

# Drug Testing Unemployment Insurance Applicants:

## An Unconstitutional Solution in Search of a Problem

By Rontel Batie and George Wentworth

Historically, states have never drug tested applicants for unemployment insurance (UI), primarily because the Social Security Act prohibits states from adding qualifying requirements that do not relate to the “fact or cause” of a worker’s unemployment. In the aftermath of the Great Recession, however, some states, in a misguided effort to try to contain the high costs of their UI programs due to high unemployment rates, began clamoring to drug test UI applicants. Their hypothesis (without any facts or data to back it up) was that claims would somehow substantially decrease, either as workers tested positive for drugs or declined to apply because of their drug use.

Mindful of the goal of drug-free workplaces but also of the lack of any data that drug use was an issue among the unemployed, in 2012, Congress reached a narrow compromise on drug testing UI claimants, one that took into account the serious constitutional issues with suspicionless drug testing. Congress agreed to allow, not require, states to test UI claimants in two specific, narrow circumstances: (1) workers who had been discharged from their last job because of unlawful drug use, and (2) workers looking for jobs in occupations where applicants and employees are subject to regular drug testing. Consistent with the new federal law, the U.S. Department of Labor issued regulations that closely tracked the legislation, defining occupations subject to regular testing to mean occupations where testing is legally required (either now or in the future), and not merely permitted.

Congressional Republicans, unhappy with the compromise they agreed to in 2012, have criticized the Labor Department regulations since they were proposed, claiming they were too narrowly drawn even though they closely tracked the legislation. The House of Representatives is now planning to invoke the Congressional Review Act to invalidate these regulations; and presumably, proponents of drug testing are counting on passage of a bill introduced in the 114<sup>th</sup> Congress by Rep. Kevin Brady (R-TX) that would effectively allow states to drug test all jobless workers filing for unemployment insurance. This bill, which we expect will be reintroduced shortly, would allow states to define occupations that “regularly” drug test to include all occupations where testing (including pre-employment testing) is permitted. If passed, this bill would open the floodgates for states to arbitrarily and unconstitutionally drug test its citizens solely because they are applying for UI benefits.

No one should be so confident that this bill could pass the Senate. Proponents have been trying to build support for drug testing UI claimants for years; but for the very narrow compromise reached in 2012, there has been no wider bipartisan support for the policy. Indeed, that is because such drug testing is simply another humiliation piled onto unemployed workers—a hurdle designed to be so stigmatizing that it discourages people from even applying for a benefit that they have earned in the first place.

## Background

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Unemployment insurance is a state-federal program created by the Social Security Act of 1935. Workers who are involuntarily unemployed qualify for insurance that is paid from state UI trust funds that are funded by taxes on employee wages. To be eligible for unemployment insurance under any state UI law, involuntarily unemployed workers must have earned sufficient wages in their recent work history (the “base period”) and be able to work, available for work, and actively seeking work. Since the advent of employee drug testing in the 1980s, no state had implemented a requirement that claimants must pass a drug test in order to qualify for UI.

Under the Middle Class Tax Relief and Job Creation Act of 2012, however, Congress amended section 303 of the Social Security Act to permit states to test UI applicants for drugs if:

- The applicant was discharged for unlawful use of controlled substances, or
- The applicant is only available for suitable work in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary of Labor).

The law also permitted states to deny benefits to an applicant who tests positive for drugs under either of these circumstances.<sup>1</sup>

The Department of Labor published a notice of proposed rulemaking on October 8, 2014, and final regulations identifying occupations that regularly conduct drug testing became effective on August 1, 2016.<sup>2</sup> The final regulation defined “occupation” as a position or class of positions that are required, or may be required in the future, by state or federal law to be drug tested. More specifically, pursuant to the Labor Department’s regulations, occupations for which state UI agencies can conduct drug testing include:

- Occupations where testing is required by state or federal law,<sup>3</sup>
- Occupations that require carrying a firearm,
- Motor vehicle operators carrying passengers,
- Aviation flight crewmembers and air traffic controllers, and
- Railroad operating crews.

Since 2012, three states (Texas, Mississippi, and Wisconsin) have enacted laws permitting state drug testing of UI claimants, consistent with the federal regulation, all delaying implementation until after the final rule was issued by the Labor Department.

## The Ready to Work Act

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The Ready to Work Act of 2016, introduced shortly after publication of the final regulation, seeks to nullify the federal regulations adopted under the Middle Class Tax Relief and Job Creation Act of 2012, and leaves it to the states to define which occupations regularly conduct drug testing. The roots of this bill are referenced in a letter sent by 10 Republican members of the House Ways and Means Committee (including Rep. Brady) to the secretary of labor during the rulemaking process, claiming that the proposed regulation would inappropriately limit state efforts to conduct drug testing.<sup>4</sup> The House members argued that states should be free to conduct drug testing as a requirement for UI eligibility—not just for unemployed workers seeking employment in an occupation where testing is required by law, but for workers seeking jobs with employers that conduct pre-employment drug testing and employers committed to having a drug-free workplace. These and other comments were considered by the Department of Labor, which *did* expand the universe of allowable drug testing from the proposed rule to the final rule, but *did not* go as far as urged by these House members because doing so would have expanded the universe of unemployed workers subject to state drug testing far beyond the clear language of the 2012 legislation.

