Estimates*, <https://www.bls.gov/news.release/empsit.t02.htm> (last visited Dec. 20, 2018).

⁵ See, e.g., NAT'L WOMEN'S LAW CTR., *The Wage Gap: The Who, How, Why, and What to Do* (2018), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/09/The-Wage-Gap-The-Who-How-Why-and-What-to-Do-2018.pdf>; [insert more]

⁶ <https://nwlc.org/resources/low-wage-jobs-are-womens-jobs-the-overrepresentation-of-women-in-low-wage-work/>; <https://www.nelp.org/wp-content/uploads/Issue-Brief-State-Unemployment-Protections.pdf> page 5

⁷ Alabama, Alaska, Arizona, Connecticut, Illinois, Kentucky, Michigan, Mississippi, Missouri, New Mexico, North Dakota, Ohio, Oregon, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin all categorically restrict part-time workers from UI eligibility. RACHEL WEST, ET AL., CTR. FOR AM. PROGRESS, NAT'L EMP. LAW PROJECT., & CTR. ON POVERTY & INEQUALITY, *Where States Are and Where They Should Be on Unemployment Protections* 1, 7-8 (2016), <https://www.nelp.org/wp-content/uploads/Issue-Brief-State-Unemployment-Protections.pdf>.

⁸ NAT'L EMP. LAW PROJECT, *Why Unemployment Insurance Matters to Working Women and their Families An Important Tool in the Work-Family Balance* (2015), https://www.nelp.org/wp-content/uploads/2015/03/Fam-Friendly-short.ais_edits3_.pdf.)

⁹ ANNE MORRISON & KATHERINE GALLAGHER ROBBINS, NAT'L WOMEN'S LAW CTR., *Part-Time Workers Are Paid Less, Have Less Access to Benefits—and Two-Thirds Are Women* (2015), https://www.nwlc.org/wp-content/uploads/2015/08/part-time_workers_fact_sheet_8.21.1513.pdf.

¹⁰ NAT'L EMP. LAW PROJECT, *supra* note 8; see HODGES, *infra* note 12 at 7.

¹¹ See WEST ET AL., *supra* note 7.

¹² LESLIE HODGES, U. OF MO., *Gender Differences in Eligibility for Unemployment Insurance* 1, 20 (2016), <https://paa.confex.com/paa/2016/meetingapp.cgi/Paper/5343>.

¹³ *Id.* at 1-2.

Unsurprisingly, gender-based disparities in receipt of UI benefits are evident: although women make up 44.1 percent of unemployed workers, they only make up 42.6 percent of UI recipients,¹⁴ while men, who make up 55.9 percent of unemployed workers, make up 57.4 percent of UI recipients.¹⁵ In short, as long as public benefit programs like UI “continue to favor traditional work arrangements and employment patterns,” there will continue to be unequal access to public benefits for women workers.¹⁶

Allowing states to add new barriers, such as a drug testing requirement as set forth in the proposed rule, will further reduce the ability of women, people of color, and low-wage workers more generally to receive the UI benefits that they need to support themselves and their families. Our specific comments on the proposed rule follow.

As an organization with a depth of experience advocating for the improvement and enforcement of our nation’s employment and civil rights laws, particularly on behalf of women workers and low-wage workers, we believe that the authority that DOL is divesting to the states is beyond that which the law allows it to delegate. Further, the proposed scope of drug testing goes beyond what the statute authorizes, and could well be implemented in a manner that is unconstitutional under the Fourth Amendment. Finally, given the information we already have about similar types of drug testing regimes, states would spend far more in resources in trying to implement such a program than it would ever be worth in savings to UI trust funds.

Background

In 2012, as part of the Middle Class Tax Relief and Job Creation Act of 2012 (MCTRA),¹⁷ Congress for the first time authorized, but did not require, states to conduct mandatory drug testing of UI applicants in two very limited circumstances:

- The applicant was “terminated from employment with the applicant’s most recent employer (as defined under state law) because of the unlawful use of controlled substances;” or
- The applicant “is an individual for whom suitable work (as defined under state law) is only available in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary of Labor).” If an applicant tests positive for drugs in either of these circumstances, a state may deny that applicant UI benefits.

DOL previously promulgated final rules in compliance with this legislation defining “occupation” as a position or class of positions that are required, or may be required in the future, by state or federal law to be drug tested. More specifically, DOL mandated that occupations for which state UI agencies could conduct drug testing include:

- Occupations where testing is required by state or federal law;

¹⁴ WEST ET AL., *supra* note 7 at 14.

