



**BILLING CODE: 4510-FW-P**

**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:** Final rule.

**SUMMARY:** The Department of Labor (DOL or the Department) is issuing this final rule to permit States to drug test unemployment compensation (UC) applicants and to identify occupations that the Secretary of Labor (Secretary) has determined regularly conduct drug testing. These regulations implement the Middle Class Tax Relief and Job Creation Act of 2012 (the Act) amendments to the Social Security Act (SSA), permitting States to enact legislation that would allow State UC agencies to conduct drug testing on UC applicants for whom suitable work (as defined under the State law) is available only in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary). The Secretary is required under the SSA to issue regulations determining those occupations that regularly conduct drug testing. These regulations succeed a final rule issued on August 1, 2016, that Congress rescinded under the authority of the Congressional Review Act (CRA). These regulations, as required under the CRA, are not substantially the same as the rescinded final rule.

**DATES:** This final rule is effective [insert date 30 days after date of publication in the *Federal Register*].

**FOR FURTHER INFORMATION CONTACT:** Gay Gilbert, Administrator, Office of Unemployment Insurance, U.S. Department of Labor, 200 Constitution Avenue NW, Room S-4524, Washington, DC 20210; telephone (202) 693-3029 (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: (1) if the applicant was terminated from employment with his or her most recent employer because of the unlawful use of a controlled substance, *see* 42 U.S.C. 503(l)(1)(A)(i); or (2) if the only available suitable work (as defined in the law of the State providing the UC) for that 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 permits States to enact legislation to do so when either 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 a Notice of Proposed Rulemaking (NPRM) determining occupations that regularly conduct drug testing for the purposes of 42 U.S.C.

503(l)(1)(A)(ii). *See* 79 FR 61013 (Oct. 9, 2014). After reviewing the comments received, the rule, as proposed in the 2014 NPRM, was modified, and on August 1, 2016, the Department published regulations determining occupations “that regularly conduct[] drug testing” in the *Federal Register* as 20 CFR part 620 (81 FR 50298). The 2016 final rule established, as occupations that regularly conduct drug testing, only those occupations “specifically identified in a State or Federal law as requiring an employee to be tested for controlled substances,” as well as specific occupations identified in Federal regulations and any occupation that required employees to carry firearms. *See* former 20 CFR 620.3 (81 FR 50298). It became effective on September 30, 2016.

On March 31, 2017, President Trump signed a joint resolution of disapproval under the authority of 5 U.S.C. 801(b), CRA (5 U.S.C. 801 *et seq.*), Pub. L. 104-121. Section 801(b) provides that a disapproved rule shall not take effect and that such a rule may not be reissued in substantially the same form unless authorized by Congress. Consistent with this law, the Department published the notice of revocation of the regulations in the *Federal Register* at 82 FR 21916 (May 11, 2017).

Because 42 U.S.C. 503(l) 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. 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,” on November 5, 2018, the Department issued a new NPRM substantially departing from the rescinded final rule. *See* 83 FR 55311.

In this final rule, the Department implements a more flexible approach to the statutory requirement that is not substantially the same as the rescinded 2016 final rule, enabling States to enact legislation to require drug testing for a far larger group of UC applicants than the previous final rule permitted. This flexibility recognizes the diversity of States' economies and the different roles of employer drug testing across the States. The Department has determined that imposing a nationally uniform list—like the one-size-fits-all approach that the Department attempted in the disapproved 2016 rule—does not fully effectuate Congress' intent regarding what constitutes employer drug testing in an occupation. 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 prescriptive requirements about what actions the employer may take; this means occupations may be regularly drug-tested in some States, but not in others. This diversity among States also renders an exhaustive list of such occupations impractical. This final rule lays out a flexible standard that States can individually meet under the facts of their specific economies and practices. Its substantially different scope and fundamentally different approach satisfies the requirements of the CRA, while still meeting the requirement of 42 U.S.C. 503(l)(1)(A)(ii) to issue regulations addressing what occupations regularly conduct drug testing.

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 regulations. 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.

## II. Summary Discussion of the Final Rule

The 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 permitting States to require an applicant for UC, for whom suitable work is only available in an occupation that regularly drug tests, to pass a drug test to be eligible for UC.

In this final rule, the Department takes a fundamentally different approach to identifying these occupations than it did in the previous final rule that Congress later rescinded. The list of occupations in the 2016 final rule that "regularly" conduct drug testing was limited to certain specifically listed occupations and those in which drug testing is required by Federal or State law. In this final rule, the Department has expanded that list in light of the congressional disapproval of the 2016 final rule. It expands the consideration of what occupations regularly conduct drug testing by accounting for significant variations in State practices with respect to drug testing. An occupation that regularly drug tests in one State may not regularly test in another, making a national one-size-fits-all list impractical and infeasible, and therefore inappropriate. Thus the Secretary has determined in this rule to include in the list of occupations that regularly conduct drug testing those occupations for which each 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 in the occupation. This new addition provides substantially more flexibility to States and recognizes that, in some States, drug testing is regularly conducted in more occupations than were initially included in the 2016 final rule.

This final rule also provides definitions of key terms. In particular, for the purpose of determining occupations that regularly test for drugs, this rule defines an “occupation” as a position or a class of positions with similar functions or duties. While the Department considered adopting a specific taxonomy of occupations, such as the Standard Occupational Classification (SOC), this rule does not do so, in order to provide flexibility to States to choose an approach that best matches its workforce. For further explanation, see the preamble discussion related to § 620.3.

In this rule, the Department is adopting 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, this 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.

This rule also includes a section on conformity and substantial compliance.

Finally, this final rule includes minor changes from the proposed rule to add clarity. Specifically, changes were made to the rule text in the introductory text of section 620.3 and in paragraphs (b) through (g) of that section.

### III. Summary of the Comments

#### **Compliance with the Congressional Review Act**

*Comment:* The Department received one comment regarding the CRA and the Department's initiation of new rulemaking. This commenter asserted that the NPRM is inconsistent with the CRA prohibition in 5 U.S.C. 801(b)(2) because that provision, according to the commenter, "forbids the executive branch from re-regulating the same matter without additional legislation."

*Department's Response:* The commenter misunderstands the prohibition in 5 U.S.C. 801(b)(2). That provision does not prohibit re-regulating "the same matter;" rather, it prohibits issuing a regulation on the same matter that is "substantially the same" as the rescinded regulation.

Section 801(b)(2) provides, in relevant part, that a [disapproved] rule may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule. It is clear from a plain reading of this provision that a reissued or new rule on the same subject is permitted provided that it is not substantially the same. Further, the legislative history for Pub. L. No. 115-17 demonstrates Congressional intent that the Department issue a new rule permitting drug testing for a broader scope of occupations than the rescinded rule permitted. *See, e.g.*, 163 Cong. Rec. H1200-01 (Feb. 15, 2017) (Rep. Brady, describing the eventually-rescinded rule as "incredibly narrow," stated that it "ignored the intent of Congress," and noted that a comment was submitted by the House Ways and Means Committee during the rulemaking process calling for the Department to issue a broader rule).

The Department looks to the plain meaning of the term "substantially." The Merriam-Webster Dictionary defines "substantial," the adjective form of the adverb "substantially," as "being largely but not wholly that which is specified." The Oxford English Dictionary provides two

slightly different definitions of “substantially:” (1) “[t]o a great or significant extent;” and (2) “[f]or the most part; essentially.” These definitions suggest that a rule is “substantially the same” where it is for the most part the same as the prior rule. The changes in this rule clear the bar. The scope of occupations that “regularly conduct drug testing” is the central issue, and the change in scope here is a significant change to the previous final rule. Thus, a rule that substantially broadens the list of occupations that “regularly conduct[] drug testing” clearly is not “in substantially the same form” as the much more restrictive final rule that Congress rescinded. Further, there is very little legislative history regarding the CRA interpreting what is meant by a rule “reissued in substantially the same form,” or a “new rule” that is “substantially the same,” and the courts have not ruled on the matter.

In the NPRM, the Department proposed a substantially different and more flexible approach to the statutory requirements than the rescinded final rule, enabling States to enact legislation to require drug testing for a larger group of UC applicants than the previous final rule permitted. The proposed rule’s substantially different scope and fundamentally different approach satisfies the requirements of the CRA that the Department not reissue a rule that is “substantially the same” as the rule disapproved by Congress. Thus, no changes have been made to the rule text as a result of the comment.

### **Additional Comments Received on the Proposed Rule**

The analysis in this section provides the Department’s responses to public comments received on the proposed rule. If a section or paragraph that appeared in the proposed rule is not addressed in the discussion below, it is because the public comments submitted in response to the proposed rule did not substantively address that specific section, or that no comments were received on

that section or paragraph; thus, no changes have been made to the regulatory text. Further, the Department received a number of comments on the proposed rule that were outside the scope of the proposed regulations. Accordingly, the Department offers no response to such comments. These comments expressed support for or opposition to drug testing in general, discussed personal narratives, or were opinions on marijuana legalization.

