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DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 620

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

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice of Proposed Rulemaking

SUMMARY: This Notice of Proposed Rulemaking (NPRM) sets forth the Department of Labor's proposal to permit States to drug test unemployment compensation (UC) applicants, including a proposed list of occupations which the Department of Labor ("Department" or "DOL") has determined regularly conduct drug testing.

DATES: Comments must be submitted, in writing, on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1205-AB81, by one of the following methods:

Federal e-Rulemaking Portal: <http://www.regulations.gov>. Follow the website instructions for submitting comments.

Mail and hand delivery/courier: Written comments, disk, and CD-ROM submissions may be mailed to Adele Gagliardi, Administrator, Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Avenue, NW,

Room N-5641, Washington, D.C. 20210.

Instructions: Label all submissions with “RIN 1205-AB81.”

Please submit your comments by only one method. Please be advised that the Department will post all comments received that relate to this NPRM on <http://www.regulations.gov> without making any change to the comments or redacting any information. The <http://www.regulations.gov> website is the Federal e-rulemaking portal, and all comments posted there are available and accessible to the public. Therefore, the Department recommends that commenters remove personal information such as Social Security Numbers, personal addresses, telephone numbers, and e-mail addresses included in their comments, as such information may become easily available to the public via the <http://www.regulations.gov> website. It is the responsibility of the commenter to safeguard personal information.

Also, please note that, due to security concerns, postal mail delivery in Washington, D.C. may be delayed. Therefore, the Department encourages the public to submit comments on <http://www.regulations.gov>.

Docket: All comments on this proposed Rule will be available on the <http://www.regulations.gov> website, and can be found using RIN 1205-AB81. The Department also will make all the comments it receives available for public inspection by appointment during normal business hours at the above address. If you need assistance to review the comments, the Department will provide appropriate aids, such as readers or print magnifiers. The Department will make copies of this proposed Rule available, upon request, in large print and electronic file on computer disk. To schedule an appointment to review the comments and/or obtain the proposed Rule in an alternative format, contact

the Office of Policy Development and Research at (202) 693-3700 (this is not a toll-free number). You may also contact this office at the address listed below.

FOR FURTHER INFORMATION CONTACT: Adele Gagliardi, Administrator, Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-5641, Washington, D.C. 20210; telephone (202) 693-3700 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

President Obama signed the Middle Class Tax Relief and Job Creation Act of 2012 (the Act), Pub. L. 112-96, on February 22, 2012. Title II of the Act amended 42 U.S.C. 503, to add a new subsection (l) permitting States to enact legislation to require drug testing of UC applicants as a condition of UC eligibility under two specific circumstances. The first circumstance is if the applicant was terminated from employment with the applicant's most recent employer because of the unlawful use of a controlled substance. *See* 42 U.S.C. 503(l)(1)(A)(i). The second circumstance is if the only available suitable work (as defined in the law of the State providing the UC) for an individual is "in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary)." *See* 42 U.S.C. 503(l)(1)(A)(ii). States are not required to drug test in either circumstance; the law merely makes it permissible for States to enact legislation to do so when one of the two circumstances is present. A State

may deny UC to an applicant who tests positive for drug use under either of these circumstances. *See* 42 U.S.C. 503(l)(1)(B).

On October 9, 2014, the Department published an NPRM determining occupations that regularly conduct drug testing for the purposes of 42 U.S.C. 503(l)(1)(A)(2). *See* 79 FR 61013 (Oct. 9, 2014). After reviewing the comments received, the Rule, as proposed in the NPRM, was modified, and on August 1, 2016, the Secretary of Labor (Secretary) published a regulation determining each occupation “that regularly conducts drug testing” in the *Federal Register* as 20 CFR part 620. It became effective on September 30, 2016.

The 2016 Rule included several components. It identified seven specific occupations that regularly conduct drug testing: an occupation that requires the employee to carry a firearm, along with six specific occupational categories identified in Federal regulations in which the employee must be tested. The Rule also included within its determination any occupation specifically identified in a State or Federal law as requiring an employee to be tested for controlled substances. Finally, the Rule defined key terms as used in the Act. At the same time the Department published its previous NPRM, it issued guidance to States in Unemployment Insurance Program Letter No. 01-15 to address other issues related to the implementation of drug testing under 42 U.S.C. 503(l). On March 31, 2017, President Trump signed a resolution of disapproval under the Congressional Review Act (CRA) (5 U.S.C. 801 *et seq.*) as Pub. L. No. 115-17. The joint resolution was enacted under the authority of 5 U.S.C. 801(b), enacted by the CRA, Pub. L. 104-121. Section 801(b) provides that a disapproved rule can not take effect, and that such a rule cannot be reissued in substantially the same form unless authorized by

Congress. Consistent with this law, the Department published the notice of revocation of the regulation in the *Federal Register* at 82 FR 21916 (May 11, 2017).

