

EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION Unemployment Compensation
	CORRESPONDENCE SYMBOL OUI/DL
	DATE October 9, 2014

ADVISORY: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 1-15

TO: STATE WORKFORCE AGENCIES

FROM: GERRI FIALA /s/ for PORTIA WU
Assistant Secretary

SUBJECT: 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

1. **Purpose.** To provide guidance about permissible drug testing of certain unemployment compensation (UC) applicants.

2. **References.**

- Section 2105 of Pub. L. 112-96, the Middle Class Tax Relief and Job Creation Act of 2012 (Act);
- Section 303 of the Social Security Act (SSA); and
- Federal-State Unemployment Compensation Program; Middle Class Tax Relief and Job Creation Act of 2012 Provision on Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants; 79 FR 61013 (proposed October 9, 2014) (to be codified at 20 C.F.R. part 620).

3. **Background.** President Obama signed the Act on February 22, 2012. Section 2105 of the Act (Attachment I) adds subsection (l) to section 303, SSA, to permit states to test a UC applicant for the unlawful use of controlled substances (drugs) as an eligibility condition if the applicant:

- a. Was terminated from employment with his/her most recent employer (as defined under state law) because of the unlawful use of controlled substances; or
- b. 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 (Secretary)).

These are the only circumstances under which a state is permitted to require applicants to take and pass a drug test as a condition of initial eligibility for UC. An applicant may, if state law provides, be denied UC based on a positive result of this drug test.

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This Unemployment Insurance Program Letter (UIPL) provides general guidance about these drug testing provisions, and specific guidance about the testing permitted by Section 303(l)(1)(A)(i), SSA, for individuals who were terminated from employment with their most recent employer because of the unlawful use of controlled substances.

As required by the Act, the U.S. Department of Labor (Department) will identify the occupations that regularly conduct drug testing in regulations. The Department has recently issued a Notice of Proposed Rulemaking seeking comment on a proposed list of such occupations. Further guidance on drug testing permitted by Section 303(l)(1)(A)(ii), SSA, for individuals for whom the only available “suitable work,” as defined in state law, is in an occupation that regularly conducts drug testing, will be issued after the final regulations identifying such occupations have been promulgated.

4. Discussion.

a. Applicant. Section 303(l)(1)(A), SSA, limits testing to “an applicant for unemployment compensation.” As such, drug testing under either clause (i) or (ii) of Section 303(l)(1)(A), SSA, is permitted only when an individual submits an initial application for UC. Once individuals have applied for UC and have been determined eligible for UC, regardless of whether they have already taken and passed a drug test, states may not require them to submit to any further drug tests as a condition of continued eligibility for UC.

b. Most Recent Employer. Section 303(l)(1)(A)(i), SSA, permits states to enact laws that provide for the drug testing of UC applicants who have been separated from their most recent employer because of the unlawful use of a controlled substance. The definition of the term “most recent employer” must be established in state law and be the same as the definition used for other UC purposes, such as when determining which employer is the separating or chargeable employer. Thus, if an employer is not “the most recent employer” under state law for purposes of adjudicating a separation from work, the state may not consider that employer as the most recent employer for purposes of determining whether the separation was for the illegal use of a controlled substance.

While separations from other employers an individual worked for during the base period may (if state law so provides) be adjudicated to determine UC eligibility, state law may provide for drug testing of a UC applicant only if the individual separated from the most recent employer due to the unlawful use of controlled substances.

It is important to note that this basis for drug testing is very limited because, in most cases, separation from employment due to illegal drug use in violation of an employer’s drug free workplace policy constitutes misconduct connected with work, which itself results in an individual being disqualified from receiving UC. Some states provide for a total denial of benefit rights for misconduct connected with work; in those states, there would be no reason to drug test as a condition of eligibility. Other states require an individual to work a specified period of time and earn a specified amount of wages before the individual can requalify for UC. If the individual later becomes unemployed and separation from the most recent employer was not due to the illegal use of a controlled substance, the state may not test the

individual for drug use as a condition of UC eligibility. In this case, the most recent employer would be the employer for whom the individual performed services in order to purge the disqualification. However, if state law provides for a fixed-period-of-time disqualification and the individual performed no subsequent work, the state may test the individual for drug use as a condition of eligibility when the individual reapplies for UC because the most recent employer will not have changed.