## 5 Reasons Why Federal Law Should Not Be Expanded to Allow States to Make Drug Testing a Condition of Unemployment Insurance Eligibility

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- 1. Neither being unemployed nor applying for unemployment insurance is, by itself, a legally sufficient reason under the Constitution to subject a citizen to government-operated drug testing.**

Generally, government-mandated drug testing not based on individualized suspicion is unconstitutional. Drug tests historically have been considered searches for the purposes of the Fourth Amendment. For searches to be reasonable, they generally must be based on individualized suspicion unless the government can show a special need warranting a deviation from the norm. Social insurance or governmental benefit programs such as UI, TANF, SNAP, and Housing Assistance, however, do not naturally evoke the special needs recognized by the Supreme Court. Indeed, states that have tried to impose mandatory suspicionless drug testing on all TANF applicants or recipients, such as Michigan and Florida, have been stopped by federal courts, which have found such testing to be unconstitutional under the Fourth Amendment.<sup>5</sup>

- 2. State-administered drug testing is redundant and needlessly shifts employer costs to the states.**

State UI programs already appropriately penalize job-related drug use. Twenty states explicitly deny benefits for any job loss connected to drug use or a failed drug test. In addition, virtually all states treat a drug-related discharge as disqualifying misconduct even if it is not explicitly referenced in their discharge statutes.

In addition, employers already have testing as a tool to screen out drug users. The Society for Human Resource Management reports that 57 percent of its members use drug testing for at

least some of their employees,<sup>6</sup> with no cost to states. And six states (Arizona, Arkansas, Indiana, Indiana, South Carolina, Tennessee, and Wisconsin) have passed legislation equating a failed or refused pre-employment drug screen with refusing suitable work.

### **3. State-administered drug-testing is a poor investment of public funds.**

At a time when there are not enough resources to adequately fund and staff state UI programs, layering on a bureaucratic new qualifying requirement would be very expensive. As federal law prohibits assigning this cost to claimants,<sup>7</sup> states would have to absorb the cost of drug testing thousands of unemployed workers, at a time when they are already struggling to administer their UI programs because of reductions in federal administrative funding.

Although UI is not a welfare program like TANF, it is instructive to look at the return on investment that states have received as a result of drug testing TANF claimants. As both the Center for Law and Social Policy and ThinkProgress have noted, 10 states have spent substantial amounts of money to set up and administer drug testing regimes for TANF recipients, but have caught precious few claimants testing positive.<sup>8</sup> In 2015, for example, states spent more than \$850,000 on testing and 321 people tested positive, a cost of nearly \$2,650 per positive test. Indeed, all testing regimes yield positive results at rates substantially below the Centers for Disease Control and Prevention's estimate of an 8.5 percent drug-use rate in the general population.

Large-scale government drug testing consistent with Rep. Brady's bill would be very expensive. Texas is one of the states that wants broader authority to drug test UI applicants, yet in March 2011, its Legislative Budget Board estimated that the cost of implementing such a program for one year would be nearly \$30 million. This is simply not a wise investment of taxpayer resources, and if legislators have genuine concerns about drug use, there are far better ways to identify and treat it than targeting and stigmatizing the unemployed.

### **4. Jobless workers have earned the right to unemployment insurance, and states cannot impose additional obstacles to initial benefit eligibility beyond those in federal law.**

UI is a social insurance program explicitly grounded in an individual's work history, involuntary job loss, and readiness to return to work. When Congress created the UI program in 1935, the Senate report accompanying the legislation spelled out that UI "differs from relief in that payments are made as a matter of right not on a needs basis, but only while the worker is involuntarily unemployed." In other words, individuals "work" to earn the "insurance" that provides income replacement until they can find new jobs.

Since the UI program was established, federal law has clearly limited payment of UI benefits; they may be paid only "with respect to" an individual's unemployment. In other words, states may not restrict benefit receipt based upon conditions unrelated to the "fact or cause" of a worker's unemployment. This means states cannot create extra hurdles for benefit eligibility, even if they serve other policy goals that states consider important. For example, in the 1960s, South Dakota passed a law imposing a means test on unemployed workers that was invalidated by the U.S. Department of Labor as contrary to federal law. State legislative

proposals to require UI claimants to pass a drug test as a condition of eligibility have repeatedly been held by the Department of Labor, during both Republican and Democratic administrations, to be conditions that are not reasonably related to the UI program's purpose: the insured risk of involuntary unemployment.