The Department's proposed rule to implement 42 U.S.C. 503(l)(1)(A)(ii) was published on November 5, 2018 (83 FR 55311). During the 60-day public comment period, the Department received a total of 211 public comments on the proposed rule. Of those, 56 comments were deemed substantive, and three were duplicates. The Department, in the NPRM, sought comments on the entirety of the proposed rule, in addition to specific areas where the Department solicited comments, as noted below. The comments of general application received in response to the solicitation have been grouped by subject matter and are discussed below. No changes have been made to the rule text as a result of any of the comments received.

### **General Comments**

*Comments:* Several commenters voiced support for the proposed rule as a means to help prevent fraud and waste, and to ensure a more efficient unemployment insurance (UI) program.

*Department's Response:* The issues raised by the comments point to an important issue for the Department; that is, the integrity of the UI program. This rule and 42 U.S.C. 503(l)(1)(A) provide a means of ensuring continued integrity by enabling States to enact laws that will bolster their findings that a claimant is able and available for work as required by Federal law and, therefore, eligible for benefits.

*Comments:* A number of commenters asserted that drug testing should be mandatory to receive unemployment benefits, or any government benefit. These commenters asserted that if job applicants and employees are required to undergo drug testing for certain occupations, it stands to reason that individuals seeking unemployment benefits or any form of government assistance should be drug tested as well.

*Department's Response:* The specific language in 42 U.S.C. 503(l)(1)(A) limits States' authority to test UC applicants for drugs to only two circumstances: where the individual was fired from his or her last employer for testing positive for drugs; or where suitable work is only available in an occupation that regularly tests for drugs. Thus, the Department is limited in these regulations to implementing the specific terms of the statute, and makes no change to the final rule.

*Comments:* Several commenters asserted that the drug testing permitted by the NPRM is inconsistent with the prohibition against unreasonable searches in the Fourth Amendment to the U.S. Constitution. The objections cited Federal court decisions that have struck down mandatory drug testing as a condition of benefits under the Temporary Aid to Needy Families program in *Lebron v. Secretary of Florida, Department of Children & Families*, 772 F.3d 1352 (11th Cir. 2014), and as a condition of candidacy for elected office in *Chandler v. Miller*, 520 U.S. 305 (1997). One commenter asserted that the proposed rule would be “saddling states with the prospect of costly litigation,” and that it “would leave states wide open to likely legal challenges in which most courts would rule against the states.” Another commenter, citing *Chandler v. Miller*, above, asserted that “a suspicion-less drug test can only be Constitutional if the Government shows a ‘special need’ to conduct testing,” and that the “proposed regulation makes no attempt to limit the State’s use of this authority to Constitutional boundaries of a ‘special

need.” A commenter also asserted that the Department, “as administrator of the Federal-State UI system, has a responsibility to foster compliance with all applicable Constitutional and statutory requirements” and “should not issue regulations that specifically authorize drug testing that would clearly violate the Fourth Amendment.”

Most commenters acknowledged that any possible Constitutional issues would arise from inappropriate State implementation of drug testing, rather than from the regulations themselves. For example, several commenters (in identical or nearly identical language) stated:

The proposed regulation does not attempt to limit the State’s use of this authority to drug test UI applicants to Constitutional boundaries. The previous version of this regulation may have passed Constitutional muster because of its close adherence to the language of the authorizing statute. However, in this NPRM, the Department’s open-ended invitation to impose drug testing on applicants for unemployment compensation based on a standardless exercise in alleged fact-finding opens the door to widespread application of this authority in a manner in clear violation of the Fourth Amendment.

*Department’s Response:* As the comments acknowledge, the NPRM itself did not conflict with the Fourth Amendment. The NPRM merely proposed adding a provision permitting a State to identify additional occupations in that State where employers “regularly” require drug testing as a condition of employment, provided that the State has a factual basis for doing so; the proposed rule did not mandate that States engage in drug testing, and the proposed rule did not relieve the States from the responsibility to ensure that whatever practices they adopt meet Constitutional requirements. Thus, the NPRM did not require any action by States that would conflict with the Constitution, nor did it grant States authority to implement the rule in a way that would not meet Constitutional requirements.

In granting broader flexibility to States to identify occupations that regularly test for drugs in the State where there is a factual basis for doing so, the Department neither encourages nor discourages drug testing as a condition of UC eligibility. The flexibility granted is in keeping

with the nature of the UC system as a Federal-State partnership that grants broad discretion to States to implement their UC programs. Granting States broader flexibility to implement drug testing in occupations that regularly test for drugs in their particular State does not violate the Fourth Amendment, and States that choose to drug test under this rule are responsible for implementing drug testing in a manner consistent with Constitutional requirements. Accordingly, the Department makes no changes to the final rule in response to these comments.

*Comments:* Numerous commenters asserted that some individuals could have difficulty accessing testing services, for a variety of reasons: distance to testing services and lack of transportation, particularly in rural areas; lack of childcare; and lack of income for transportation.

*Department's Response:* The Department issued Unemployment Insurance Program Letter (UIPL) No. 2-16 (October 1, 2016) to ensure both physical and meaningful access to the UC program. As a result, State UC agencies are already required to ensure access to services, a requirement that will also cover drug testing under this rule. Thus, the Department has not made any changes to the rule as a result of these comments.

*Comments:* Several commenters asserted that the drug testing provision in 42 U.S.C. 503(l)(1)(A)(ii) would add unfair and unnecessary hurdles to receipt of UC, and will increase harm to workers and families already struggling to meet basic needs. Still others stated that government, and in particular the Department, should be focused on helping more individuals obtain jobs and on protecting workers by addressing challenges to the unemployment insurance system before the next recession. Other commenters urged the Department to withdraw the proposed rule, with one commenter asserting that the Department should follow the clear intent of 42 U.S.C. 503(l)(1)(A)(ii).

*Department's Response:* The purpose of this regulation is to implement 42 U.S.C. 503(l)(1)(A)(ii) permitting States to enact legislation providing for drug testing of UC applicants if the applicant “is an individual for whom suitable work . . . is only available in an occupation that regularly conducts drug testing[.]” This rule implements the statute and assists States in determining that individuals are able and available for work, and can accept work when it is offered in their occupations that regularly conduct drug testing.

Therefore, the Department makes no changes to the final rule in response to these comments.

*Comments:* Several commenters expressed concern that this regulation would adversely affect low-wage workers, low-income communities, and people of color. Among those commenters, one specifically addressed the wage gap between white males and black males, white women and black women, and white men and women and Latinos and Latinas.

*Department's Response:* The purpose of this rule is to implement the provisions of sec. 2105 of the Middle Class Tax Act (the Act), which amended sec. 303 of the Social Security Act (SSA) to add sec. 303(l)(1)(A), permitting States to drug test UC applicants in the specified limited circumstances.

This rule is not designed to negatively impact any specific demographic among applicants for UC. It permits States to conduct drug testing of UC applicants for whom suitable work is available only in an occupation that regularly conducts drug testing. States that choose to drug test applicants under the rule are responsible for implementing the drug testing program in a manner that does not result in discrimination against protected classes.

States' UI programs remain subject to sec. 188 of the Workforce Innovation and Opportunity Act and 29 CFR 38.2(a)(2), so they are prohibited from discriminating against UC applicants on the bases of, among other protected characteristics, race, color, sex, national origin, and

disability. *See* 29 U.S.C. 3248; *see also* 29 CFR 38.2(a)(2) and 38.5. Section 188’s prohibition on discrimination extends to policies and procedures that have discriminatory effects as well as those that have discriminatory purposes. *See, e.g.,* 29 CFR 38.6, 38.11, and 38.12. States are required to collect and maintain data necessary to determine whether they are in compliance with the provisions of sec. 188. *See* 29 CFR 38.41.

The Department previously made clear to the States in UI Program Letter (UIPL) No. 2-16 (published October 1, 2015) that nondiscrimination laws applicable to State UC agencies prohibit discrimination based on both disparate treatment and disparate impact.

Therefore, the Department makes no changes to the final rule in response to these comments.

*Comments:* Numerous commenters expressed concern that drug testing UC applicants stigmatizes both unemployment insurance use and individuals who use or are addicted to drugs. Some of those commenters suggested that the rule is an attempt to demonize UC applicants, or that requiring drug testing of UC applicants would be arbitrary and would result in humiliating UC applicants. One commenter suggested the rule require States to create funded programs for drug treatment.

*Department’s Response:* The purpose of this regulation is to implement the provisions of 42 U.S.C. 503(l)(1)(A)(ii) to permit States to test UC applicants for drugs if the applicant “is an individual for whom suitable work . . . is only available in an occupation that regularly conducts drug testing[.]”

This rule, and the enabling statute, do not permit states to indiscriminately test UC applicants for illegal drug use. Rather, only UC applicants who meet the statutory threshold set out above may be tested. Those applicants should, based on prior employment in such an occupation, already know that pre-employment or post-hire drug testing is a requirement for the occupation

in which suitable work is available to them. Further, such testing is related to the individual being able to and available for work.