Because the statute was not repealed or amended following the resolution of disapproval, the statute continues to require the Secretary to issue regulations to enable the determination of occupations in which drug testing regularly occurs. But the CRA prohibits the Department from reissuing the rule “in substantially the same form” or issuing “a new rule that is substantially the same” as the old rule. 5 U.S.C. 801(b). To comply with both the mandate to issue regulations to enable the determination of occupations in which drug testing regularly occurs, and the CRA prohibition on reissuing the rule “in substantially the same form,” the Department has carefully considered the Act, the 2016 Rule, and the congressional notice of disapproval.

In this NPRM, the Department now proposes a substantially different and more flexible approach to the statutory requirements than the 2016 Rule, enabling States 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 Department recognizes that imposing a nationally uniform list—like the one-size-fits-all approach that the Department attempted in the disapproved 2016 rule—may not fully effectuate Congress’ intent, as expressed in 42 U.S.C. 503(l)(1)(A)(ii), that States be permitted to drug test when the only suitable work for an applicant is in an occupation that regularly conducts such tests. Employers exercise a variety of approaches and practices in conducting drug testing of employees. Some States have laws that impose very minimal restrictions on employer drug testing of employees while other States have

very detailed and proscriptive requirements about what actions the employer can take. That diversity of State treatment also renders an exhaustive list of such occupations impractical. The proposed Rule therefore lays out a flexible standard that States can individually meet under the facts of their specific economies and practices. In the Departments' view, the Rule's substantially different scope and fundamentally different approach satisfies the requirements of the CRA, at least where, as here, the Department is under a continuing statutory obligation to propose regulations in this space.

This proposed Rule is not expected to be subject to the requirements of Executive Order (E.O.) 13771 because this proposed rule is expected to result in no more than *de minimis* costs.

When developing the previous proposed Rule published in 2014, the Department consulted with a number of Federal agencies with expertise in drug testing to inform the proposed regulation. Specifically, the Department consulted with the Substance Abuse and Mental Health Services Administration (SAMHSA) in the U.S. Department of Health and Human Services (HHS); the U.S. Department of Transportation (DOT); the U.S. Department of Defense (DOD); the U.S. Department of Homeland Security (DHS); DOL's Bureau of Labor Statistics (BLS); and DOL's Occupational Safety and Health Administration (OSHA). The Department consulted these agencies because they have experience with required drug testing. DOD and DHS deferred to SAMHSA for interpretation of the drug testing requirements, and the Department gave due consideration to the SAMHSA guidance when developing the 2014 proposed Rule.

In revisiting these regulations, the Department determined that these consultations with Federal agencies are sufficient, although it took steps to ensure that the information provided remains current.

Review of State Drug Testing Laws

As it did in developing the previous Rule, the Department has canvassed State laws to develop an understanding of what occupations require regular drug testing at the State level. In particular, the Department reviewed all current State legislation implementing 42 U.S.C. 503(l), as part of developing this proposal.

Reflecting their diverse needs and workforces, States vary widely in their drug testing requirements. Some State laws identify specific classes of positions for which drug testing of applicants and/or employees is required. For example, State laws commonly require employers to drug test employees in occupations where public safety is involved. States may require private employers to conduct at least some drug testing of employees and/or job applicants who work as drivers of school transportation vehicles and commercial motor vehicles (similar to federal law requirements), or who work for nursing homes and home health agencies, residential childcare facilities, public works projects contractors, corrections facilities, and nuclear and radioactive storage and transfer facilities.

Other States have enacted laws that permit and encourage, but do not require, employers to conduct drug testing of applicants and/or employees. Some State laws identify types of positions for which employers may conduct drug testing, such as individuals employed in safety-sensitive positions or in an occupation which has been designated as a high-risk or safety-sensitive occupation. At least one State permits

testing of individuals who “participate in activities upon which pari-mutuel wagering is authorized.”¹ Most States allow a private employer to decide whether and when to drug test job applicants and employees, often in accordance with a written policy created by the employer according to State law. In some instances, State law specifies that the employer may test job applicants and current employees for any job-related purpose consistent with business necessity and the terms of the employer’s written policy.