¹⁵ *Id.*

¹⁶ HODGES, *supra* note 12 at 21. Hodges goes on to aptly point out the importance of access to programs such as UI and states that “jobs largely determine our ability to meet essential material needs, and they provide many nonmaterial social and psychological benefits.” *Id.* at 22.

¹⁷ Middle Class Tax and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, (2012), <https://www.gpo.gov/fdsys/pkg/PLAW-112publ96/html/PLAW-112publ96.htm>.

- Occupations that require carrying a firearm;
- Motor vehicle operators carrying passengers;
- Aviation flight crewmembers and air traffic controllers; and
- Railroad operating crews.

DOL also provided that the list above could expand in the future as additional state laws were passed to require drug testing for specific occupations.

In 2017, the Republican-controlled Congress passed a resolution under the Congressional Review Act to invalidate these regulations, and the president signed it into law. DOL is now seeking to essentially re-regulate and increase the circumstances under which states may test UI applicants for drug use.

The new proposed regulation, however, would expand both the scope of what constitutes regular drug testing and the manner by which occupations can be determined to be regularly drug tested. The occupations that can be regularly drug tested is dramatically expanded to include both: 1) those professions that test on a regular basis; and 2) those that require pre-employment screening. In addition, the proposed rule allows states to develop, with virtually no direction from DOL, 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.”¹⁸

This proposed regulation is far broader than what Congress intended in MCTRA. Further, it illegally delegates critical DOL authority to states and likely runs afoul of the Fourth Amendment protection against unreasonable searches. If a state chooses to implement this rule, it would be costly to states already struggling with administrative funding and will ultimately result in workers losing access to earned benefits.

1. **The Department of Labor has no authority to delegate the authority to define which occupations regularly test for drug use to the states, and in doing so, proposes a regulation that would allow drug testing that is far beyond what is allowed by the plain and unambiguous language of the authorizing statute.**

The authorizing language in MCTRA specifically assigned DOL with the task of defining “an occupation that regularly conducts drug testing”¹⁹ through regulations. DOL may not abdicate or delegate its authority to determine which occupations are subject to this provision merely because of its desire “to provide flexibility to States to choose a system that matches its workforce best.”²⁰ If it does so, it acts in an arbitrary and capricious manner, in violation of the Administrative Procedure Act.²¹ In this instance, DOL’s attempt to delegate the authority to define “an occupation that regularly conducts drug testing” to

¹⁸ Federal-State Unemployment Compensation Program; Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants Under the Middle Class Tax Relief and Job Creation Act of 2012, 83 Fed. Reg. 55311 (proposed Nov. 5, 2018) (to be codified at 20 C.F.R. § 620.3).

¹⁹ Middle Class Tax and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, (2012), <https://www.gpo.gov/fdsys/pkg/PLAW-112publ96/html/PLAW-112publ96.htm>.

²⁰ Federal-State Unemployment Compensation Program; Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants Under the Middle Class Tax Relief and Job Creation Act of 2012, 83 Fed. Reg. 55311, 55314 (proposed Nov. 5, 2018) (to be codified at 20 C.F.R. § 620.3).

²¹ *See, e.g., Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 328 (5th Cir. 2001).

the states contravenes the plain language of the authorizing statute, which explicitly provides that this definition shall be “determined under regulations issued by the Department of Labor...”²²

Moreover, by attempting to give states such broad authority to define which occupations regularly drug test, DOL has gone far beyond the clear and plain language in the MCTRA and what it intends. If implemented, the proposed regulation would allow states to establish a “factual basis” for allowing drug testing for workers using “[l]abor market surveys; reports of trade and professional organizations; and academic, government, and other studies.” This questionable “standard” is rife with potential for abuse; its language is so broad and provides so little guidance that it could create a loophole to justify drug testing for virtually any workers under any circumstances.

2. The broader the authority states have to conduct suspicionless drug testing in order to receive UI, the greater the risk of successful legal challenge to doing so.

Courts have consistently held that government-mandated drug testing is a search subject to the restrictions of the Fourth Amendment. Absent probable cause, a suspicionless drug test is constitutional only if the government shows a “special need” to conduct testing.²³ The Supreme Court has recognized such a “special need” in only two classes of cases—those involving employment and schools.²⁴ Courts have consistently found that suspicionless drug testing in other areas, including as a condition of receiving government benefits, constitutes a violation of the Fourth Amendment.²⁵ In *Lebron v. Secretary of Florida Department of Children and Families*, for example, the court held that justifications offered by the state such as “promot[ing] work, protect[ing] families, and conserv[ing] resources” were *not* sufficient to permit carrying out suspicionless drug testing of public benefit applicants. Instead, courts have required the state to show some type of “concrete danger” that necessitates drug testing in this context.²⁶ The court in *Lebron* held that the Fourth Amendment prohibits “blanket government searches” and stated that attempting to require suspicionless drug testing of public benefits applicants without such a showing “crosses the constitutional line.”²⁷

