

Limiting Drug Testing for UI

Question: What are the current federal rules regarding states' authority to use drug testing for UI?

Answer: The Middle Class Tax Relief and Job Creation Act of 2012 (Pub. L. 112-96) amended federal law to permit states to conduct drug testing as a condition of initial UI benefit eligibility in two circumstances: if the individual was discharged from employment for unlawful drug use, or if the only suitable work available to the individual is in an occupation that regularly conducts drug testing. States are permitted to deny benefits to individuals who test positive for drugs under these circumstances.

The U.S. Department of Labor was required by the 2012 law to define in regulations those occupations that conduct regular drug tests. The Department did so in proposed regulations issued October 2014. The occupations included jobs that require carrying a firearm, aviation flight crews, air traffic controllers, commercial drivers and railroad crews covered by the motor carrier safety administration or railroad administration, pipeline crew members, and commercial maritime crew members. In addition, occupations subject to drug testing under state law (as defined prior to October 2014) are properly subject to UI drug testing. Once these regulations are made final, then states can implement UI drug testing for occupations within these listings. Currently, three states (Mississippi, Texas, and Wisconsin) have UI drug testing laws that are based on this federal law.

Question: What approaches have states taken to drug testing for UI?

Answer: A number of states have seen bills that require every claimant to pass a drug test in order to qualify for benefits. This is prohibited by federal law because states may not restrict initial benefit eligibility based upon conditions unrelated to the “fact or cause” of a worker’s unemployment. (See the discussion of this limit on state authority in the prior section on misconduct.) In addition, there are likely constitutional limits on conditioning UI eligibility upon passing a drug test, as two federal courts of appeals have rejected similar efforts in the context of drug testing for welfare recipients.

States can pass legislation equating a failed or refused pre-employment drug screen with refusing suitable work. If prospective employers report this information to the state agency, it then provides a basis to disqualify claimants. At least six states (AZ, AR, IN, SC, TN, and WI) have passed these laws. To date, these provisions have not been widely utilized by employers, presumably because they fear repercussions from furnishing drug testing results to state agencies.

States can already restrict eligibility for workers whose job loss is related to drug use. A number of states impose misconduct penalties to claimants for failing a drug test and this option remains permissible. 20 states currently have provisions that classify discharges connected to drug use or a failed drug test as misconduct. It is important to note that the remaining states would also likely treat a drug-related discharge as disqualifying misconduct even though it is not explicitly referenced in their misconduct discharge statutes.

Question: What limits apply to states that wish to move forward on broad UI drug testing?

Answer: Implementing an overbroad UI drug testing program that exceeds federal authority would trigger costly penalties for a state and its employers. The Federal Unemployment Tax Act (FUTA) and the Social Security Act (SSA) establish the basic federal framework for the UI system including the consequences of state noncompliance. When state law meets minimum federal requirements, employers receive a 5.4 percent credit against the 6.0 percent federal payroll tax that is levied on covered employers on wages up to \$7,000 a year paid to an employee. In states that meet federal requirements, employers pay an effective federal tax rate of 0.6 percent, or a maximum \$42 per covered employee, per year. If a state does not comply with the FUTA standards, the Secretary of Labor is required to withhold approval of the state law for employer tax credit within that state. If a state were to enact and implement a noncompliant law to drug test UI claimants, it could result an increase in the federal payroll tax for employers of up to \$378 per covered employee, per year.

States are also entitled to federal grants to cover the necessary costs of administering the UI program. If a state does not meet the requirements of Title III of the SSA, it could result in denial by the Secretary of Labor of grants for costs of administration, which must also be withheld if the state law is not approved under FUTA.

Question: Are there constitutional barriers to drug testing for UI claimants?

Answer: Yes. Two federal courts of appeals have struck down drug testing laws that subjected welfare recipients to warrantless drug testing that was not based upon a reasonable suspicion that a specific individual was using illicit drugs. There is reason to think that similar rulings will result if suspicion-less drug testing is imposed upon UI applicants or recipients.