When States provide restrictions on workplace drug testing, they commonly provide more protection to current employees than to job applicants. For example, a State’s law may permit employers to require all job applicants with conditional offers of employment to take drug tests, but permit an employer to require an employee to submit to a drug test only if the employer has reasonable suspicion that use of drugs is impairing the employee’s job performance, or has probable cause to believe that the employee, while on the job, is using or is under the influence of drugs.

At least six States also provide various discounts and credits to employers that adopt drug-free workplace programs. Some States’ programs require drug testing of applicants and/or employees as part of these programs, while others do not. Some States that require participating employers to test job applicants nevertheless allow the employers to limit such testing based on reasonable classifications of job positions. Employer sponsorship of a drug-free workplace program is usually voluntary, but may be required for State contractors.

DOL’s research of Federal and State laws related to drug testing found that these laws often refer to classes of positions with similar functions and duties that are required

¹ CONN. GEN. STAT. § 31-51y(c).

to be drug tested (e.g., positions requiring an employee to carry a firearm, or positions involving the operation of motor vehicles carrying members of the public).

Since 42 U.S.C. 503 was amended to add subsection 503(l) in 2012, three States, Mississippi, Texas, and Wisconsin, have enacted laws specifically addressing drug testing of unemployment compensation applicants that directly refer to drug testing under 42 U.S.C. 503(l)(1)(A)(ii).²

Summary of the proposed Rule

The proposed Rule implements the statutory requirement that the Secretary issue regulations determining how to identify “an occupation that regularly conducts drug testing” for the purposes of requiring an applicant for UC benefits, for whom the only suitable work is in an occupation that regularly drug tests, to pass a drug test to be eligible for UC benefits.

The proposed new Rule takes a fundamentally different approach to identifying these occupations than did the Department’s earlier rule. The 2016 Rule limited the list of occupations that “regularly” conduct drug testing to certain specifically listed occupations and those in which drug testing is required by Federal or State law. The Department has reconsidered that list in light of the congressional disapproval of the 2016 Rule. The Department now acknowledges that the list did not adequately account for the significant variation in State practices with respect to drug testing. An occupation that is regularly drug tested in one State may not be regularly tested in another, making a

² The State enactments in each of these States refer to the Federal law and note that the occupations that regularly conduct drug testing are those designated under regulations developed by the Secretary of Labor, which are the regulations proposed in this NPRM. See Miss. Code Ann. § 71-5-513(A)(3)(c), Tex. Lab. Code Ann. § 207.021(b-1), and Wis. Stat. § 108.133(1)(c)(ii).

national one-size-fits-all list inappropriate. This variation also makes developing a nationally applicable and exhaustive list of occupations that “regularly” conduct drug testing wholly impractical. Therefore, the Secretary has determined in this proposed Rule to include in the list of occupations that regularly conduct drug testing those occupations for which a State has a factual basis for finding that employers in that State conduct drug testing as a standard eligibility requirement for employing or retaining employees. This new addition provides substantially more flexibility to States and recognizes the reality that, in some States, drug testing is regularly conducted in many more occupations than were initially listed in the 2016 Rule.

This proposed regulation also provides definitions of key terms. It identifies positions or classes of positions with similar functions or duties as “occupations,” for the purposes of determining “occupations” that regularly test for drugs in this proposed Rule. While the Department considered adopting a specific taxonomy of occupations, such as the Standard Occupational Classification (SOC) System, the proposed Rule does not do so, in order to provide flexibility to States to choose a system that matches its workforce best. Due to the wide variation in State economies and practices, a one-size-fits-all taxonomy imposed by the Federal government could not be tailored to each State’s situation and would thus be impracticable. States may utilize the SOC system, the O*NET system developed under a grant by the Department by the North Carolina State Department of Commerce, or another system of the State’s choosing.

The Department, in proposing this new Rule, adopts the finding in the 2016 Rule that any occupation for which Federal or State law requires drug testing is among those that are drug tested “regularly.” The Department recognizes that Federal and State laws

may evolve in identifying which positions or occupations are required to drug test. Thus, the new proposed Rule allows for occupations identified in future Federal or State laws as requiring drug testing to be occupations that States will be able to consider for drug testing of UC applicants.

Finally, the proposed Rule includes a section on conformity and substantial compliance.