The only possible justification articulated in the NPRM is DOL’s interest in “provid[ing] flexibility to States to choose a system that matches its workforce best,”²⁸ which clearly would fail to satisfy the standard set forth in *Lebron*. The proposed regulation thus fails to meaningfully limit the state’s use of this authority to the constitutional boundaries of a “special need.” The open-ended invitation to impose drug testing on a broad swath of UI applicants opens the door to widespread application of this authority in a manner that would violate the Fourth Amendment. Imposing a drug-testing regimen that a federal court is likely to strike down does a disservice to UI applicants potentially subject to unconstitutional drug testing and states using scarce UI program resources to implement such testing.

²² Middle Class Tax and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, (2012), <https://www.gpo.gov/fdsys/pkg/PLAW-112publ96/html/PLAW-112publ96.htm>.

²³ See Nat’l Fed’n of Fed. Emps.-IAM v. Vilsack, 681 F.3d 483, 490 (D.C. Cir. 2012).

²⁴ See Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Ry. Labor Execs.’ Ass’n, 489 U.S. 602 (1989); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, (2002).

²⁵ See, e.g., *Lebron v. Sec’y of Fla. Dep’t of Children & Families*, 772 F.3d 1352 (11th Cir. 2014) (striking down state’s Temporary Assistance for Needy Families drug-testing program); *Chandler v. Miller*, 520 U.S. 305 (1997) (striking down drug testing of certain political candidates).

²⁶ *Lebron*, 772 F.3d 1352 at 1378.

²⁷ *Id.*

²⁸ *Id.*

3. Requirements that add unfair and unnecessary hurdles to UI reciprocity are unfair to claimants and undermine the program.

While the Department has legislative authority to devise a rule to allow for narrow circumstances under which states can test claimants for drug use, any expansion of that authority creates hurdles for workers and expands the chance that workers who need and are eligible to their earned benefits will be unable to access them. Indeed, a 2016 survey of states that conduct drug testing of TANF recipients found that “at least 1.6 times as many people were denied benefits for failing to follow through on a drug test as those who tested positive.”²⁹ This may be because people may have difficulty accessing drug testing services, which may require arranging time off work, child care, and other considerations.³⁰ Additionally, over-the-counter cough suppressants, cold medicines, pain relievers and some prescription medications for anxiety and depression could produce a false positive in some drug tests.³¹

Rather than imposing additional hurdles to UI receipt, DOL and state UI agencies should to make every effort to ensure that workers who are entitled to benefits are getting them. Receipt of UI is already at historic lows for reasons unrelated to the current unemployment rate, including the reduction of the number of weeks that workers can collect UI benefits as well as stricter-than-usual enforcement of various “continuing eligibility” requirements.³² The further erosion of the UI program hurts more than the workers who involuntarily find themselves out of work – it damages families, communities, and the overall economy. UI is partly meant to serve as a cushion against economic shock during recessionary periods. Making it harder for workers to access that lifeline blunts UI’s capacity as a counter-cyclical economic tool.

Finally, drug testing stigmatizes UI usage. Requiring a urine sample from a jobless worker merely to apply for UI is dehumanizing, could act as a disincentive for some workers from applying for UI, and fosters a stereotype that unemployed workers are to blame for their own unemployment. This runs counter to the UI program’s purpose and history, which has always made clear that the benefits provide assistance to workers who are unemployed through no fault of their own.³³ And it is insulting to millions of Americans who are simply trying to get back on the economic ladder.

4. The costs, both financial and otherwise, far outweigh the benefits of drug testing UI applicants.

²⁹ BRYCE COVERT & JOSH ISRAEL, *States Spend Millions to Drug Test the Poor, Turn Up Few Positive Results*, THINKPROGRESS, Apr. 20, 2017, <https://thinkprogress.org/states-spend-millions-to-drug-test-the-poor-turn-up-few-positive-results-81f826a4afb7/>.

³⁰ *Id.*

³¹ *See, e.g.*, CHRISTINE ADAMEC, LIVESTRONG.COM, *Drugs That Can Cause False Positive Drug Tests*, <https://www.livestrong.com/article/161857-drugs-that-can-cause-false-positive-drug-tests/> (last visited Jan. 4, 2019); CHARLENE LAINO, WEBMD, *Drug Tests Often Trigger False Positives*, May 20, 2010, <https://www.webmd.com/drug-medication/news/20100528/drug-tests-often-trigger-false-positives#1>.

