COALITION ON HUMAN NEEDS
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January 4, 2019

DELIVERED ELECTRONICALLY

Ms. Adele Gagliaradi
Administrator, Office of Policy Development and Research
U.S. Department of Labor
200 Constitution Avenue NW, Room N-5641

Re: 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

Dear Ms. Gagliardi:

I am writing on behalf of the Coalition on Human Needs to provide comments on the above-referenced notice of proposed rulemaking (NPRM) issued by the Department of Labor (DOL) and published in the Federal Register on November 8, 2018.

The Coalition on Human Needs (CHN) is an alliance of human service providers, faith groups, policy experts, and labor, civil rights, and other advocacy organizations concerned with meeting the needs of low-income and vulnerable people. Over our 38-year history, CHN has focused on ways to assist low-income workers through federal law, regulation, and budgets. We have worked to make improvements in federal Unemployment Insurance (UI). We have also paid particular attention to Temporary Assistance for Needy Families and have tracked the use of drug testing in that program.

Based on our members' experience with unemployment law and policy, we believe that DOL is divesting to the states more authority than the law allows it to delegate. Further, the proposed scope of drug testing exceeds what the statute authorizes and could lead to implementation of the law in a manner that is unconstitutional under the Fourth Amendment. In addition, the experiences of certain states in utilizing similar types of drug testing leads to a clear conclusion that states would spend far more in resources to even try to implement such a program than it would ever be worth in savings to UI trust funds. Finally, the goal of Unemployment Insurance programs should be to assist workers in finding new employment and to prevent extreme hardship while they are unemployed. Policies that result in denials of earned benefits, or discouraging unemployed workers from applying for benefits, are contrary to the purposes of the UI program.

Background: In 2012, as part of the Middle Class Tax Relief and Job Creation Act of 2012 (MCTRA)[1] Congress for the first time authorized, but did not require, states to conduct mandatory drug testing of UI applications in two very limited circumstances:

- The applicant was "terminated from employment with the applicant's most recent employer (as defined under state law) because of the unlawful use of controlled substances;" or
- The applicant "is an individual for whom suitable work (as defined under state law) is only available in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary of Labor)." If an applicant tests positive for drugs in either of these circumstances, a state may deny that applicant UI.

The Department of Labor previously promulgated final rules in compliance with this legislation defining "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, DOL mandated that occupations for which state UI agencies could conduct drug testing include:

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

DOL also provided that the list above could expand in the future as additional state laws were passed to require drug testing for specific occupations.

Unhappy with these regulations, despite that they closely adhered to the law Congress passed, Congress passed a resolution under the Congressional Review Act (CRA) to invalidate the regulations and the President signed the CRA resolution into law. Because the CRA prohibits similar rule-making in the future once a resolution of disapproval is enacted, DOL is now seeking to implement new rule that is different enough to be allowable. In so doing, it has dramatically increased states' authority to test UI applicants for drug use, beyond what the statute intends.

The new proposed regulation would expand both the scope of what is meant by "regularly drug testing," and the manner by which occupations can be determined to regularly drug test. The Department of Labor in this rule abdicates its authority to determine the full scope of professions that drug test by allowing states to develop, on a virtually unfettered basis, 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 that occupation."[2] The definition is dramatically expanded by including not just those professions that test on a regular basis, but those which require pre-employment screening as well.

This proposed regulation is far broader than the scope that Congress intended in MCTRA, illegally delegates critical DOL authority to states, likely runs afoul of the Fourth Amendment protection against unreasonable searches, if implemented by a state, would be costly to states already

[1] P.L. 112-96, https://www.gpo.gov/fdsys/pkg/PLAW-112publ96/html/PLAW-112publ96.htm.
[2] 20 C.F.R. §620.3(j).

struggling with administrative funding, and will ultimately result in workers losing access to earned benefits.

1. **The Department of Labor has no authority to delegate to states the definition of occupations that regularly test for drug use, and in doing so, proposes a regulation that would allow drug testing that is far beyond what is allowed by the plain and unambiguous language of the authorizing statute.**

The authorizing language in MCTRA (Sec. 2015(1)(A)(ii)) specifically assigned DOL the task of defining "an occupation that regularly conducts drug testing." DOL may not abdicate or delegate its authority to determine which occupations are subject to this provision merely because of its desire "to provide flexibility to states to choose a system that matches its workforce best." And by doing so, it acts in an arbitrary and capricious manner, in violation of the Administrative Procedures Act. See, e.g., Tex. Office of Pub. Util. Counsel v. FCC, 265 F.3d 313, 328 (5th Cir.2001) Congress clearly assigned to the DOL, in the plain language of the authorizing statute, the responsibility to define which occupations are covered by this law and DOL may not pass on this obligation to the states.