The Department seeks comments on the entirety of the proposed Rule, and, in the section-by-section description of the proposed Rule, highlights areas where comments would be particularly helpful.

II. Section-by-Section Review

What is the Purpose of the Proposed Regulation? (§ 620.1)

Proposed § 620.1 explains that the purpose of the NPRM is to implement 42 U.S.C. 503(l)(A)(ii), permitting drug testing of UC applicants for the use of controlled substances, where suitable work (as defined under the State's UC law) is only available in an occupation for which drug testing is regularly conducted (as determined under this part 620).

What Definitions Apply to this Part? (§ 620.2)

“Applicant” means an individual who files an initial claim for UC under State law. “Applicant” excludes an individual already found initially eligible and filing a continued claim. The Department came to this conclusion based on how the word “applicant” is used elsewhere in 42 U.S.C. 503 and the Social Security Act. Specifically, in enacting 42 U.S.C. 503(l), Congress also enacted 42 U.S.C. 503(a)(11), which describes in different language those seeking continued eligibility. Paragraph (a)(11)

provides that a State unemployment law must include “[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 actually seeking work.” Thus, Congress distinguished “applicants” and “claimants” in the Act. This distinction appears elsewhere in Section 503. Paragraphs (d)(2)(A) and (e)(2)(A) both refer to “new applicants” in the context of individuals whose UC eligibility has yet to be determined. In contrast, paragraph (j)(1) refers to “new claimants” in the context of individuals who have been found eligible for UC. Likewise, 42 U.S.C. 503(h)(3)(B) and (i)(1)(A)(ii), which require UC information disclosures to HHS and the Department of Housing and Urban Development, both refer to an individual who “is receiving, has received, or has made application for” UC. There as well, the Act, distinguishes an individual making “application for” UC benefits from one who “is receiving” or “has received” UC. This distinction between applicants and recipients is similar to that found elsewhere in the Social Security Act. *See, e.g.*, 42 U.S.C. § 1396w(b)(1)(A) (“applicant for, or recipient of, medical assistance”); *id.* § 1320b-6(j)(1)(A) (“applicant for, or recipient of, benefits”); § 1396a(a)(4) (“services to applicants and recipients”).

“Controlled substance,” as defined by 42 U.S.C. 503(l)(2)(B), has the same meaning given such term in SEC. 102 of the Controlled Substances Act (Pub. L. 91-513, 21 U.S.C. 802). “Controlled substance” means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of 21 U.S.C. 801 *et seq.* 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.

“Occupation” means a position or class of positions with similar functions and duties. As discussed above, Federal and State drug testing laws do not generally specify or refer to “occupations” requiring drug testing, but rather identify classes or categories of positions, in descriptive terms—such as, for example, positions requiring the carrying of a firearm, or positions that use motor vehicles to carry members of the public. These types of position descriptions identify a crucial aspect, function, or duty of these positions (e.g., driving a motor vehicle, or carrying a firearm) that is the basis for the drug testing requirement. This definition gives States flexibility to identify occupations based on their own systems for classifying occupations. The Department considered and rejected mandating the use of the Standard Occupational Classification (SOC) system. While the SOC system provides a methodology for classifying workers into occupational categories for the purpose of data collection and statistical analysis, it may not provide the best mechanism to support states in identifying the occupations in which employers regularly drug test. To assist states in identifying additional occupations that regularly drug test, the definition of “occupation,” for purposes of this rule, clarifies that the positions or classes of positions identified as occupations must have similar functions and duties, a change from the 2016 Final Rule. As noted previously, employer drug testing, whether mandated by law or not, tends to focus on positions where employees are carrying out specific functions and duties such as jobs in which the worker carries a firearm, transports the public, or handles financial transactions. States remain free to choose to use the SOC system, but are not required to use it.

“Suitable Work” means suitable work as defined under the UC law of the State against which the claim is filed. This is the same definition of “suitable work” under that

State's law as the State otherwise uses for determining UC eligibility based on seeking work or refusing work.

“Unemployment Compensation” is defined in SEC. 303(l)(2)(A) of the Social Security Act (SSA), to have the same meaning given to the term in 42 U.S.C. 503(d)(2)(A), which states the term unemployment compensation means any unemployment compensation payable under State law (including amounts payable pursuant to an agreement under a Federal unemployment compensation law.)

Section 3306(h) of the Federal Unemployment Tax Act (26 U.S.C. 3306(h)) defines compensation to mean cash benefits payable to individuals with respect to their unemployment.