c. Suitable Work. New section 303(l)(1)(A)(ii), SSA, permits drug testing of UC applicants 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. States must use the same definition of “suitable work” under their law for UC applicant drug testing purposes that they use for work search and refusal of work purposes when determining eligibility for UC. Some states establish different definitions of suitable work depending on how long individuals have been unemployed. Since drug testing is permissible only for certain UC applicants, states must use the definition of suitable work that applies to individuals who file initial claims.

d. Only Available. New section 303(l)(1)(A)(ii), SSA, permits drug testing of UC applicants 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. This means that all work that is suitable for an individual must be in an occupation that regularly conducts drug testing. If suitable work for an individual is available in any occupation for which drug testing is not regularly conducted, that individual may not be subject to drug testing under section 303(l)(1)(A)(ii), SSA. Additionally, in order for work in a specified occupation to be available, there must be work in the local labor market for that specific occupation.

e. Drug Testing Standard. New section 303(l)(2)(B), SSA, defines “controlled substance” by reference to Section 102 of the Controlled Substances Act (21 U.S.C. 802). Therefore, states may condition UC eligibility on passing tests under either clause (i) or (ii) of Section 303(l)(1)(A), SSA, only for substances that are identified in Section 102 of the Controlled Substances Act. That section provides that “a “controlled substance” means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of that subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.” The current list of controlled substances is found at 21 U.S.C. 812 (Attachment II).

States that enact laws to drug test UC applicants must establish their own drug testing programs. However, states may enter into a contract with an entity to conduct the drug tests on behalf of the state. When conducting tests for illegal use of controlled substances, the state must use a test that meets or exceeds the standards of the *Mandatory Guidelines for Federal Workplace Drug Testing Programs*, published by the Substance Abuse and Mental Health Services Administration (SAMHSA), or the U.S. Department of Transportation (DOT) procedures. Those are the standards that the Federal government uses and are the standards that most laboratories, and government or private-sector employers use when following the provisions of the Drug Free Workplace Act. Tests that do not meet or exceed (i.e., have more rigorous standards for sample collection, chain of custody, and other procedural requirements)

the SAMHSA or DOT procedures may not be used to determine an individual's eligibility for UC. Additionally, any laboratory used by the state to conduct drug testing must meet all of the requirements to be certified by SAMHSA under Subpart K of the Mandatory Guidelines for Federal Workplace Drug Testing Programs. (See 73 FR71858 published on November 25, 2008.)

The *Mandatory Guidelines for Federal Workplace Drug Testing Programs* may be found online at: <http://www.gpo.gov/fdsys/pkg/FR-2008-11-25/pdf/E8-26726.pdf>. Information about DOT standards may be found online at: <http://www.dot.gov/odapc/>. All questions regarding these standards should be directed to those agencies.

f. Cost of Drug Testing. Section 301, SSA, provides that the Federal government will provide grants to the states for the administration of their UC laws. Section 303(a)(1), SSA, requires, as a condition of a state receiving these administrative grants, that state law include provision for “[s]uch methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due.” These provisions of law have been historically interpreted to prohibit states from transferring the cost of administering the UC program to unemployed workers because these costs may inhibit individuals who may be eligible from filing a claim and receiving UC “when due.” If a state chooses to require drug tests under either clause (i) or (ii) of Section 303(l)(1)(A), SSA, the testing would be an expense of administering the state UC law. As such, it may be paid from the state's UC administrative grant. Further, because it is a cost of program administration, states may not require applicants to pay any of the cost of drug tests.