There is no intent to stigmatize employment in these occupations or receipt of UI benefits, and no stigma should attach simply because the State UI agency conducts such a test as a condition of the applicant being able and available for work in occupations which regularly conduct drug testing. Nor is such testing intended to demonize or humiliate the UC applicant for whom drug testing is a usual condition of hire, or continued employment, in those occupations that regularly test employees for drugs, either pre-hire or post-hire. Thus, the Department makes no change to the final rule based on these comments.

As noted in the preamble discussion related to § 620.4, below, States may provide information on the availability of treatment for drug use or addiction if they so choose, but may not use federal UI administrative funding to do so.

## **Discussion of Comments by Section**

### **Comments regarding § 620.2 Definitions**

The NPRM proposed definitions for several key terms used in the proposed regulatory text. These are: applicant, controlled substance, occupation, suitable work, and unemployment compensation. The Department received no comments on the definitions of occupation, suitable work, and unemployment compensation. Accordingly, the definitions of these terms are adopted in the final rule as proposed.

#### *Definition of Applicant*

*Comment:* The Department received one comment agreeing with the analysis in the Preamble that limited the definition of “applicant” to an individual filing an initial claim for unemployment compensation. The commenter asserted that the definition adopts an interpretation of “applicant”

that has been consistently applied by both the previous and current administrations at DOL, and which appears well supported by analysis of the language of various statutory provisions relating to initial applications for unemployment compensation and claimants for continuing compensation. There were no comments opposed to the proposed definition. Accordingly, the definition of “applicant” is adopted in the final rule as proposed.

#### *Definition of Controlled Substance*

With regard to the definition of “controlled substance,” the Department, as required by statute (*see* 42 U.S.C. 503(1)(2)(B)), adopted the definition of that term as set forth in sec. 102 of the Controlled Substances Act (Pub. L. 91-513, 21 U.S.C. 802). As explained in that Act, “[c]ontrolled 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.

*Comments:* The Department received comments related to the proposed definition of “controlled substances,” which includes marijuana, and its impact on States with laws that decriminalize the use of marijuana for medical and/or recreational purposes.

One commenter asserted that the Department was acting arbitrarily and capriciously by defining “controlled substances” as that term is defined in Federal law in light of the fact that various States have decriminalized the possession of marijuana for medical and/or recreational use. By adopting such a definition, the commenter asserted, some States may “deny unemployment compensation benefits to an individual using marijuana for either medical or recreational purposes that are not in violation of any State law.” This commenter also noted that the NPRM preamble did not even discuss marijuana decriminalization in some States “thus

failing the [Administrative Procedures Act] APA requirement that an agency explain the basis for its actions.” Another commenter argued that “the implementation of drug testing requirements for UI applicants as endorsed by this proposed rule would disproportionately punish individuals who use marijuana in compliance with State law.”

Several commenters expressed concerns that the proposed rule would exacerbate the existing conflict between Federal and State laws regarding marijuana use and would disproportionately punish individuals whose marijuana use is decriminalized in their respective States. These commenters added that the proposed rule “could create issues with states [sic] rights and workers who live in states with legal marijuana but work in states without it.” As a solution, a couple of commenters suggested that States could provide waivers to those UC claimants who live in States that have decriminalized the use of marijuana, noting that the United States Army has adopted such a solution.

*Department’s Response:* Proposed § 620.4(a) of the NPRM provides, in relevant part, that “[s]tates may require drug testing for unemployment compensation applicants, as defined in sec. 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 . . . .” Proposed § 620.2 defines “controlled substances” consistent with how that term is defined in sec. 102 of the Controlled Substances Act (21 U.S.C. 802).

The Department has made no changes to the final rule in response to these comments. As noted above, the statute requires that the Department define “controlled substance” according to a provision in a Federal statute, the Controlled Substances Act. Thus, regardless of how State laws treat marijuana, the Department is statutorily required to adopt the definition of “controlled substances” as set forth in the Controlled Substances Act. *See* 42 U.S.C. 503(l)(2)(B). The

Department does not have the authority to adopt a definition of “controlled substances” different from what Congress expressly provided. Furthermore, the Department has no statutory authority to prohibit a State from testing for a substance that is a “controlled substance” under Federal law if the other statutory requirements to allow testing are met. This is the case regardless of whether the State has partially or wholly decriminalized marijuana possession or use, or whether an interstate UC claim is filed by a claimant who resides in a State where marijuana is decriminalized and seeks work in another State where it is not decriminalized.

We also note proposed § 620.4(a) is permissive in nature and not mandatory. It provides that a State may drug test, as a condition of UC eligibility, “for the unlawful use of one or more controlled substances” as defined in Federal law. The plain language of this regulation allows drug testing; it does not require it. Further, it permits States to omit any controlled substances they so choose from drug testing. Thus, States that choose to drug test as a condition of UC eligibility are permitted to omit marijuana, or any other controlled substance(s), from drug testing. Accordingly, the rule does not conflict with any State laws that partially or wholly decriminalize marijuana, nor can it resolve any conflicts of law within or between States. Regarding the comments that States provide waivers to interstate claimants who live in States that have decriminalized marijuana but work in States that have not, the rule already provides sufficient flexibility for States to exempt claimants from drug testing in such circumstances, or to omit marijuana from drug testing altogether. However, the Department has no authority to require States to provide such waivers.

**Comments regarding § 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 this regulation, 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. This rule recognizes the need for States' participation in identifying which occupations regularly conduct drug testing in each State, and whether additional occupations should be included. Section 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. A minor edit to the introductory text of this section, inserting, "enact legislation to," more closely aligns the regulation with the statutory text, but does not change the substance of the requirements in this section.

Paragraph (a) includes the class of positions that requires the employee to carry a firearm as an "occupation" that regularly drug tests.

Paragraphs (b)-(g) include various specific occupations that were listed in the previous rule as ones that regularly require drug test, since various Federal laws require drug testing of employees in each of these occupations. This rule identifies in paragraphs (b)-(g) six specific sections of regulations issued by several agencies of DOT and the Coast Guard that identify classes of positions that are subject to drug testing. Any position with a Federal legal requirement for drug testing was determined to constitute an occupation that regularly conducts drug testing. However, this final rule departs from the NPRM by removing the parentheticals describing the categories of occupations. This is because the parentheticals did not fully describe the regulations

cited and because the regulations are subject to amendment that could render the descriptions obsolete.

Paragraphs (h) and (i) include in the list of occupations that regularly conduct drug testing any occupation that is required to be drug tested under any Federal law or under the law of the State seeking to drug test UC applicants in that occupation. The law need not currently exist; future Federal or State law requiring drug testing is included under this provision. As with the previous six sections, any position with a legal requirement for drug testing has been determined to constitute an occupation that regularly conducts drug tests.

Paragraph (j) adds to the list of occupations that regularly drug test a significant provision not contained in the previous final rule, and that fundamentally transforms the regulatory approach and scope of the proposed regulations. This fundamental change satisfies the requirements of the CRA and allows the Department to fulfill its continuing statutory obligation to regulate.

Paragraph (j) provides that where there is a factual basis for doing so, a State may identify additional occupations in that State which require pre-hire or post-hire drug testing as a standard eligibility requirement. 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. The 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). Once this final rule takes effect, the Department will 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 ETA Form MA 8-7 (OMB control number 1205-0222) prior to implementation by the State or any changes to State UI laws. Such reports would similarly be submitted prior to implementation of drug testing of applicants in occupations the State identifies as meeting the Federal standard described above.

The NPRM requested comments on the proposed standard and whether the Department should instead impose a heightened standard of evidence to demonstrate that an occupation is one that regularly conducts drug tests and, therefore, is an occupation for which drug testing is a standard eligibility requirement. The NPRM sought comments also on what heightened level of evidence of drug testing would be appropriate, if commenters believed a different standard than what was proposed in the NPRM should be used.

*Comments:* The Department received a number of comments regarding the proposed standard, many asserting that the standard was vague. Several commenters favored a heightened standard of evidence, arguing that the standard in the NPRM is insufficient. A few commenters also recommended an alternative standard.

One commenter argued that the proposed rule provides "little to no guidance concerning how the determination" of occupations is to be made. The commenter asserted that "the regulatory

text merely requires the State to have an undefined ‘factual basis,’” and that the NPRM preamble “offers little guidance with its undescriptive and nonexclusive list of vague examples ranging from reports of trade and professional organizations to a virtually standard-less ‘other studies’.” The commenter asserted that this “is the polar opposite of a determination under DOL regulations.”

Another commenter stated that “we the regulated community have no idea what the standard is that DOL has proposed, so we don’t know how to assess what would be ‘heightened’ standard.” The commenter added that “[a]t the least, a standard should require facts and conclusions that would survive a *Daubert* challenge to an expert witness in federal court.”