What are the Occupations for which Drug Testing is Regularly Conducted for Purposes of this Part 620? (§ 620.3)

In this proposed Rule, the Department recognizes both the historic Federal-State partnership that is a key hallmark of the UC program as well as the wide variation among States' economies and practices. The proposed rule thus recognizes the need for States' participation in identifying which, and whether additional, occupations regularly conduct drug testing in each State. Proposed § 620.3 describes a number of different occupations that the Department has determined regularly drug test. States may use this list, in addition to the broader criterion, in identifying occupations for which drug testing is regularly conducted based on the criteria set by the Secretary under these regulations.

Proposed subsection 620.3(a) includes the class of positions that requires the employee to carry a firearm as an “occupation” that regularly drug tests.

Proposed subsections 620.3(b)-(g) include various specific occupations that were listed in the previous Rule as ones that regularly drug test, since various Federal laws require drug testing of employees in each of these occupations. The proposed Rule identifies in subsections 620.3(b)-(g) six specific sections of regulations issued by several agencies of DOT and the Coast Guard that identify the classes of positions that are subject to drug testing. Any position with a Federal legal requirement for drug testing unquestionably constitutes an occupation that regularly drug tests.

Proposed subsections 620.3(h) and (i) include in the list of occupations that regularly drug test any occupation that is required to be drug tested under any future Federal law or under the law of the State seeking to drug test UC applicants in that occupation. As with the previous six sections, any position with a legal requirement for drug testing unquestionably constitutes an occupation that regularly drug tests.

Proposed subsection 620.3(j) adds to the list of occupations that regularly drug test a significant provision not contained in the previous Final Rule that fundamentally transforms the regulatory approach and scope of the proposed regulation, and thus satisfies the requirements of the CRA, at least where, as here, the Department is under a continuing statutory obligation to propose regulations in this space. Proposed subsection 620.3(j) provides that a State may identify additional occupations in that State where employers require pre-hire or post-hire drug testing as a standard eligibility requirement and consider those occupations as regularly conducting drug testing. This provision reflects the Secretary's determination that, because there is wide variation among State economies and employment practices, it is not practicable to exhaustively list all occupations that "regularly conduct[] drug testing." Instead, the Department sets out a

Federal standard by which it is possible to assess—under Federal, not State, law—whether a State has a sufficient basis to require drug testing of a particular class of UC applicants. That proposed Federal standard is as follows: When identifying an occupation that regularly conducts drug testing, the State must identify a factual basis for its finding that employers conduct pre-employment or post-hire drug testing as a standard eligibility requirement for obtaining or maintaining employment in the identified occupation. Factual bases may include, but are not limited to: labor market surveys; reports of trade and professional organizations; and academic, government, or other studies. This proposed standard effectuates the plain meaning of the Act’s authorization of drug testing where suitable work “is only available in an occupation that *regularly* conducts drug testing.” Section 303(l)(1)(A)(ii) (emphasis added). If this rule were enacted as proposed, the Department would review States’ factual bases through reports authorized under 42 U.S.C. § 503(a)(6) and 20 CFR 601.3; these reports are currently made through States’ submissions of Form MA-8-7.

DOL seeks comments on whether it should instead impose a heightened standard of evidence to demonstrate that an occupation is one that regularly conducts drug tests and therefore can be considered an occupation for which drug testing is a standard eligibility requirement. If so, what heightened level of evidence of drug testing would be appropriate?

DOL also seeks comments on any suggested additions, deletions, or edits to the list and descriptions of occupations that regularly conduct drug testing, or on the scope of the latitude accorded to States in the approach proposed here. DOL likewise seeks comments on its determination that it is impracticable to develop a nationally uniform list

of occupations that regularly drug test, given the wide variations in regional economies and in State law.

Finally, DOL seeks comments on its planned approach of using submissions through Form MA-8-7 as the method for reviewing States' factual bases for finding that employers conduct pre-employment or post-hire drug testing as a standard eligibility requirement for obtaining or maintaining employment in the identified occupation.