g. Total Reduction of Benefit Rights. Section 3304(a)(10) of the Federal Unemployment Tax Act (FUTA) requires that “compensation shall not be denied to any individual by reason of cancellation of wage credits or total reduction of 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.” Section 303(l)(1)(B), SSA, as added by the Act, specifies that “[n]othing in this Act or any other provision of Federal law shall be considered to prevent a State from enacting legislation to provide for . . . denying such compensation to such applicant on the basis of the result of the [drug] testing conducted by the State . . .” As such, it provides an exception to the requirements of section 3304(a)(10), FUTA. Thus, states may cancel wage credits or impose a total denial of benefit rights on applicants who fail a drug test permitted under either clause (i) or (ii) of Section 303(l)(1)(A), SSA.

h. Timely Eligibility Determinations. The requirement that UC payments be made when due in section 303(a)(1), SSA, has been interpreted to require that UC be paid as soon as administratively feasible. (See California Department of Human Resources Development v. Java, 402 U.S. 121, 130-31 (1971).) The Department's regulations at 20 CFR part 640 establish the standard for benefit payment promptness. As a result, states that implement drug testing provisions consistent with the requirements of either clause (i) or (ii) of Section 303(l)(1)(A), SSA, must establish procedures to ensure that eligibility determinations are made promptly, that benefits are provided “with the greatest promptness that is administratively feasible,” and that they meet all of the promptness requirements in 20 CFR part 640.

i. Confidentiality of information. The results of, or even the fact of, a drug test for an applicant for UC is confidential UC information as defined in 20 CFR 603.2(j). Therefore, the confidentiality requirements of 20 CFR 603.4 apply. States may not release information about an individual's drug test except as provided under state law that conforms to the requirements of 20 CFR part 603.

j. Limits on Permissible Drug Testing. Section 3304(a)(4), FUTA, requires, as a condition for employers in a state to receive credit against the Federal tax, that state law provide that "all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund" Section 303(a)(5), SSA, provides a similar requirement as a condition for a state to receive administrative grants. Section 3306(h), FUTA, defines compensation as "cash benefits payable to individuals with respect to their unemployment." These provisions taken together are commonly referred to as the "withdrawal standard" of Federal UC law.

UIPL No. 787 transmitted the Secretary's decision in the 1964 conformity case involving South Dakota that interpreted these sections to mean UC eligibility must be based on the "fact or cause" of unemployment. Specifically, the Secretary ruled that the payment of UC premised on a condition of entitlement "unrelated to the fact or cause of unemployment" is inconsistent with Federal law.

Because of this longstanding interpretation, the only permissible reasons for drug testing are those provided for in Section 303(l), SSA. As a general rule, when there is no direct link between a person becoming unemployed and the illegal use of a controlled substance, drug testing does not relate to the "fact or cause" of unemployment because the fact or possibility of drug use has nothing to do with the reason a person became unemployed. Even in Section 303(l), SSA, testing is permitted only if the "cause" of unemployment is termination from employment because of unlawful use of controlled substances or the "fact" of unemployment is due to an inability to pass a required drug test. Thus, the underlying requirement remains that UC eligibility must be based on the "fact or cause" of an individual's unemployment. As exceptions to any of the requirements of Federal UC law are narrowly construed, drug testing of claimants as a condition of eligibility for UC for any reason other than those specifically authorized by section 303(l)(1)(A), SSA, would violate the withdrawal standard.

k. Effective Date. Because Section 2105 does not provide for an effective date, section 303(l), SSA, became effective upon enactment of the Act on February 22, 2012. However, as discussed above, only drug testing under clause (i) of Section 303(l)(1)(A) may be implemented by states at this time; drug testing under clause (ii) is not permitted until a final rule is in effect. Also, as a reminder, since drug testing under the Act is optional, no changes to state UC law are required unless a state wishes to provide for drug testing of UC applicants as authorized by the Act. However, states that wish to conduct drug testing as permitted by Section 303(l)(1)(A), SSA, must amend their state law to explicitly provide for such testing.

- 5. Action Required.** States are requested to review this UIPL, and assure their laws and practices conform to and comply with its guidance.

6. **Inquiries.** Inquiries should be directed to the appropriate Regional Office.

7. **Attachments.**

I Text of Section 2105 of Pub. L. 112-96, the Middle Class Tax Relief and Job Creation Act of 2012.

II 21 U.S.C. § 812. Schedules of controlled substances.