

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

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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 Trump Administration's announcement of intent to propose a new drug testing rule.

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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 1, 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](#)).

New Regulations

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 Drug Testing Regulation 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.

Agenda Notice of Proposed Rulemaking

In spring 2018, the President's Unified Agenda of Regulatory and Deregulatory Actions (Agenda) proposed to issue a Notice of Proposed Rulemaking from DOL that is to identify the occupations that regularly conduct drug testing for purposes of Section 2105 of P.L. 112-96.

On April 17, 2018, at the House Committee on Ways and Means Hearing on Jobs and Opportunity: Federal Perspectives on the Jobs Gap, Chairman Brady asked Labor Secretary Acosta about the status of crafting new regulations on drug testing UC applicants (see the hyperlink beginning at 1 hour, 56 minutes). Secretary Acosta replied that DOL was in the process of drafting a new proposed rule, but that it had to take into consideration the reissue requirements of the Congressional Review Act. 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."

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