

U.S. Department of Labor

Employment and Training Administration
200 Constitution Avenue, N.W.
Washington, D.C. 20210



JAN 17 2012

Mr. Abraham J. Turner
Executive Director
Department of Employment and Workforce
1550 Gadsden Street
Columbia, South Carolina 29202

Dear Mr. Turner:

We have reviewed House Bill (HB) 4488 and Senate Bill (SB) 1050 for conformity to Federal unemployment compensation (UC) law. These bills would amend the state UC law to require the UC agency to implement a drug testing program and require individuals to submit to a drug test as a condition of establishing initial eligibility. These bills are not identical but they both raise issues with the requirements of UC Federal law. A detailed discussion follows.

HB 4488 would require the state to implement a drug testing program and would require individuals to submit to drug screening as a condition of UC eligibility. If the screening indicates there is probable cause that the individual is using illegal drugs, the individual would be required to complete a substance abuse assessment, which may include drug testing by a certified professional. Any individual who fails a drug test would have to complete a drug treatment program approved by the Department of Alcohol and Other Drug Abuse Services in order to become eligible for unemployment benefits. After completion of the drug treatment program, the individual would be subject to random drug testing in order to maintain eligibility. If the individual fails a random drug test, he or she would be ineligible until he or she completes a second drug treatment program. If an individual fails a second random drug test, the individual would be disqualified for at least twelve months after the last positive result.

SB 1050 would require the state to implement a drug testing program and would require individuals to submit to drug testing as a condition of UC eligibility. The individual would be required to pay for the cost of the drug test. If the drug test result is negative, the individual would receive an enhanced UC benefit paid from the UC fund equal to the cost of the drug test as part of his first UC payment. If an individual has a positive result for a controlled substance, the individual would be permitted to ask for a second drug test within twenty-four hours of the first drug test. If the drug test result is positive, the individual would not receive unemployment benefits for twenty weeks unless the individual completes a substance abuse treatment program offered by a provider approved by the department. If an individual wants to reapply prior to the end of the twenty-week period, the individual would be required to submit to a new drug test before the individual may reapply for benefits.

These bills raise several issues with various provisions of Federal UC law. A discussion of these issues follows.

1. Conditioning initial eligibility for UC on submission to a drug test or screening. Section 3304(a)(4) of the Federal Unemployment Tax Act (FUTA) requires, as a condition for employers in a state to receive credit against the Federal tax, that state law provide that "all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund" Section 303(a)(5) of the Social Security Act (SSA) provides a similar requirement as a condition for a state to receive administrative grants. Section 3306(h), FUTA, defines compensation as "cash benefits payable to individuals with respect to their unemployment." These provisions are commonly referred to as the "withdrawal standard" of Federal UC law.

The Secretary of Labor's decision in the 1964 conformity case involving South Dakota interpreted these sections to mean UC eligibility must be based on the "fact or cause" of unemployment:

Read together, these provisions of the Federal law expressly require that all money withdrawn from the unemployment fund of a State be used solely in the payment of benefits to individuals with respect to their unemployment. The legislative history is abundantly clear that Congress, through these provisions, intended to insure and make certain that State unemployment compensation laws would be genuine unemployment compensation laws, genuinely protective of the unemployed, under which the expenditure of funds would be devoted exclusively to the payment of unemployment insurance benefits. More precisely, it was the intent of Congress to create a social insurance system under which entitlement to benefits was a *matter of right* on the part of those who became involuntarily unemployed because of lack of work, e.g., laid off from work or otherwise unemployed through no fault of their own, and who are able to work and available for work, but who are unable to find suitable work. In short, what Congress was prescribing was wage insurance for the relief of the unemployed, to compensate for wage loss resulting from unemployment due to lack of work, without regard to any means or needs test or criteria of entitlement having no reasonable relationship to 'unemployment.' (Emphasis added.)

Requiring an individual to agree to submit to a drug test or drug screening as a condition of initial eligibility for UC is not permitted because it is unrelated to the fact or cause of the individual's unemployment. Once initial eligibility has been established, drug testing or screening, subject to certain conditions, may be permitted as a test of whether the individual is available for work. If the individual refuses to take the test or screening, or fails the test, the

individual could be held not available for work and ineligible for benefits until such time as he or she takes and passes the test.

2. Cost and administration of the drug testing program. Section 303(a)(1), SSA, requires, as a condition of a state receiving administrative grants for the operation of the UC program, 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."