*Department’s Response:* The Department does not consider the standard of evidence in the proposed rule to be vague or overly broad. The Department also disagrees with the assertion that the proposed rule provides insufficient guidance on how the determination of occupations must be made. Proposed § 620.3, like the rescinded final rule, contained a list of specific occupations in paragraphs (a) through (g), and a provision permitting drug testing for UC eligibility of any other occupation required to be drug-tested as a condition of employment under Federal or State law in paragraphs (h) and (i). Proposed paragraph (j) was added to account for any variations that may exist from State to State with regard to occupations that regularly conduct drug testing, but where such testing is not required by law. As described elsewhere, the proposed rule required a factual basis for identifying such occupations, and the Department will receive and review such identifications. Acknowledging these variations across States is consistent with the flexibility granted to States in the Federal-State partnership that Federal UC law broadly embraces.

Regarding the portion of the comment suggesting that DOL adopt a standard that would at least survive a *Daubert* challenge, the comment offered no clear alternative standard of evidence.

A *Daubert* challenge, originating from the court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which established criteria for the admissibility of scientific expert testimony, refers to the process for challenging the validity and admissibility of expert testimony. The expert is required to demonstrate that his/her methodology and reasoning are scientifically valid and can be applied to the facts of the case. However, *Daubert* does not provide an administrable substantive standard of evidence, or a clear level of evidence, that the Department or a State can apply in the context of this regulation.

Therefore, the Department makes no changes to the final rule in response to these comments.

*Comments:* Many commenters argued that the Department should use submissions from States to narrowly define the relevant occupations into a nationally applicable list.

*Department's Response:* The Department finds that using submissions of information from States to produce a nationally applicable list of occupations is not administratively feasible. It is extraordinarily difficult to develop a nationally applicable list of occupations that regularly drug test, beyond those that are legally required, while leaving flexibility to account for differences between practices in different States to allow for full implementation of the Congressional mandate. An occupation that is regularly drug-tested in some States might not be regularly drug-tested in others; a national list might not capture this discrepancy, and, indeed, could result in even broader drug testing than is consistent with the statute. Therefore, the Department declines this recommendation and makes no changes to the final rule as a result of these comments.

*Comment:* One commenter argued that the Department should impose “quality standards” in the States’ gathering of information for submissions to the Department on occupations that regularly drug-test; however, the commenter did not specify any recommended “quality standards.”

*Department's Response:* The Department finds it is not administratively feasible to provide more definite standards in the rule text while maintaining States' flexibility to provide factual information from a wide range of sources. The Department monitors and exercises oversight of all aspects of all States' UC administration, and works with States to address deficiencies of conformity or substantial compliance with Federal law requirements. Just as with all aspects of oversight of State UC, the Department will provide oversight of States to ensure conformity and substantial compliance with this rule and take appropriate action as necessary. The Department makes no changes to the final rule in response to this comment.

*Comment:* A commenter criticized abandoning the rescinded regulations' reliance on SOCs established by the Bureau of Labor Statistics (BLS), because these codes "are used in a variety of other setting [sic] for other uses such as establishing prevailing wages," which the commenter asserted undermined a statement in the NPRM that the BLS SOCs "may not provide the best mechanism to support states in identifying occupations in which employers regularly drug test."

*Department's Response:* That the proposed rule does not rely on BLS SOCs does not mean States may not rely on SOCs to identify occupations. Indeed, the rescinded final rule did not define occupations by BLS SOCs, and the NPRM in 2014 that preceded the rescinded final rule (which left unchanged the NPRM definition of "occupation") explained that the reliance on a "class of positions" in the definition was in contrast to reliance on single occupations identified in the BLS SOCs. The reference to BLS SOCs in the rescinded final rule was merely illustrative, not a requirement to use the system in determining occupations. As in the rescinded final rule, the absence of BLS SOCs in the proposed rule does not discourage States from embracing SOCs. However, the Department does not find it necessary or desirable to impose the SOCs established

by BLS, as it may not always be the best system through which to classify occupations for the purposes of these regulations.

Therefore, the Department makes no changes to the final rule in response to this comment.

*Comment:* A commenter cited the Conference Report accompanying the enactment of the statutory provision on UC drug testing, noting the Conference Report stated that drug testing is permitted under 42 U.S.C. 503(l)(1)(A)(ii) only where passing a drug test is “a standard eligibility requirement.” The commenter argued that drug testing is not a standard eligibility requirement in any occupation unless drug testing is conducted for every single employee in that occupation. The commenter argued that a requirement that all employees in an occupation be drug tested would be consistent with the treatment of employees in virtually all of the other categories in proposed § 620.3 with regard to drug testing.

*Department’s Response:* The Department disagrees that “a standard eligibility requirement” necessarily requires that all employers drug test all employees in an occupation in order to include the occupation as among those subject to drug-testing. Such an interpretation is not required by the statute or the Conference Report language cited by the commenter. An occupation that “regularly” drug tests, or for which drug testing is “a standard eligibility requirement,” need not uniformly require testing under the plain meaning of either term. The plain meaning of “standard” does not support the commenter’s recommendation. The Merriam-Webster Dictionary defines “standard” in the most relevant definition as “regularly and widely used.” The Oxford Dictionary in the relevant definition describes “standard” as something “used or accepted as normal or average.” The Cambridge Dictionary defines “standard” as “usual or expected.” None of these definitions requires that a practice be universal in order to be “standard.” Thus, the Department does not find a “standard eligibility requirement” need be

universal in order to be standard. To be “regular” or “standard” it is sufficient that drug testing in an occupation be usual. While the other categories listed in this regulation do cover occupations in which drug testing is required by all employers, that is not the statutory requirement.

Therefore, the Department makes no changes to the final rule in response to this comment.

*Comments:* Commenters also suggested that the Department consider the reason an occupation regularly tests employees and whether that reasoning has a “nexus with unemployment in general or with whether the claimant is able and available for work in particular.”

*Department’s Response:* The Department did not make changes in response to the comments suggesting that the standard should connect drug testing to unemployment. The purpose of the standard is to implement the requirements of 42 U.S.C. 503(l). Section 503(l) of 42 U.S.C. does not require a connection between unemployment and drug testing, only that it be established that an occupation regularly conducts drug testing. However, though no such connection is required, if the only suitable work available to an individual is in an occupation that regularly conducts drug testing, there is a strong connection between being able to pass a drug test and being able and available for work as required by 42 U.S.C. 503(a)(12). Under the final rule, the Department intends to give States the flexibility to consider these reasons in their particular circumstances.

*Comments:* Several commenters expressed a concern that the proposed standard set forth in the NPRM for identifying occupations that regularly conduct drug testing “is rife with potential for abuse and for inappropriate motives.” These commenters suggested that the Department should require States to provide more information about the fact-finding conducted than is specified in the proposed rule. In general, these commenters did not specify the abuse or inappropriate motives that would be risked, nor did they recommend an alternative heightened

standard for the Department to consider. A few of the commenters elaborated that drug test providers contracted by States might have an inappropriate financial self-interest to encourage broader drug testing by States than is merited by evidence, which could inappropriately influence the decisions of policy makers to authorize broad drug testing.

*Department's Response:* The Department did not make changes in response to these comments. These assertions are unrelated to the requirements of 42 U.S.C. 503(l), and issues such as these, if they arise, will be addressed administratively by the Department's monitoring and oversight of § 620.3(j).

*Comments:* Several commenters argued that the proposed rule could lead, in various ways, to discrimination. One commenter argued that the proposed standard could allow States to “depress equal access to earned benefits,” and that the Department should take steps to minimize this possible consequence by “working with states to make sure working people have fair access to earned benefits.” However, this commenter did not recommend an alternative standard of evidence. Relatedly, one commenter argued for heightened standards of evidence because drug testing “should not be permitted as a blanket for all occupations which could lead to discriminatory implementation.” This commenter also did not specify an alternative standard of evidence. Another commenter argued that “[t]he degree of flexibility this regulation gives to states has tremendous potential to target occupations that are more likely to employ working people of color.” Similarly, another commenter argued that it is “problematic” that each “state can decide which professions to routinely drug test,” because the “tendency is to administer drug tests to industries which disproportionately employ people of color.” These commenters also did not recommend a specific alternative standard.

*Department's Response:* Commenters' concerns relate to a State's implementation of paragraph (j), rather than to the proposed Federal standard for drug testing by States. This particular provision does not provide States with unfettered discretion to drug test UC applicants and it must be viewed in connection with the other requirements of this rule, namely that drug testing of UC applicants in general is not permitted unless the only suitable work for an applicant is in an occupation that regularly conducts drug testing. As discussed above, States' UI programs are subject to sec. 188 of the Workforce Innovation and Opportunity Act, and States are prohibited from discriminating against UC applicants on the bases of the protected characteristics listed above, which include race and color. Also, States will be subject to Department monitoring and oversight of occupations to be drug tested under proposed § 620.3(j). Therefore, the Department made no changes to the final rule in response to these comments.

The Department also asked for 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 proposed approach.

*Comments:* The Department received a number of comments that proposed paragraph (j) constitutes an unlawful delegation to the States of the Department's authority to determine which occupations regularly conduct drug testing. In general, commenters advanced two types of arguments toward this conclusion. One was that Federal law prohibits a Federal agency from delegating its authority to an outside entity absent clear Congressional authorization to do so. A second argument was that proposed paragraph (j) is arbitrary and capricious under § 706 of the APA.