³² GEORGE WENTWORTH, CTR. FOR LAW & SOC. POL’Y, *Closing Doors on the Unemployed: Why Most Jobless Workers Are Not Receiving Unemployment Insurance and What States Can Do About It* (2017), <https://www.nelp.org/publication/closing-doors-on-the-unemployed/>.

³³ U.S. DEP’T OF LABOR, EMPL. & TRAINING ADMIN., *About Unemployment Insurance: Unemployment Insurance Factsheet*, <https://workforcesecurity.doleta.gov/unemploy/uifactsheet.asp> (last visited Jan. 4, 2019).

It is well documented that states do not have adequate funding to run their UI programs effectively.³⁴ States are currently experiencing record low administrative funding³⁵ and they can scarcely afford additional administrative burdens. Because federal law prohibits assigning this cost to claimants,³⁶ states would have to absorb the full cost of drug testing thousands of unemployed workers. At a time when states are already struggling to administer their UI programs, this is a cost they are ill-equipped to afford.

It is instructive to look at the return on investment states have received as a result of drug testing TANF claimants. As both the Center for Law and Social Policy and ThinkProgress have noted, states have spent substantial amounts of money to set up and administer drug testing regimes for TANF claimants, but have caught precious few claimants testing positive.³⁷ It is notable that in 2016, thirteen states spent over \$1.3 million on drug testing, but only 369 individuals tested positive,³⁸ at a cost of approximately \$3,523 per positive test. Every state that implemented drug testing for TANF in 2016 had a positive drug test rate, among all applicants, below 2.5 percent.³⁹ Indeed, all testing regimes revealed positive results at rates substantially below the CDC's estimate of a 9.4 percent drug-use rate in the general population.⁴⁰

Conclusion

Under the current UI system, women, workers of color, and low-income workers are already disproportionately less likely to be eligible for UI benefits.⁴¹ Barriers, such as drug testing, that would add yet another hurdle during the application process would only further contribute to low and shrinking UI receipt by women and people of color. Instead of allowing states to further limit access to UI benefits, the federal government and the states should be working together to improve equity in their UI systems. Moreover, during this period of relatively low unemployment, the administration should be focused on bolstering the UI system and encouraging states to adjust their requirements to meet the needs of women, people of color, and low-wage workers, *not* putting forth policies that will undermine the necessary protections that keep workers economically self-sufficient during tough economic times.

For all of the reasons set forth in this comment, DOL should immediately withdraw this harmful proposed rule. If finalized, the rule would have significant and widespread negative implications for workers, particularly women and low-wage workers. This proposal perpetuates negative stereotypes and does not

³⁴ See REBECCA DIXON, NAT'L EMP. LAW PROJECT, *Federal Neglect Leaves State Unemployment Systems in a State of Disrepair* (2013), <https://www.nelp.org/publication/federal-neglect-leaves-state-unemployment-systems-in-a-state-of-disrepair/>.

³⁵ *Id.*

³⁶ RONTEL BATEL & GEORGE WENTWORTH, NAT'L EMPL. LAW. PROJECT, *Drug Testing Unemployment Insurance Applicants: An Unconstitutional Solution in Search of a Problem* 4 n.7, Feb 2017, <https://www.nelp.org/wp-content/uploads/Drug-Testing-Unemployment-Insurance-Applicants.pdf> (citing Unemployment Insurance Program Letter 1-15, issued October 9, 2014. *Permissible Drug Testing of Certain Unemployment Compensation Applicants Provided in Subtitle A of the Middle Class Tax Relief and Job Creation Act of 2012*).

³⁷ VICTORIA PALACIO, CTR. FOR LAW & SOC. POL'Y, *Drug Testing SNAP Applicants is Ineffective and Perpetuates Stereotypes* (2017), <https://www.clasp.org/sites/default/files/publications/2017/08/Drug-testing-SNAP-Applicants-is-Ineffective-Perpetuates-Stereotypes.pdf>; COVERT, *supra* note 29.

³⁸ COVERT, *supra*.

³⁹ *Id.*

⁴⁰ *See id.*

⁴¹ West et al., *supra* note 7.

address the critical need for the UI system to better serve women who lose their jobs and prepare for the inevitable next recession.

Thank you for the opportunity to submit comments on the proposed rulemaking. Please do not hesitate to contact Amy Matsui (amatsui@nwlc.org) or Julie Vogtman (jvogtman@nwlc.org) to provide further information.

Sincerely,



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