What are the Parameters for the Testing of Applicants for the Unlawful Use of a Controlled Substance? (§ 620.4)

Proposed § 620.4, consistent with 42 U.S.C. 503(l), provides that a State may require applicants to take and pass a test for the illegal use of controlled substances as a condition of initial eligibility for UC under specified conditions, and that applicants may be denied UC based on the results of these tests. States are not required to drug test as a condition of UC eligibility based on any of the occupations set out under this proposed Rule. States may choose to do so based on some or all of the identified occupations, however, States may not, except as permitted by 42 U.S.C. 503(l)(1)(A)(i) (governing drug testing of individuals terminated for the unlawful use of a controlled substance), drug test based on any occupation that does not meet the definition in § 620.3 for purposes of determining UC eligibility.

Proposed subsection 620.4(a) provides that an applicant, as defined in proposed § 620.2, may be tested for the unlawful use of one or more controlled substances, also as defined in proposed § 620.2, as an eligibility condition for UC, if the individual is one for whom suitable work, as defined by that State's UC law, is only available in an occupation that regularly conducts drug testing, as determined under proposed § 620.3. As discussed

in the Summary of the proposed Rule, the term “applicant” means that only an individual who is filing an initial UC claim, not a claimant filing a continued claim, may be subject to drug testing.

Proposed subsection 620.4(b) provides that a State choosing to require drug testing as a condition of UC eligibility may apply drug testing based on one or more of the occupations under § 620.3. This flexibility is consistent with the statute, which permits, but does not require, drug testing, and the partnership nature of the Federal-State UC system.

Proposed subsection 620.4(c) provides that no State would be required to drug test UC applicants under this part 620. This provision was not in the 2016 Final Rule, but again reflects the partnership nature of the Federal-State UC system and the Department’s understanding that the Act permitted, but did not require, States to drug test UC applicants under the identified circumstances.

While 42 U.S.C. 503(l) requires the Secretary to issue regulations determining the occupations that regularly conduct drug testing, the Secretary may address other issues relating to 42 U.S.C. 503(l) in guidance, such as program letters and other issuances, and may issue additional guidance as needed.

What are the consequences of implementing a drug testing program that is not in accordance with these regulations? (§ 620.5)

Proposed subsection 620.5(a) explains that implementation of drug testing of UC applicants as authorized under State laws must be in conformity with these regulations for States to be certified as eligible to receive Federal grants for the administration of its UC program under 42 U.S.C. 502. The procedures for resolving issues of conformity or

compliance with the requirements of the proposed Rule, and the remedies for failure to conform or comply, are found in 20 CFR 601.5.

III. Administrative Information

Executive Orders 12866 and 13563: Regulatory Planning and Review

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives, and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. For a “significant regulatory action,” E.O. 12866 asks agencies to describe the need for the regulatory action and explain how the regulatory action will meet that need, as well as assess the costs and benefits of the regulation.³ This regulation is necessary because of the statutory requirement contained in 42 U.S.C. 503(l)(1)(A)(ii), which requires the Secretary to determine the occupations that regularly conduct drug testing for the purpose of determining which applicants may be drug tested when applying for State unemployment compensation. The Department considers this proposed Rule to be a “significant regulatory action,” as defined in SEC. 3(f) of E.O. 12866, because it raises novel legal or policy issues arising out of legal mandates. Before the amendment of Federal law to add the new 42 U.S.C. 503(l)(1), drug testing of applicants for UC as a condition of eligibility was prohibited.

The proposed Rule is entirely voluntary on the part of the States, and the Department does not yet have sufficient data to predict how many States will establish a

³ Exec. Order No. 12866, § 6(a)(3)(B).

drug testing program. Before the enactment of the Federal law in 2012, States were not permitted to condition eligibility for UC on drug testing. The unsettled federal regulatory landscape since that time may have chilled States' interest in pursuing drug testing, and it is uncertain to what extent States' costs in administering drug testing would be offset by savings in their UC programs. Whatever the reason, to date, only three States have enacted State laws to pursue drug testing of UC applicants under this statutory provision.

There are limited data on which to base estimates of the cost associated with establishing a testing program, or the offsetting savings that a testing program could realize. Only one of the three States that have enacted conforming drug testing laws issued a fiscal estimate. That State, Texas, estimated that the 5-year cost of administering the program would be \$1,175,954, taking into account both one-time technology personnel services to program the system and ongoing administrative costs for personnel. The Texas analysis estimated a potential savings to the Unemployment Trust Fund of \$13,700,580 over the 5-year period, resulting in a net savings of approximately \$12.5 million. The Department believes it would be inappropriate to extrapolate the Texas analysis to all States, in part because of differences in the Texas law and the requirements in this proposed Rule. The Department has included this information about Texas for illustrative purposes only and emphasizes that by doing so, it is not commenting on or endorsing the methodology or assumptions in the Texas analysis.