Moreover, by attempting to give states such broad authority to define which occupations regularly test for drug use, DOL has gone far beyond the clear and plain language and purpose of the MCTRA. The proposed regulation would allow states to establish a "factual basis" for allowing drug testing for workers using "[l]abor market surveys; reports of trade and professional organizations; and academic, government, and other studies." This vague set of criteria is not consistent with the narrow strictures of the MCTRA and is likely to result in drug testing being required more broadly than the law intends. The impact of this will be fewer workers receiving services likely to result in their reattachment to the labor force.

It is also important to consider that as states select providers to administer drug tests, those providers will have an interest in ensuring the broadest possible occupational definition to maximize applicants available for testing. State-by-state determination of occupations subject to drug testing will increase the opportunities for inappropriate decisions made related to the financial interests of drug testers.

Congress authorized testing in very narrowly defined circumstances and gave authority to the US Department of Labor to define the particular occupations that regularly test applicants for drug use, in order to limit inappropriate influence in the determination of which workers could be required to take drug tests as a condition of receiving UI.

2. **Providing broader authority to states to conduct suspicionless drug testing as a condition for receiving UI increases the risk of successful legal challenge against the proposed rule.**

Courts have consistently held that government-mandated drug testing is a search subject to the restrictions of the Fourth Amendment. Without probable cause, a suspicionless drug test can only be constitutional if the Government shows a "special need" to conduct testing. (*See* Nat'l Fed'n of Fed. Emps.-IAM v. Vilsack, 681 F.3d 483, 490 (D.C. Cir. 2012). The Supreme Court has recognized

such a "special need" in only two classes of cases, those relating to employment and schools,[3] but the courts have consistently found that suspicionless drug testing in other areas, including as a condition of receiving government benefits, constitutes a violation of the Fourth Amendment.[4]

The proposed regulation makes no attempt to limit the state's use of this authority to constitutional boundaries of a "special need." The open-ended invitation to impose drug testing on applicants for unemployment compensation based on vague and inadequate standards opens the door to widespread application of this authority in a manner in clear violation of the Fourth Amendment. Encouraging states to direct scarce UI program resources towards drug-testing likely to be held contrary to the Fourth Amendment serves no useful purpose, while also harming applicants potentially subject to unconstitutional drug testing.

3. **Requirements that add unfair and unnecessary roadblocks to receipt of UI benefits are unfair to claimants and undermine the program.**

Making it more difficult to qualify for UI will mean fewer eligible people will receive their earned benefits, regardless of exposure to a controlled substance as defined by the rule. People may have difficulty accessing testing services depending on the location of those services. Over the counter cough suppressants, cold medicines, pain relievers and some prescription medications for anxiety and depression could produce a false positive in some tests. While the Department has legislative authority to devise a rule to allow for narrow circumstances under which states can test claimants for drug use, any expansion of that authority also expands the chance that workers who need their earned benefits will be unable to access them.

There is a body of evidence across programs that shows that whenever more documentation is required, a certain number of eligible people are denied benefits because of their inability to secure or submit the proper documents. Most recently, this has been seen in Arkansas' implementation of Medicaid work rules, where many people have been unable to submit proof of work online, and thousands of people have lost months of Medicaid coverage.[5] A *New York Times* piece about the impact of more frequent documentation requirements described a Washington State decision to require Medicaid enrollees to document their eligibility twice a year as opposed to the previous annual requirement. That plus more paperwork resulted in a reduction in the Medicaid caseload of more than 40,000 children.[6] Another study of adults in the Medicaid program before the Affordable Care Act found that 29 percent of those who remained eligible nevertheless lost coverage because of the paperwork burdens at the time of the annually required redeterminations of eligibility.[7]

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[3] See Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Ry. Labor Execs.' Ass'n , 489 U.S. 602 (1989); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, (2002).

[4] See, e.g., Lebron v. Sec'y of Fla. Dep't of Children & Families, 772 F.3d 1352 (11th Cir. 2014) (striking down state's Temporary Assistance for Needy Families drug-testing program); Chandler v. Miller, 520 U.S. 305 (1997) (striking down drug testing of certain political candidates).

[5] https://www.cbpp.org/topics/health

[6] https://www.nytimes.com/2018/01/18/upshot/medicaid-enrollment-obstacles-kentucky-work-requirement.html

[7] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2607511/

Rather than imposing additional burdensome requirements for UI receipt, which is already at historic lows for reasons unrelated to the current unemployment rate,[8] the Department of Labor and state UI agencies should to make every effort to ensure that workers who are entitled to benefits are getting them. The number of unemployed workers who receive Unemployment Insurance has fallen 25% since 2007 – from 36% of workers to 27% nationally.[9] This continued erosion of the program hurts more than the workers who have involuntarily found themselves out of work – it damages families and communities as well. Unemployment Insurance is partly meant to serve as a cushion against economic shock when jobs are hard to find. Making it harder and more distasteful for workers to access that lifeline undermines UI's purpose in sustaining families during hard times so they are strong enough to recover and rebuild economic security.