**5. State-administered drug testing as a condition of UI benefit eligibility promotes negative stereotypes of unemployed U.S. workers.**

Perhaps most importantly, requiring jobless workers who seek to collect benefits they have already earned to prove that they are drug-free represents a not-so-subtle attack on the character of unemployed Americans. This license for governmental intrusion into the privacy of average Americans who just happen to be unlucky enough to lose their job seems rooted in a blanket assumption that unemployed workers are to blame for their own unemployment and that the ranks of the unemployed are crowded with lazy drug abusers. Drug testing is simply a lazy way of blaming the victims of larger economic trends or corporate practices such as downsizing, outsourcing, and offshoring.

Requiring a urine sample from a worker without a job only because she applies for UI allows state governments to legitimize an ugly stereotype that, among other things, will be detrimental to the reemployment efforts of the unemployed. Scapegoating those who need, and are entitled to depend on, basic social insurance programs is inconsistent with the UI program's purpose and history. It is insulting to millions of Americans who are shouldering the greatest burdens of job loss and struggling to get back on the economic ladder.

## **Conclusion**

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State UI programs face real problems—insufficient funds to adequately administer their programs, scant resources for reemployment services, and in many cases, trust fund balances insufficient to weather another recession. If Congress wants to fix the UI program, they should spend their time working on these issues, not on inventing problems that do not really exist, scapegoating the unemployed, and wasting time and money “permitting” states to enact programs that will be struck down by the federal courts as unconstitutional.

## Endnotes

<sup>1</sup> Section 303(l) (1) (a) (ii) of the Social Security Act (42 U.S.C. 503 (1) (l) (a) (ii)<sup>1</sup>):

(1) Nothing in this Act or any other provision of Federal law shall be considered to prevent a State from enacting legislation to provide for—

(A) testing an applicant for unemployment compensation for the unlawful use of controlled substances as a condition for receiving such compensation, if such applicant—

(i) was terminated from employment with the applicant's most recent employer (as defined under the State law) because of the unlawful use of controlled substances; or

(ii) is an individual for whom suitable work (as defined under the State law) is only available in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary of Labor); or

(B) denying such compensation to such applicant on the basis of the result of the testing conducted by the State under legislation described in subparagraph (A).

(2) For purposes of this subsection—

(A) the term “unemployment compensation” has the meaning given such term in subsection (d)(2)(A); and

(B) the term “controlled substance” has the meaning given such term in section 102 of the Controlled Substances Act (21 U.S.C. 802).

<sup>2</sup> Title 20 CFR 620 Employees' Benefits “Occupations That Regularly Conduct Drug testing for State Unemployment Compensation Eligibility Determination Purposes.”

<sup>3</sup> Specific federal agencies identified in the regulation include the Federal Aviation Administration, Federal Motor Carrier Safety Administration, Federal Railroad Administration, Federal Transit Administration, Pipeline and Hazardous Materials Safety Administration, and the Coast Guard. The regulation also clarified that states could not legally charge any of the costs of state drug testing back to the unemployed worker.

<sup>4</sup> Letter to Secretary of Labor Thomas Perez from Dave Camp, Chairman, Committee on Ways and Means and nine additional Committee members, dated November 7, 2014,

<https://www.regulations.gov/document?D=ETA-2014-0004-0016>.

<sup>5</sup> [www.clasp.org/resources-and-publications/publication-1/2016.02.04-Drug-Testing-and-Public-Assistance-Brief-Final.pdf](http://www.clasp.org/resources-and-publications/publication-1/2016.02.04-Drug-Testing-and-Public-Assistance-Brief-Final.pdf).

<sup>6</sup> <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/ldrugtestingefficacy.aspx>.

<sup>7</sup> Unemployment Insurance Program Letter 1-15, issued October 9, 2014. “*Permissible Drug Testing of Certain Unemployment Compensation Applicants Provided in Subtitle A of the Middle Class Tax Relief and Job Creation Act of 2012*”.

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

<sup>8</sup> [www.clasp.org/resources-and-publications/publication-1/2016.02.04-Drug-Testing-and-Public-Assistance-Brief-Final.pdf](http://www.clasp.org/resources-and-publications/publication-1/2016.02.04-Drug-Testing-and-Public-Assistance-Brief-Final.pdf); [https://thinkprogress.org/drug-testing-welfare-recipients-is-a-popular-new-policy-that-cost-states-millions-here-are-the-cf829257ade0#\\_yyn2wa6zx](https://thinkprogress.org/drug-testing-welfare-recipients-is-a-popular-new-policy-that-cost-states-millions-here-are-the-cf829257ade0#_yyn2wa6zx).