The Department requests comments from interested stakeholders on the costs of establishing and administering a State-wide testing program; the number of applicants for unemployment compensation that fit the criteria established in the law; estimates of the

number of individuals who would subsequently be denied unemployment compensation due to a failed drug test; and the offsetting savings that could result.

In the absence of such data, the Department is unable to quantify the administrative costs States will incur if they choose to implement drug testing pursuant to this proposed Rule. No additional funding has been appropriated for this purpose, and current Federal funding for the administration of State unemployment compensation programs may be insufficient to support the additional costs of establishing and administering a drug testing program, which would include the cost of the drug tests, staff for administration of the drug testing function, and technology to track drug testing outcomes. States would also incur ramp up costs to implement the processes necessary for determining whether an applicant is one for whom drug testing is legally permissible; referring and tracking applicants referred for drug testing; and conducting and processing the drug tests. States would also have to factor in increased costs of adjudication and appeals of both the determination that an individual is subject to drug testing and resulting determinations of benefit eligibility based on the test results.

Paperwork Reduction Act

The Department has determined that this proposed Rule does not contain a “collection of information,” as the term is defined. *See* 5 CFR 1320.3(c). DOL expressly seeks comments on this determination.

Executive Order 13132: Federalism

Section 6 of E.O. 13132 requires Federal agencies to consult with State entities when a regulation or policy may have a substantial direct effect on the States, the relationship between the National Government and the States, or the distribution of

power and responsibilities among the various levels of government, within the meaning of the E.O. Section 3(b) of the E.O. further provides that Federal agencies must implement regulations that have a substantial direct effect only if statutory authority permits the regulation and it is of national significance.

This proposed Rule does not have a substantial direct effect on the States, the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of Government, within the meaning of the E.O. This is because drug testing authorized by the regulation is voluntary on the part of the State—it is not required.

Unfunded Mandates Reform Act of 1995

This regulatory action has been reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (the Reform Act). Under the Reform Act, a Federal agency must determine whether a regulation proposes a Federal mandate that would result in the increased expenditures by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any single year. The Department has determined that, since States have the option to drug test UC applicants and can elect not to do so, this proposed Rule does not include any Federal mandate that could result in increased expenditure by State, local, and tribal governments. Drug testing under this proposed Rule is purely voluntary, so any increased cost to the States is not the result of a mandate. Accordingly, it is unnecessary for the Department to prepare a budgetary impact statement.

Plain Language

The Department drafted this proposed Rule in plain language.

Effect on Family Life

The Department certifies that this proposed Rule has been assessed according to SEC. 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105-277, 112 Stat. 2681) for its effect on family well-being. The Department certifies that this proposed Rule does not adversely impact family well-being as discussed under SEC. 654 of the Treasury and General Government Appropriations Act of 1999.

Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act

The Regulatory Flexibility Act (RFA), at 5 U.S.C. 603(a), requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis, which describes the impact of the proposed Rule on small entities. Section 605 of the RFA allows an agency to certify a Rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. This proposed Rule does not affect small entities as defined in the RFA. Therefore, the proposed Rule will not have a significant economic impact on a substantial number of these small entities. The Department has certified this to the Chief Counsel for Advocacy, Small Business Administration, pursuant to the RFA.

List of Subjects in 20 CFR Part 620

Unemployment compensation.

For the reasons stated in the preamble, the Department proposes to amend 20 CFR chapter V by adding part 620 to read as follows:

PART 620-- Drug Testing for State Unemployment Compensation Eligibility

Determination Purposes

Sec.

620.1 Purpose.

620.2 Definitions.

620.3 Occupations that Regularly Conduct Drug Testing For Purposes of Determining Which Applicants May Be Drug Tested When Applying for State Unemployment Compensation.

620.4 Testing of Unemployment Compensation Applicants for the Unlawful Use of a Controlled Substance.

620.5 Conformity and substantial compliance.

Authority: 42 U.S.C. 1302(a); 42 U.S.C. 503(l)(1)(ii)

§ 620.1 Purpose.

The regulations in this part implement 42 U.S.C. 503(l). 42 U.S.C. 503(l) permits States to enact legislation to provide for State-conducted testing of an unemployment compensation applicant for the unlawful use of controlled substances, as a condition of unemployment compensation eligibility, if the applicant was discharged for unlawful use of controlled substances by his or her most recent employer, or if suitable work (as defined under the State unemployment compensation law) is only available in an occupation for which drug testing is regularly conducted (as determined under this part 620). 42 U.S.C. 503(l)(1)(A)(ii) provides that the occupations that regularly conduct drug testing will be determined under regulations issued by the Secretary of Labor.