In support of the unlawful delegation argument, commenters relied on several court decisions that have held that "[a]n agency [unlawfully] delegates its authority when it shifts to another

party almost the entire determination of whether a specific statutory requirement has been satisfied or where the agency abdicates its final reviewing authority.” *Fund for Animals v. Kempthorne*, 538 F.3d 124, 133 (2d Cir. 2008), citing *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 567 (D.C. Cir. 2004), and *Nat’l Park & Conservation Ass’n v. Stanton*, 54 F.Supp.2d 7, 19 (D.D.C. 1999). According to these commenters, paragraph (j) impermissibly shifts the entire determination of which occupations regularly drug test by allowing each State to identify those occupations within its State that regularly drug test without providing guidance concerning how the States should make such determinations.

One commenter noted that “[w]hile an agency may be able to delegate some amount of ‘fact gathering’ to an outside party [citing the *U.S. Telecom* court decision above], the grant of authority to States to determine occupations that regularly drug test goes far beyond fact gathering.” Specifically, the commenter argued that “[d]etermining how to interpret and define the concept of ‘regularly’ is the antithesis of fact gathering. It is exercising discretion and policy-making.” The commenter added—

[T]he requirement to determine which occupations regularly drug test leaves states with another substantial interpretative task. While “occupations” do not drug test, employers drug test and employees are drug tested. Thus, a decision has to be made in interpreting how to determine what to measure. To the extent that this provision can be interpreted to carry out Congressional intent, DOL, not state agencies, must exercise discretion to decide whether an occupation regularly drug tests when measured by the percentage of employers of that occupation drug testing employees in that occupation or when measured by the percentage of employees in that occupation who are drug tested.

Separately, regarding delegation, some commenters asserted that the State UC agencies in their respective States have a pattern of administrative practices that are inconsistent with State and Federal Constitutional requirements. These commenters argued that “[t]here is no basis whatsoever to assume that state agencies delegated with new administrative authority to deny

benefits will use such authority consistent with the U.S. Constitution or the rules and regulations of the Social Security Act.”

*Department’s Response:* The Department disagrees with the comments that the rule improperly shifts to the States the determination of which occupations regularly conduct drug testing. The proposed rule explicitly determined, in paragraphs (a) through (g) of proposed § 620.3, specific occupations that may be drug-tested, thus directly determining many occupations that are regularly drug tested. Similarly, paragraphs (h) and (i) specify that States may drug test for occupations in which employees are required by Federal or State law to be drug tested. Paragraph (j) of § 620.3 allows each State to identify occupations in that State that regularly drug test and relies on each State as a fact-finder with regard to its local circumstances. Furthermore, the Department will review additional occupations identified by the State. Each State will be required to submit for Departmental review and oversight the occupations that the State finds regularly conduct drug testing as a standard eligibility requirement for obtaining or maintaining employment in the State, and the factual bases on which it relied. Thus, contrary to the commenters’ assertions, this rule does not abdicate the Department’s responsibility to determine the occupations that regularly drug test. It simply allows each State to identify factual bases for finding that additional occupations regularly conduct drug testing in that particular State. Such a grant of limited discretion is lawful, particularly as the Department will retain reviewing authority over the States’ identification of occupations that regularly conduct drug testing, as well as the authority to take action to ensure conformity and substantial compliance with Federal law requirements. *See Kempthorne*, 538 F.3d 124 (finding that the Fish and Wildlife Service did not abdicate its authority to regulate the takings of migratory birds when it granted limited discretion to state agencies to determine whether the killing of a migratory bird in the agency’s

State was necessary to prevent the depredation of fish, wildlife, plants, and their habitats in the State's local area); *see also Stanton*, 54 F.Supp.2d at 19 (finding that "[t]he relevant inquiry" is whether the Federal agency "retained sufficient final reviewing authority" over the subordinate's actions.)

Finally, regarding some commenters' assertions that a State UC agency might not administer the program consistent with State or Federal Constitutional requirements if given discretion, the Department monitors and exercises oversight of all aspects of all States' UC administration, and works with States to address deficiencies of conformity or substantial compliance with Federal law requirements. Just as with all aspects of oversight of State UC, the Department will monitor States to ensure conformity and substantial compliance with this rule and take appropriate action as necessary.

Therefore, the Department makes no changes to the final rule in response to these comments.

*Comments:* Separately from the above arguments regarding improper delegation, many commenters asserted that proposed § 620.3(j) is arbitrary and capricious under the APA. One commenter in particular elaborated in detail this argument. This commenter argued that the Department:

was arbitrary and capricious in adding section 620.3(j) of the NPRM after determining in its 2016 Final Rule that (1) "whether an occupation is subject to 'regular' drug testing was not chosen as a standard here it would be very difficult to implement in a consistent manner" and (2) "we are unable to reliably and consistently determine which occupations require 'regular' drug testing where not required by law."

*See* 81 FR 50300 (August 1, 2016).

The commenter continued that the proposed rule provides "no specific explanation of its change in position on those two statements in the preamble to the 2016 Final Rule," as required by law. The commenter made four additional assertions arguing the proposed rule is arbitrary

and capricious in its delegation of authority. First, the commenter argued that it is arbitrary and capricious “to assign responsibility for determining which occupations regularly drug test to States.” Second, the commenter argued that it is arbitrary and capricious “to allow States to have inconsistent determinations of which occupations drug test in the face of a Congressional provision clearly calling for one uniform determination on that issue by specifically assigning that responsibility to DOL.” Third, the commenter argued that it is arbitrary and capricious “to allow States to individually determine how to interpret the concepts of ‘regular’ and ‘standard eligibility requirement’ without [the Department] explaining why . . . [such an approach] was consistent with the statutory requirement that occupations that regularly drug test be determined under regulations issued by DOL and why a uniform application of the drug testing requirements for unemployment compensation applications is not required.” Fourth, the commenter argued that it is arbitrary and capricious “to allow States to gather facts concerning which occupations drug test without detailed quality standards setting forth how that fact gathering should be conducted.”

Some commenters argued that the Department failed to set out with any specificity what would constitute a sufficient factual basis for identifying occupations that regularly drug test. These commenters stated that “[r]eports by trade and professional organizations may reflect initiatives that do not comport with the narrow strictures of [Sec. 303(l)(1)(A)(ii), SSA] and may not establish a ‘factual basis’ for testing. In addition, allowing ‘other studies’ provides so little guidance that it is rendered essentially meaningless.” Commenters added, “Congress clearly assigned to the DOL, in the plain language of the authorizing statute, the responsibility to define which occupations are covered.”

The commenters argued that sec. 303(l), SSA, was drafted as it was in order “to limit inappropriate influence in the determination of which working people could be required to take drug tests as a condition of receiving UI.” Another commenter suggested that proposed § 602.3(j) was subject to potential inappropriate influence, that “[d]epending on the experience rating system in a state, employers could also be incentivized to adopt new drug testing regimes solely for the purpose of minimizing their liability for unemployment benefits.”

*Department’s Response:* The Department has considered the various assertions that the proposed rule is arbitrary and capricious in violation of the APA and, for the following reasons, disagrees.

First, the assertion that the 2016 final rule has any bearing on this proposal is inconsistent with the CRA. 5 U.S.C. 801(f) provides that “[a]ny rule that takes effect and later is made of no force or effect by enactment of a joint resolution under sec. 802 shall be treated as though such rule had never taken effect.” Pub. L. 115-17 invalidated the 2016 final rule, stating that the rule “shall have no force or effect.” As this rule is not an amendment to the prior, rescinded final rule, it is not necessary under the APA to explain the rationale for taking a different approach in this rule than was taken in the 2016 rule.

Second, even if the Department was required to explain why it had changed its earlier position, the argument that the Department did not give an adequate rationale for departing from the rescinded 2016 final rule is inaccurate. By rescinding the previous rule, Congress rejected the approach in the 2016 rule of limiting the standard to occupations drug tested as a condition of employment under State or Federal law. Given the CRA’s prohibition on republishing the 2016 rule in substantially the same form and the requirement that the Department promulgate a regulation to implement sec. 303(l) of the SSA, the Department was legally required to adopt a

different regulatory approach. The rescinded final rule noted that it rejected the regularity of drug testing in private employment as a standard because it would be very difficult to implement in a consistent manner and that the Department determined that it would be unable to reliably and consistently determine which occupations regularly require drug testing beyond those required by law. In developing its new proposal, the Department, for the reasons explaining proposed § 602.3(j) in the preamble to the NPRM, adopted a standard that overcomes the issues identified by the commenter by utilizing States' expertise to research and identify which occupations drug test regularly in their own States.