In response to these court decisions, proponents of broader drug testing of public assistance programs and UI have advocated screening tools that supposedly furnish a reasonable suspicion justifying testing of those who fail the screenings. Whether these screening options will address constitutional limits awaits their actual implementation and court tests of their constitutionality.

Question: What reasons are given for drug testing of UI claimants?

Answer: State lawmakers often claim this legislation is designed to deter drug use among the unemployed. They cite the prevalence of employer drug-free workplace policies and the use of a drug test as a pre-employment screening tool as evidence of the need for unemployed workers to be screened as a condition of receiving benefits. The other reason states have given is cost. They assume there will be significant savings from benefits that are not paid to workers who fail the tests.

Moreover, there is confusion about the UI policy options states already have available to them to address programs of drug abuse and employment readiness. As an illustration, in instances where a worker loses a job for a drug-related reason, states have long been free to disqualify that individual from UI benefits based on misconduct. Public Law 112-96, further gives states the authority to drug test these individuals for benefits. States also have many policy levers to identify individuals who may need drug treatment and do not need to use the UI program as a drug treatment program.

Some policy makers blamed workers for their record spells of long-term unemployment during the recent downturn. Drug testing was one of many mean-spirited proposals that aimed to do the wrong kind of problem-solving. Proponents have engaged in mean-spirited efforts to paint the unemployed as lazy drug abusers or addicts in need of treatment, but there is no reason to think that someone who was just working and is otherwise eligible for UI benefits deserves either of these characterizations. It is important to note that the unemployment insurance program is designed to assist workers who have lost their jobs involuntarily, generally for economic reasons. If policy makers are genuinely concerned with helping unemployed workers return to work they can work on providing more state funding for some of the options detailed earlier in this chapter in the section, [Assisting Claimants with Job Searches and Reemployment](#).

Question: What are the arguments against drug testing UI claimants?

Answer: The limited options available to states for drug testing do not bode well for the cost effectiveness or efficacy of such a program. States would need to use their strained UI administrative funds to run such a program. With such a small population to be tested, the cost of administering the program could easily outweigh any benefit. A member poll by the Society for Human Resource Management found that nearly 60 percent of employers perform pre-employment drug testing. Testing is expensive and it is redundant for states to take over this function from employers.

While addressing drug abuse and employment readiness is a laudable goal, these goals are outside purposes of the UI program. A worker's eligibility for UI benefits is underwritten by their work history and involuntary unemployment. There is no convincing evidence connecting involuntary job loss with drug use to justify singling jobless workers out for special scrutiny. In fact, Congress avoided potential constitutional concerns by limiting this law to a small population of workers who must submit to drug testing as a part their continued employment relationship. Legislators should use other evidence-based policy levers to assist workers with reemployment.

Resources:

Rebecca Dixon, "Drug Testing and Unemployment Insurance," Fact Sheet, National Employment Law Project (April 2015)(unpublished).

Middle Class Tax Relief and Job Creation Act of 2012, Public Law 112-96 (February 22, 2012).

U.S. Department of Labor, "Unemployment Compensation: The Federal-State Partnership," Office of Unemployment Insurance, Division of Legislation (April 2015), <http://workforcesecurity.doleta.gov/unemploy/pdf/partnership.pdf>.

U.S. Department of Labor, “Permissible Drug Testing of Certain Unemployment Compensation Applicants,” Unemployment Insurance Program Letter No. 1-15 (October 9, 2014), http://workforcesecurity.doleta.gov/dmstree/uipl/uipl2k15/uipl_0115.pdf.

U.S. Department of Labor, “Decision of the Secretary of Labor in South Dakota Conformity Proceeding,” Unemployment Insurance Program Letter No. 787 (October 2, 1964), http://workforcesecurity.doleta.gov/dmstree/uipl/uipl_pre75/uipl_787.htm.