§ 620.2 Definitions.

As used in this part—

Applicant means an individual who files an initial claim for unemployment compensation under State law. Applicant excludes an individual already found initially eligible and filing a continued claim.

Controlled substance means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of 21 U.S.C. 801 *et seq.*, as defined in SEC. 102 of the Controlled Substances Act (21 U.S.C. 802). 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.

Occupation means a position or class of positions with similar functions and duties. Federal and State laws governing drug testing refer to classes of positions that are required to be drug tested. Other taxonomies of occupations, such as those in the Standard Occupational Classification (SOC) system, may be used by States in determining the boundaries of a position or class of positions with similar functions and duties under § 620.3. Use of the SOC codes, however, is not required, and States may use other taxonomies to identify a position or class of positions with similar functions and duties.

Suitable Work means suitable work as defined by the unemployment compensation law of a State against which the claim is filed. It must be the same definition the State law otherwise uses for determining the type of work an individual must seek, given the individual's education, experience, and previous level of remuneration.

Unemployment Compensation means any cash benefits payable to an individual with respect to the individual's unemployment under the State law (including amounts payable under an agreement under a Federal unemployment compensation law).

§ 620.3 Occupations that Regularly Conduct Drug Testing for Purposes of Determining Which Applicants May Be Drug Tested When Applying for State Unemployment Compensation.

In electing to test applicants for unemployment compensation under this part, States may require drug testing for applicants for whom the only suitable work is in one or more of the following occupations that regularly conduct drug testing, for purposes of § 620.4:

- (a) An occupation that requires the employee to carry a firearm;
- (b) An occupation identified in 14 CFR 120.105 by the Federal Aviation Administration, in which the employee must be tested (Aviation flight crew members and air traffic controllers);
- (c) An occupation identified in 49 CFR 382.103 by the Federal Motor Carrier Safety Administration, in which the employee must be tested (Commercial drivers);
- (d) An occupation identified in 49 CFR 219.3 by the Federal Railroad Administration, in which the employee must be tested (Railroad operating crew members);
- (e) An occupation identified in 49 CFR 655.3 by the Federal Transit Administration, in which the employee must be tested (Public transportation operators);

- (f) An occupation identified in 49 CFR 199.2 by the Pipeline and Hazardous Materials Safety Administration, in which the employee must be tested (Pipeline operation and maintenance crew members);
- (g) An occupation identified in 46 CFR 16.201 by the United States Coast Guard, in which the employee must be tested (Crewmembers and maritime credential holders on a commercial vessel);
- (h) An occupation specifically identified in Federal law as requiring an employee to be tested for controlled substances;
- (i) An occupation specifically identified in the State law of that State as requiring an employee to be tested for controlled substances; and
- (j) An occupation where the State has 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 the occupation.

§ 620.4 Testing of Unemployment Compensation Applicants for the Unlawful Use of a Controlled Substance.

(a) States may require drug testing for unemployment compensation applicants, as defined in § 620.2, for the unlawful use of one or more controlled substances, as defined in § 620.2, as a condition of eligibility for unemployment compensation, if the individual is one for whom suitable work, as defined in State law, as defined in § 620.2 of, is only available in an occupation that regularly conducts drug testing as identified under § 620.3.

(b) A State conducting drug testing as a condition of unemployment compensation eligibility, as provided in paragraph (a) of this section, may only elect to require drug testing of applicants for whom the only suitable work is available in one or more of the occupations listed under § 620.3. States are not required to apply drug testing to any applicants for whom the only suitable work is available in any or all of the occupations listed.

(c) No State is required to drug test UC applicants under this part 620.

§ 620.5 Conformity and substantial compliance.

- (a) In general. A State law implementing the drug testing of applicants for unemployment compensation must conform with—and the law’s administration must substantially comply with—the requirements of this part 620 for purposes of certification under 42 U.S.C. 502(a), governing State eligibility to receive Federal grants for the administration of its UC program.
- (b) Resolving Issues of Conformity and Substantial Compliance. For the purposes of resolving issues of conformity and substantial compliance with the requirements of this part 620, the provisions of 20 CFR 601.5 apply.

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