Regarding other arguments that the proposed rule is "arbitrary and capricious," first, the proposed rule does not assign responsibility for determining which occupations regularly drug test to States. Rather, under the proposed rule, the Department is leveraging the expertise of the States to identify occupations in which employers regularly drug test in their States, while the Department retains authority to review, monitor, and oversee States' identification of those occupations and the factual bases for their identification. Second, 42 U.S.C. 503(l), by its terms, does not require a determination of occupations which regularly test for drugs in all States; it simply prohibits the Department from interfering with State requirements for drug testing of an applicant in an occupation that regularly conducts drug testing. As mentioned above, the proposed rule is consistent with the rescinded final rule, which also allowed differences across States based on the occupations each State's law required to be drug-tested as a condition of employment. The proposed rule departs from the rescinded final rule, not in allowing "inconsistent" choices of occupations across States, but in whether drug testing must be a State law requirement to consider the occupation one in which drug testing is a regular requirement for employment. Third, it is inaccurate to describe the proposed rule as deferring to States the

interpretation of what constitutes “regular” drug testing and what constitutes a “standard eligibility requirement.” Rather, the proposed rule articulates a Federal standard – the *Secretary’s* interpretation of those statutory terms, not the *States’* interpretations – under which States make factual findings, i.e., as the NPRM preamble clearly states, the proposed rule requires States to have a factual basis for identifying additional occupations that regularly conduct drug testing, which is subject to the Department’s review. Further, the Department has never required a “uniform application of the drug testing requirements” across the States. As noted above, the rescinded final rule also permitted States to drug test different occupations based on what occupations must be drug-tested as a condition of employment under different States’ laws. Fourth, there is no requirement that regulations contain specific “quality standards” for fact-gathering by States, nor is it arbitrary or capricious for the proposed rule to let the “factual basis” standard be fleshed out through Department review of States’ particular findings. Rather, this flexible approach is consistent with case law discussed above, and with the Federal-State UC partnership, by which the Department is responsible for monitoring and overseeing broad requirements that States must meet to receive administrative grants, and for employers in a State to receive credits against their Federal unemployment taxes.

Regarding assertions that the proposed rule is arbitrary and capricious because it lacks specificity, and that the Department has deferred the decision-making regarding which occupations regularly conduct drug testing to States, proposed § 620.3(j) does not remove the Department from exercising independent judgment in the determination of occupations. Rather, the NPRM made clear that any “factual basis” by a State for identifying an occupation that regularly conducts drug testing is subject to Departmental review. The Department retains

authority to find that a State lacks sufficient factual basis to include an occupation it wishes to drug test. Therefore, the Department retains independent judgment.

Finally, regarding incentives to drug test, it is highly unlikely that employers in an occupation will adopt drug testing based upon the distant potential that other employers will adopt testing to result in the occupation being one which regularly requires drug testing in order to reduce their experience rating. Further, as a number of commenters pointed out, Federal funding for administration of the UI program is currently low, and States will have a strong incentive to control the cost of drug testing because they will receive no additional Federal funding for those costs. Thus, these objections are unsupported, and are not a basis to find proposed § 620.3(j) to be arbitrary or capricious.

Therefore, the Department makes no changes to the final rule in response to these comments.

*Comment:* One commenter expressed that States should be permitted to drug test for occupations that are potentially dangerous or those that regularly involve drug testing, and another commenter stated that drug testing should be limited to those positions with legitimate safety concerns and proper justification for what the commenter characterized as invasive testing.

*Department's Response:* The purpose of this regulation is to implement the provision in 42 U.S.C. 503(l)(1)(A)(ii) that States may drug test applicants for UC for whom the only suitable work is in an occupation that regularly conducts drug testing. Safety concerns can be a reason why drug testing is regularly conducted for some occupations. However, limiting those occupations for which a UC applicant may be tested for drugs to only those where there are safety concerns is inconsistent with the statutory language permitting drug testing where an occupation regularly conducts such testing.

Congress disapproved the earlier regulation implementing 42 U.S.C. 503(l)(1)(A)(ii), which limited testing to those positions or occupations where there are certain safety concerns or where drug testing is required by Federal or State law. Thus, it is clear Congress intended the regulation to reflect a broader interpretation of “occupations that regularly drug test,” not a narrower one. As a result, the Department makes no changes to the rule based on this comment.

The Department likewise sought comments on its conclusion that it is impracticable to develop a nationally uniform list of occupations that regularly drug test, given the wide variations in regional economies, employer practices, and in State law.

*Comments:* One commenter stated that creating a uniform list of occupations that drug test is impractical, and the Secretary, in the alternative, should provide national guidelines for categories of positions for which States may drug test.

Several commenters made statements of support for the promulgation of a nationally uniform list of occupations that regularly drug test, stating that, by not creating one, the Department was not adhering to the authorizing statute or the will of Congress. Commenters stated that the Department was avoiding its responsibility by allowing flexibility, and did not explain how it reached its interpretation of Congressional intent. Commenters asked for these occupations to be defined narrowly, because the occupation must be the only viable option available for the applicant to find new employment. In the absence of a nationally uniform list, one commenter suggested, the Department should keep a list of nationally applicable occupations.

One commenter stated the Department suffered a lack of will to exhaustively catalogue all employment-related drug testing requirements under State laws, and to do so for the benefit of this rulemaking is not beyond the Department’s capabilities. The commenter asserted that the

Department lacked any “robust” evidence to support the asserted impracticality of creating such a list.

*Department’s Response:* The Department considered these comments and maintains that the creation of a nationally uniform list is impractical and will not provide the flexibility needed by States to implement the will of Congress. The Department disagrees with the comments that it improperly shifted to the States the determination of which occupations regularly conduct drug testing. The proposed rule explicitly identified, in paragraphs (a) through (g) of proposed § 620.3, specific occupations that may be drug-tested, thus directly determining many occupations that may be drug tested. Similarly, paragraphs (h) and (i) specify that States may drug test for occupations in which employees are required by Federal or State law to be drug tested. Paragraph (j) of proposed § 620.3 provides States with fact-finding authority to identify occupations that regularly drug test in their own State and relies on each State as a fact-finder with regard to its own localized context. Furthermore, the Department will review any occupations the State identifies and the facts presented to substantiate adding them. Each State will be required to submit for Departmental review and oversight the occupations that the State finds regularly conduct drug testing as a standard eligibility requirement in the State, and will require the State to submit the factual bases it relied on. Thus, contrary to the commenters’ assertions, this rule does not abdicate the Department’s responsibility to determine the occupations that regularly drug test. It simply grants States fact-finding authority to find factual bases for identifying additional occupations that regularly conduct drug testing in their own States. Such a grant of fact-finding authority is lawful, particularly as the Department will retain reviewing authority over the States’ identification of occupations that regularly conduct drug testing, as well as the authority to take action to ensure conformity and substantial compliance

with Federal law requirements. *See Kempthorne*, 538 F.3d 124; *see also Stanton*, 54 F.Supp.2d at 19.

Therefore, the Department makes no changes to the final rule in response to these comments.

*Comments:* Several commenters expressed support for the Department's determination, stating that it recognized the value and importance of giving flexibility to individual States to identify what type of oversight system is most appropriate for employers and employees, and that State governments and officials are more familiar with the industries and occupations of a State. This will alleviate arbitrary determinations, stated one commenter, by recognizing State officials' power to develop policies pertinent to drug testing in the State. Flexible standards based on State-specific economies, one commenter put forth, means the regulations States enact will ensure effectiveness and consistency within the State. These commenters stated that it would be poor public policy to apply the same standards to vastly different economies. Standards for a State with a large manufacturing base may not be appropriate for a State with a primarily rural economy, stated one of these commenters.

*Department's Response:* The Department considered these comments and will be maintaining the policies and approaches noted in the commenters' supportive statements.

Finally, the Department asked for comments on its planned approach of using submissions through ETA's 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.

*Comments:* Some commenters asserted that the ETA Form MA 8-7 "requires too little analysis on the part of the States." These commenters stated that the form should require reasoned analysis of attached supporting documentation to address the rationale for drug testing

in specific occupations and whether that reasoning should extend to prevent deserving claimants from receiving UC.

*Department's Response:* Form MA 8-7 is not intended to be a stand-alone tool for analyzing materials submitted by States. Rather, it is the form used by the Department to collect the necessary information, authorized under section 303(a)(6), SSA and 20 CFR 601.3, to ensure State laws, regulations, and policies conform to and comply with Federal law. The Department has an established methodology in place to identify and review all changes to States' UI programs. By reviewing materials submitted with ETA Form MA 8-7, which States are already required to use for all changes in law, regulations, policies, and procedures, the Department will analyze a State's factual basis for identifying an occupation as one in which employers conduct pre- or post-employment drug testing as a standard eligibility requirement for obtaining or maintaining employment. As provided in 20 CFR 601.3, the Secretary of Labor requires States to submit State laws and plans of operation for implementing those laws. The Department implements this provision through ETA FORM MA 8-7 which requires States to submit "all relevant state materials." Plans of operation in this context includes states' factual bases for identifying any additional occupations that regularly conduct drug testing pursuant to the Rule. In addition, the Department retains oversight authority and will conduct routine monitoring of State administration of the UI program, including state implementation of the drug testing provisions of 42 U.S.C. 503(l)(1)(A) and this final rule. As a result, the Department makes no changes to the final rule.

**Comments regarding: § 620.4 Testing of unemployment compensation applicants for the unlawful use of a controlled substance.**

Consistent with 42 U.S.C. 503(l), § 620.4 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 final 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), conduct drug testing based on any occupation that does not meet the definition in § 620.3 for purposes of determining UC eligibility.