Requiring the individual to pay more than *de minimus* costs of drug tests, drug screening, substance abuse assessments, or substance abuse treatment programs, would violate this principle because individuals may not be able to afford the costs of such programs and may delay or not file claims because of an inability to pay for them. Since the drug testing or drug screening program would be an eligibility requirement, it would be an expense of administering the state UC law, and may not be transferred to individuals. Additionally, section 303(a)(1), SSA, has been interpreted to require that UC be paid as soon as administratively feasible. If drug testing or screening creates more than incidental delays in payments or determinations of eligibility, another issue would be raised.

SB 1050 requires the individual to pay for the cost of the drug test. It is unclear what expense that this might entail. To the extent that this amount is not inconsequential, imposing a financial burden on an individual to apply for UC by paying for the drug test raises an issue as explained above.

While SB 1050 would reimburse the individual for this cost in his or her first benefit payment under certain circumstances, this raises a separate issue. As noted above, under the withdrawal standard, money may be withdrawn from the UC fund only for the payment of UC exclusive of the expenses of administration. There are some other exceptions to the withdrawal standard but none of them authorizes a withdrawal from the UC fund to reimburse individuals for the cost of drug testing.

Finally, Section 303(a)(8), SSA, requires a state to limit use of its administrative grants to those expenses found necessary for the proper and efficient administration of the UC law, including costs involved in determining eligibility for benefits. However, if enhanced tests for determining eligibility are used that result in additional costs beyond normal administrative expenses, then increased funding for such expenses may not be provided by the Department.

3. Total reduction of benefit rights. Federal law limits the circumstances under which an individual may be totally disqualified for benefits. Section 3304(a)(10), FUTA, provides that:

compensation shall not be denied to any individual by reason of cancellation of wage credits or total reduction of his benefit rights for any cause other than discharge for misconduct connected with his work, fraud in connection with a claim for compensation, or receipt of disqualifying income;...

HB 4488 provides that an individual may be disqualified for twelve months upon failure of a second drug test. As such, this provision constitutes a total reduction of benefit rights, which raises an issue. Failing a drug test that is unrelated to an individual's separation from employment (and therefore not a discharge for "misconduct connected with work") is not a basis for which Federal law authorizes a total reduction of benefit rights. As such, because this bill provides for a total reduction of benefit rights, it raises an issue.

4. The opportunity to contest the drug test result and to appeal a denial of benefits. Section 303(a)(1), SSA, requires "[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." Section 303(a)(3), SSA, requires state law to provide an opportunity for a "fair hearing before an impartial tribunal for all individuals whose claims for unemployment compensation are denied."

The Supreme Court's decision in *California Department of Human Resource Development v. Java*, 402 U.S. 121 (1971) interprets the "when due" requirement. Notably, *Java* held that payment of UC "when due" means "at the earliest stage of unemployment that such payments [are] administratively feasible after giving both the worker and the employer an opportunity to be heard." (Emphasis added.) We have long interpreted *Java* to require that, once initial eligibility is established, further benefits are "due" until the state agency affords the claimant and the employer the opportunity to be heard. In the case of a positive drug test, the individual must have an opportunity to contest the results of the test before a determination of ineligibility is made.

Further reinforcing this requirement, Unemployment Insurance Program Letter (UIPL) No. 1145 requires that the claimant be notified of potentially disqualifying issues and be given an opportunity to be heard before payments made during a continued claim can be denied:

... when a claimant was initially found [to be] eligible, notice and opportunity to be heard must be afforded to the claimant and any other interested party before a redetermination can be made that could modify or reverse that initial determination. [Item VIII.B.1 of the attachment to UIPL No. 1145.]

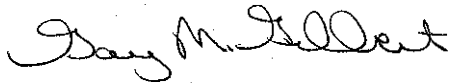
In sum, the state agency must have methods of administration reasonably calculated to insure full payment of UC "when due." This includes an opportunity to be heard. Although a "notice" from an employer or another source (i.e., a positive drug test result) may be sufficient grounds to commence an inquiry into whether UC is "due," the individual must still be informed of any issue(s) and afforded the opportunity to rebut information that would result in a denial of current

or future benefits. Once a denial has occurred, Section 303(a)(3), SSA, requires the agency to hold a hearing if the individual wishes to appeal this determination.

These bills are silent regarding the opportunity an individual would have to challenge the results of a drug test before UC is denied, and an opportunity to appeal any denial of benefits based on the results of the drug test.

Please contact Randy Fadler, your Regional Office UI Legislative Specialist, at (404) 302-5360 or Fadler.randy@dol.gov should you have questions regarding this letter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gay M. Gilbert".

Gay M. Gilbert
Administrator
Office of Unemployment Insurance

cc: Helen Parker
Regional Administrator
Atlanta