Finally, regardless of the narrow provisions of the MCTRA, drug testing stigmatizes unemployment insurance usage. A blanket license for governmental intrusion into the privacy of average Americans who just happen to be unlucky enough to lose their job seems rooted in the assumption that unemployed workers are to blame for their own unemployment. Requiring a urine sample from a jobless worker merely to apply for UI, allows state governments to legitimize an ugly stereotype that, among other things, will be detrimental to the reemployment efforts of the unemployed. Unemployed workers need and are entitled to depend on basic social insurance programs. Scapegoating them is inconsistent with the UI program's purpose and history, and insulting to millions of Americans who are shouldering the greatest burdens of job loss and struggling to get back on the economic ladder.

4. **The costs, both financial and otherwise, far outweigh the benefits of drug testing UI applicants.**

It is well documented that states do not have adequate funding to run their UI programs in a fully efficient and effective manner.[10] As states are experiencing record low administrative funding based on historically low unemployment levels, they can scarcely afford additional administrative burdens. Because federal law prohibits assigning this cost to claimants, states would have to absorb the full cost of drug testing thousands of unemployed workers.

It is instructive to look at the return on investment states have received as a result of drug testing TANF claimants. As both the Center for Law and Social Policy and Think Progress have noted, ten states have spent substantial amounts of money to set up and administer drug testing for TANF recipients, with very few claimants testing positive. In 2015, for example, states spent over $850,000 on testing and 321 people tested positive, at a cost of approximately $2,650 per positive test.[11] Indeed, all testing programs reveal positive results in rates substantially below the CDC's estimate of 9.2 percent drug-use rate in the general population.[12]

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[8] https://www.nelp.org/publication/closing-doors-on-the-unemployed/.
[6] Id.
[10] https://www.nelp.org/publication/federal-neglect-leaves-state-unemployment-systems-in-a-state-of-disrepair/; https://waysandmeans.house.gov/wp-content/uploads/2016/09/20160907HR-Testimony-Conti.pdf.
[11] https://thinkprogress.org/drug-testing-welfare-recipients-is-a-popular-new-policy-that-cost-states-millions-here-are-the-cf829257ade0/
[12] https://www.clasp.org/sites/default/files/publications/2017/08/Drug-testing-SNAP-Applicants-is-Ineffective-Perpetuates-Stereotypes.pdf

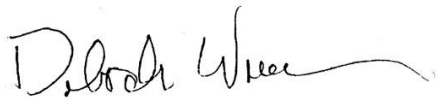
Further, courts have ruled that suspicionless testing in TANF is unconstitutional under the Fourth Amendment, as in a Florida Appeals Court ruling in 2014. In a 54-page ruling, Judge Stanley Marcus concluded that "citizens do not abandon all hope of privacy by applying for government assistance." He said that "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable" and that "by virtue of poverty, TANF applicants are not stripped of their legitimate expectations of privacy."[13] There is every reason to believe that the over-broad application of drug testing of UI applicants will be viewed similarly in court.

Conclusion: Drug testing, as described above, has little benefit and unnecessary and wasteful costs. Beyond that, it harms individuals and families by denying them needed benefits. It may be the intent of proponents of drug testing to curb the significant problem of substance use disorders in this country, but there is scant evidence that people receive treatment as a result of these requirements, wherever they have been imposed. People lose access to benefits such as income assistance or medical care; they are not directed to treatment programs. The loss of needed benefits only exacerbates the problems faced by these families. The best way to help people gain employment, which is a main purpose of Unemployment Insurance, is to connect them to services, not to drive them away.

The members of the Coalition on Human Needs strongly support funding of treatment for those with substance use disorders. With improved access to treatment, many people with substance use disorders are getting the help they need, although clearly our nation has a long way to go. But the evidence from states that have required drug testing in TANF shows that almost no cases of substance use disorder are revealed. The nation is far better served by providing the earned benefits workers are entitled to, and not diverting scarce resources to drug tests.

Further, by attempting to craft rules that are unlike the previously disapproved rule, DOL has exceeded its statutory authority, and set up policies likely to be ruled unconstitutional. We strongly urge that the proposed rule be withdrawn. Implementing drug testing in narrow circumstances as the statute provides can be warranted; this overbroad application, as the Judge Marcus in the Florida ruling observed, "…intrudes upon expectations of privacy that society has long recognized as reasonable." Just as the court concluded that poverty is not a justification for stripping away expectations of privacy, neither is unemployment.

Sincerely,



Deborah Weinstein
Executive Director

[13] http://www.governing.com/topics/health-human-services/tns0florida-drug-test-welfare.html