Paragraph (a) provides that an applicant, as defined in § 620.2, may be tested for the unlawful use of one or more controlled substances—also defined in § 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 § 620.3. As discussed in the Summary of the proposed rule, the term “applicant” means an individual who is filing an initial UC claim, not a claimant filing a continued claim. Thus, States may only subject applicants to drug testing.

Paragraph (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.

Paragraph (c) provides that no State would be required to drug test UC applicants under this part. 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 permits, but does not require, States to drug test UC applicants under the identified circumstances.

*Comment:* In response to the NPRM's broader, more flexible approach for identifying occupations that regularly drug test, one commenter raised a concern that such an approach "risks conflicting with statutory protections mandated by the [Americans with Disabilities Act] ADA," and noted that "[t]he Equal Employment Opportunity Commission has been aggressively challenging employers whose drug screens lead to denial of a job without an individualized assessment to determine whether the person's lawful use of prescription drugs may be considered a disability." However, the commenter never explained how the proposed rule risks a conflict with the ADA.

*Department's Response:* Section 620.3 of the NPRM sets forth a proposed list of occupations for which drug testing is regularly conducted. Proposed paragraph (j) of this section embodied the Department's new, more flexible, approach to identifying the occupations which regularly drug test, by allowing each State to identify additional occupations in that State where employers require pre-hire or post-hire drug testing as a standard eligibility requirement provided that the State has a factual basis for doing so. As explained in the NPRM, factual bases may include, but are not limited to: labor market surveys; reports of trade and professional organizations; and academic, government, or other studies, and would be reviewed by the Department. *See* 83 FR 55311, 55315 (Nov. 5, 2018).

Section 303(l)(1), SSA, permits States to drug test applicants whose only suitable employment is in an occupation that regularly conducts drug testing or who were terminated from employment with their most recent employer because of the unlawful use of a controlled substance; this rule does not authorize States to engage in conduct that would violate Federal

disability non-discrimination laws, including the ADA. Indeed, States must continue to adhere to Federal disability non-discrimination law as a condition of receiving UC administrative grants under Title III of the SSA, and the annual unemployment insurance funding agreements between the Department and each State includes this requirement. Accordingly, the Department makes no changes to the final rule in response to this commenter's concern.

*Comments:* A number of commenters stated that there is no evidence that unemployed workers are more likely to use drugs, while one commenter stated that there is no evidence suggesting that drug testing deters drug use. Several commenters raised concerns that drug testing UC applicants would do nothing to help people struggling with addiction, or to identify individuals in need of treatment.

*Department's Response:* These regulations, which implement 42 U.S.C. 503(l)(1)(A)(ii), specifically address drug testing of UC applicants for whom suitable work is only available in an occupation that regularly conducts drug testing.

While the Department is without authority to use this rule to mandate drug treatment, UC applicants who fail drug tests may be encouraged to confront and overcome the challenges associated with substance use disorder by getting treatment, and to successfully return to the workforce.

States may not pay those costs, including costs of providing information on substance use disorder or the cost of treatment, from Federal UI administrative grant funds. However, nothing in this rule prevents States from providing brochures or other information, paid for from other sources, on the availability of drug treatment to UC applicants who have failed a drug test. Moreover, as noted below, the Department has made funds available to States to address the effects of the opioid crisis on the economy.

In March 2018, the Department announced a National Health Emergency demonstration project through Training and Employment Letter (TEGL) No. 12-17, to identify, develop, and test innovative approaches to address the economic and workforce-related impacts of the opioid epidemic. In July 2018, the Department approved six grant awards, totaling more than \$22 million, to the following states: Alaska (\$1,263,194), Maryland (\$1,975,085), New Hampshire (\$5,000,000), Pennsylvania (\$4,997,287), Rhode Island (\$3,894,875), and Washington State (\$4,892,659).

In September, 2018, the Department issued TEGL No. 4-18 to describe how the National Dislocated Worker Grant (Disaster Recovery DWG) Program's disaster grants apply to the unique challenges of the opioid crisis. All states, outlying areas, and appropriate tribal entities are eligible to apply for Disaster Recovery DWG assistance as described in TEGL No. 4-18. Eligible applicants use Disaster Recovery DWGs to create disaster-relief employment to alleviate the effects of the opioid crisis in affected communities, as well as provide employment and training activities, including supportive services, to address economic and workforce impacts related to widespread opioid use, addiction, and overdose.

Therefore, the Department makes no changes to the final rule in response to these comments.

*Comments:* Numerous commenters expressed concern over the possibility of positive test results that could occur because an applicant was taking prescription medication or over-the-counter medication. One commenter addressed drug testing of individuals who are enrolled in medication-assisted treatment for opioid addiction, noting that some drug tests can detect methadone and buprenorphine. A commenter noted that “conventional urinalysis testing methods are prone to false positives,” and that urinalysis indicates only the presence of a drug or

metabolites in the body. One commenter stated that drug testing of chemically treated hair, or hair that is dark in color, “can be especially susceptible to external contamination.”

*Department’s Response:* This rulemaking is limited to implementing the statutory requirement to identify occupations that regularly conduct drug testing. These comments regarding potential false positives are outside the scope of this rule, therefore, the Department makes no changes to the regulatory text in response to these comments.

*Comment:* Another commenter asserted that drug testing UC applicants is a waste of tax dollars, and the “only ones who will win in this case will be the companies billing the State after the test has been administered.”

*Department’s Response:* The purpose of this regulation is to implement the provision in 42 U.S.C. 503(l)(1)(A)(ii) that States may drug test applicants for UC for whom the only suitable work is in an occupation that regularly conducts drug testing. Thus, whether and to what extent a State’s activities may benefit drug testing companies is unrelated to the purpose of this regulation. The Department makes no changes to the final rule as a result of this comment.

*Comments:* A number of commenters expressed that drug testing of UC applicants undermines the purpose of the UC program. These commenters stated that making it more difficult for unemployed workers to access benefits blunts the UC program’s capacity as a counter-cyclical economic tool and weakens the safety net.

*Department’s Response:* The purpose of this regulation is to implement the provision in 42 U.S.C. 503(l)(1)(A)(ii) permitting States to drug test UC applicants for whom the only suitable work is in an occupation that regularly conducts drug testing. The regulation does not require States to implement a drug testing program, and the basic eligibility requirements for UC are unchanged. To be eligible for UC, claimants must be able and available to accept suitable work.

This rule allows States to implement drug testing as a means for ensuring that UC applicants for whom the only suitable work is in an occupation that regularly conducts drug testing can demonstrate that they are able and available to accept suitable work by passing a drug test. We also note that the drug testing provisions in 42 U.S.C. 503(l)(1)(A)(ii) are narrowly drawn. There will be minimal effect on the UC program's role in minimizing economic impacts in an economic downturn.

Therefore, the Department makes no changes to the final rule in response to these comments.

#### IV. Administrative Information

##### **Paperwork Reduction Act**

The Department has determined that any use of the existing form MA 8-7 under this rule is already approved under OMB control number 1205-0222.

##### **Plain Language**

The Department drafted this rule in plain language.

##### **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 this final 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 rule does not affect small entities as defined in the RFA. Therefore, the 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.

### **Executive Order 13771**

*Comments:* The Department received one comment asserting that the proposed rule did not comply with Executive Order (E.O.) 13771 (Reducing Regulations and Controlling Regulatory Costs).

*Department's Response:* This final rule is not subject to E.O. 13771 because the cost is *de minimis*. The drug testing of UC applicants as a condition of UC eligibility is entirely voluntary on the part of the States, and because permissible drug testing is limited under the statute and this rule, the Department believes only a small number of States will establish a testing program for a limited number of applicants for unemployment compensation benefits.

### **Executive Orders 12866 and 13563: Regulatory Planning and Review**

*Comment:* The Commenter argues that the Department's cost and benefits analysis was " cursory and unrigorous;" the argument relies on the Department's admission that it lacked data to quantify administrative costs.

*Department's Response:* 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.<sup>1</sup>

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 unemployment compensation. This rule is 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), Federal law did not permit drug testing of applicants for UC as a condition of eligibility.

The decision to conduct drug testing for any of the occupations identified in the final rule is entirely voluntary on the part of the States (see § 620.4). To date, only three States (Mississippi, Texas, and Wisconsin) have enacted laws to permit drug testing of UC applicants under the circumstances addressed by this rule. These States, however, have not yet begun testing because the prior rule was rescinded, and this rule was not yet published. As a result, the Department does not have sufficient information to determine how many States will establish a drug testing program, and what the costs and benefits of such a program might be to States. Before the enactment of the Federal law in 2012, States were not permitted to condition eligibility for UC on drug testing. Due to variations among States’ laws, and in the number of UC applicants, level of benefits, and prevalence of drug use in a State, the Department is unable to estimate the extent to which States’ costs in administering drug testing would be offset by savings in their UC programs.

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<sup>1</sup> Exec. Order No. 12866, section 6(a)(3)(B).

The Department requested comments 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. The Department received comments, discussed below, on the costs of establishing and administering a testing program and the cost of drug tests. However, no other comments were received providing specific information on the other issues on which the Department requested comment.

*Comments:* One commenter wrote that Ohio had a 4.3 percent unemployment rate as of May 2018, which equates to approximately 530,000 unemployed workers in Ohio. At an average cost of \$30 per drug test, it would cost \$18 million to test UC applicants. The commenter stated that that money could instead be allocated for improving infrastructure issues, drug treatment programs, education programs, and job training programs.

A number of commenters wrote that States would spend much more to implement a drug testing program than it would be worth in savings to the UI trust funds. These commenters stated that when 13 States spent \$1.6 million collectively to drug test Temporary Assistance for Needy Families (TANF) applicants in 2016, only 369 people tested positive out of approximately 250,000. The commenters argued that because States are experiencing record-low administrative funding, they cannot afford additional administrative burdens, particularly when few people tested positive.

Only three States have enacted laws to pursue drug testing of UC applicants under this statutory provision to date, and they have not yet begun testing. 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 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 Department has not evaluated the methodology of Texas' estimate. Separately, it would be inappropriate to extrapolate the Texas cost analysis to all States, in part because of differences between Texas law and the laws of other States, and because of the variations in States' programs noted above. Therefore, the Department cites this information only for the purpose of disclosing the minimal information available for review.

One commenter wrote that drug tests can be expensive and that funds could be reappropriated for initiatives such as rehabilitation, common-sense drug education, and overdose first aid. The commenter also stated that it is not the States' duty to drug test unemployed workers; rather, it is a potential employer's duty to test applicants if the employer wishes.

Several commenters wrote that the cost of drug testing would be an unnecessary drain on resources that should be made available to workers affected by reductions in force. The commenters argued that the financial costs would far outweigh any savings from drug testing UC applicants and would place further stress on State budgets, especially when the Federal grants that States principally rely on to administer their programs have been reduced significantly. Simply put, these commenters concluded that drug testing is not a good use of scarce resources.

One commenter wrote that studies have shown that the vast majority of individuals receiving public assistance do not use drugs. The commenter supports a policy orientation in favor of an exercise of this authority, if at all, only for occupations in which the rationale for drug testing is truly compelling.

Two commenters wrote that Michigan has unsuccessfully attempted to test recipients of cash assistance. In 2000, a Michigan law providing for random testing of welfare recipients was declared unconstitutional by a federal court. In 2016, Michigan administered a pilot program of suspicion-based drug testing, but no recipients or applicants were tested. The commenters argued that these programs did not save money or reveal any undeserving claimants—they merely increased administrative costs. These commenters asserted that States may be pressured by this final rule to use already-limited UI funding to establish and administer a testing program.

*Department's response:* The Department carefully reviewed the comments and concluded that they did not adequately provide reliable information on the costs of establishing and administering a State-wide testing program; the number of applicants for UC who would be tested; and individuals who would subsequently be denied UC due to a failed drug test. In the absence of such data, the Department is unable to quantify the administrative costs States would incur if they choose to implement drug testing pursuant to this final rule.

As explained above, nothing in the Act amending section 303, SSA, or in this regulation requires States to establish a drug testing program. *See* § 620.4 of this final rule. States may choose to enact legislation to permit drug testing of UC applicants consistent with Federal law. In doing so, States will make that decision based on many factors, including the costs and benefits of a drug testing program that is limited to only those UC applicants specifically permitted to be drug tested as a condition of UC eligibility in the Act.

The Department reiterates that States will voluntarily make their own determination whether to establish a testing program. States may determine that current funding for the administration of State UC programs is 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 for drug testing; and conducting and processing the drug tests. States would also have to factor in the 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. However, these costs could vary widely across States, and the Department has no ability to develop an estimate that could be relevant across multiple States.

The benefits of the rule are equally difficult to quantify. As explained above, 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. However, due to differences in State laws, the number of claims, benefit levels, and the prevalence of substance use disorder in a State, the Department is unable to use the savings anticipated by Texas as a national norm. In addition, as previously discussed, permissible drug testing is limited under the statute and this rule; the Department expects only a small number of UC applicants will be tested. As such, the Department makes no changes as a result of these comments.

### **Executive Order 13132: Federalism**

*Comment:* The specific comment regarding noncompliance with E.O. 13132 is that the rule would permit drug testing of UC applicants when testing is required under Federal law, and that the rule would have a substantial effect on States by compelling them to provide a factual basis for imposing a drug-testing requirement using ETA form MA 8-7.

*Department's Response:* 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. Sec. 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.

E.O. 13132, sec. 3, establishes Federalism Policymaking Criteria that agencies must follow when formulating and implementing policies with Federalism implications. Those criteria include:

- That agencies consider statutory authority for any action that would limit State policymaking discretion;
- That the national government grant States maximum administrative discretion possible; and
- That agencies encourage States to develop their own policies to achieve program objectives and, where possible, defer to States to develop standards.

This rule accomplishes each of the requirements set out above. First, the Department is required by 42 U.S.C. 503(l)(1)(A)(ii) to identify in regulation the occupations that regularly conduct drug testing. State UC agencies are permitted to drug test UC applicants for whom the only suitable work is in an occupation that regularly drug tests. Thus, the Department has statutory authority to issue this regulation.

Second, this rule gives States significant flexibility to identify additional occupations in their State that regularly drug test job applicants, either pre-hire or post-hire based on a factual analysis. See sections 620.3 and 620.4 of this final rule.

Third, this rule encourages States that choose to enact drug testing legislation as permitted by 42 U.S.C. 503(l)(1)(A)(ii) to develop policies and establish standards to achieve the program objectives, consistent with Federal law. The Department retains oversight responsibility to ensure State law conforms to, and the State is in compliance with, Federal UC law.

Thus, this 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. because drug testing authorized by the regulation remains voluntary on the part of the State – it is not required.

### **Unfunded Mandates Reform Act of 1995**

*Comment:* The commenter states that the Department incorrectly concluded that the Unfunded Mandates Reform Act of 1995 does not apply to this rule. The commenter’s reasoning is that required drug testing under other federal laws would be required of a State that enacts a drug testing law consistent with 42 U.S.C. 503(l)(1)(A), and that the State UC agency would have unfunded mandates conditioned on designating some occupations for drug testing.

#### *Department’s Response:*

The Unfunded Mandates Reform Act of 1995 defines “Federal Intergovernmental Mandate” to mean “any provision in legislation, statute, or regulation that (i) would impose an enforceable duty upon a State....”

This regulation does not impose any duty on States; rather, it permits States, consistent with the statutory authority in 42 U.S.C. 503(l)(1)(A) to enact legislation to test UC applicants for drugs under the limited circumstances set out in the statute. The requirement that States submit the factual basis for identifying an occupation under § 620.3(j) of the regulation using ETA form MA 8-7 is consistent with long-standing procedures by which States must inform the Department of changes in State law.

### **Effect on Family Life**

*Comment:* The commenter referred to at the beginning of this discussion of compliance with several E.O.s and statutory requirements questions the Department's certification that this rule does not impact family well-being. The commenter cites the requirement in section 654(c) of the Treasury and General Government Appropriations Act that agencies must determine whether the action increases or decreases disposable income or poverty of families and children and determine whether the proposed benefits of the action justify the financial impact on the family.

*Department's Response:*

This regulation has no impact on family well-being because it merely affords States an option that they must independently choose. Allowing States to drug test UC applicants in the very limited circumstances set out in 42 U.S.C. 503(l)(1)(A)(ii) does not, in and of itself, increase or decrease disposable income or poverty, or otherwise affect family well-being.

Based on available data (or lack thereof), it is impossible for the Department to predict the number of States that will exercise this option or how broadly they will implement any drug testing in their State. Similarly, there is no existing data or way to predict, positively or negatively, what impact, if any, such State drug testing may have on family well-being. This regulation only implements the provision in 42 U.S.C. 503(l)(1)(A)(ii) that States may drug test

applicants for UC for whom the only suitable work is in an occupation that regularly conducts drug testing.

Thus, the Department makes no change to its certifications that the rule complies with each of the Executive Orders and other provisions discussed above.

### **List of Subjects in 20 CFR Part 620**

Unemployment compensation

For the reasons stated in the preamble, the Department amends 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)(A)(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). 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 enact legislation to 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;
- (c) An occupation identified in 49 CFR 382.103 by the Federal Motor Carrier Safety Administration, in which the employee must be tested;
- (d) An occupation identified in 49 CFR 219.3 by the Federal Railroad Administration, in which the employee must be tested;
- (e) An occupation identified in 49 CFR 655.3 by the Federal Transit Administration, in which the employee must be tested;

(f) An occupation identified in 49 CFR 199.2 by the Pipeline and Hazardous Materials Safety Administration, in which the employee must be tested;

(g) An occupation identified in 46 CFR 16.201 by the United States Coast Guard, in which the employee must be tested;

(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, 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.

John P. Pallasch,

Assistant Secretary for Employment and Training, Labor.

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