

Testimony of Douglas J. Holmes  
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Workers' Compensation

Before the  
Subcommittee on Human Resources  
Committee on Ways and Means  
United States House of Representatives

Hearing on Moving from Unemployment Checks to  
Paychecks: Implementing Recent Reforms  
April 25, 2012

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Chairman Davis, Ranking Member Doggett, and members of the Subcommittee on Human Resources, thank you for the opportunity to testify on efforts to move from

until the enactment of the Act, there was no specific federal statutory requirement that states or the federal government administer the program to meet these specific federal requirements. Instead, the US Department of Labor adopted policy in determining whether an individual is unemployed so as to be eligible to be paid unemployment compensation, based on whether the individual was participating in the workforce.

This policy guideline, although in keeping with the UI program policy, over time has been modified with respect to federal requirements and the implementation of state law, to permit individuals in certain circumstances to be deemed able to work despite being ill or disabled, to be deemed available to work while restricting their availability, and to be permitted to limit their search for work while continuing to claim unemployment compensation.

**New regulations and policy should recognize the following points in developing new regulations.**

1. **The new able to work, available to work and actively seeking work requirements are conditions of an individual being eligible to be paid unemployment compensation;** the responsibility in providing information upon which a state UI agency may conclude that the claimant is meeting these requirements rests with the claimant.
2. **The payment for a week of unemployment requires that the able to work, available to work and actively seeking work requirements apply to the entire week being claimed;** there is no authority under which to permit a claimant to restrict his or her ability, availability or active search for work to a period less than the entire week.
3. **State UI agencies are without authority to make payments to individuals with respect to weeks of unemployment compensation claimed if there is insufficient documentation upon which to conclude that the individual meets all of these requirements;** the agency has a duty **not** to make payment of a week without there first being a determination that addresses these issues.
4. **The US DOL payment “when due” regulations and performance measures should apply from the point in time that the agency makes a determination with respect to a week, and not with respect to the ending date of a week claimed;** the current US DOL performance measures prioritize speed of payment over quality of determination and integrity.
5. **The “suitable” work definition, is not a federally required limiter on the jobs for which an individual must make himself or herself available as a condition of receiving unemployment compensation;** the individual must show that he or she is available to accept work the individual is capable of performing without applying his own subjective evaluation of work that he or she may find “suitable”.

20 CFR 604.4(a) currently provides that “A state may consider an individual to be able to work during the week of unemployment claimed if the individual is able to work for all **or a portion** of the week claimed, provided any limitation on his or her ability to work does not constitute a withdrawal from the labor market”

Under the new statutory requirements, the determination of “ability” is not based on whether the individual has withdrawn from the labor market. In order to be paid for a week of unemployment an individual must be able to work throughout the week.

20 CFR 604.4(b) currently provides that “if an individual has previously demonstrated his or her ability to work and availability for work following the most recent separation from employment, the State may consider the individual able to work the week of unemployment claimed despite the individual’s illness or injury, unless the individual has refused an offer of suitable work due to such illness or injury”

This provision is inconsistent with the Act in that an individual must be able to work with respect to a week to be eligible to be paid for the week. The fact that at some prior time the individual might have been able to work or the fact that an individual may have refused an offer of suitable work are irrelevant to the determination of ability with respect to a particular week. If an individual refuses an offer of work with respect to the week, that would be an additional reason to deny payment as the individual could not then maintain that he or she was available for work for the week.

### **Available to Work**

The current provisions in 20 CFR 604.3(b) are inconsistent with the availability requirements of the new statute because the new requirement is not dependent on a determination of whether the individual is offering services for which a labor market exists or the geographical scope of the availability.

20 CFR 604.5 contains a list of special exceptions to the availability requirement that are inconsistent with the new statute, including

- 1. Permits an individual to be available for any work for a portion of the week claimed, provided that any limitation placed by the individual on his or her availability does not constitute a withdrawal from the labor market;**

As previously discussed with respect to ability, the statute does restrict the determination of the availability requirement with reference to a determination of whether the claimant has withdrawn from the labor market. A statement from a claimant that he or she has not withdrawn from the labor market while claiming unemployment compensation is irrelevant to a determination of the availability issue.

- 2. Permits an individual to limit his or her availability to work which is “suitable” under the state unemployment compensation law;**

The rule provides that “A State must not deny UC to an individual for failure to be available for work during a week if, during such week, the individual is participating in a self-employment assistance program.

There is no special provision in the Act to provide that the availability requirements are to be applied differently for claimants under Self Employment Assistance (SEA) programs. The fact that an individual is available to be self-employed is some evidence of his or her availability for work, but should not be per se determinative of the availability issue and there is no authority in federal statute for a rule that would prohibit a state from denying benefits to an individual for a week simply because the individual is in an SEA program.

#### **7. The rule addressing Short-time compensation (STC) is inconsistent with the Act**

20 CFR 604.5 provides that “ A State must not deny UC to an individual participating in a short-time compensation (also known as worksharing) program under State UC law for failure to be available for work during a week, but such individual will be required to be available for his or her normal workweek.

There is no such prohibition against denial in the Act. Section 2161(a)(5) of the Act requires that STC employees meet the availability for work and work search test requirements while collecting short-time compensation benefits, by being available for their workweek as required by the State agency. However, since federal law with respect to availability does not provide for special treatment of UC claimants who are receiving STC and the state UI agency is required to follow federal law, a rule flatly prohibiting denial of UC while participating in STC is inconsistent with federal statute.

#### **Actively Seeking Work**

**The currently effective federal work search regulations are inconsistent with the statutory requirement that claimants be available to work and actively seeking work during a week in order to be eligible to be paid unemployment compensation.**

20 CFR 604.5(h) provides that “The requirement that an individual be available for work does not require an active search for work on the part of the individual. States may, however, require an individual to be actively seeking work to be considered available for work, or States may impose a separate requirement that the individual must actively seek work.”

The plain language of the Act is clear that individuals must be “actively seeking work” as a condition of being eligible for unemployment compensation for any week.

## **Drug Testing**

The abuse of prescription drugs as well as illegal controlled substances is a growing issue in the workforce, impacting performance, resulting in discharge of employees and creating a barrier for unemployed workers in meeting the requirements to be hired. It also affects a claimant's ability to maintain that he or she is able to work and available to work to meet the requirements of weekly unemployment compensation benefit eligibility.

Section 2105 of the Act provides that states are not prohibited from enacting legislation that provides for the testing of applicants for unemployment compensation for the unlawful use of controlled substances as a condition of receiving unemployment compensation in certain circumstances.

Administration of this by a state electing such a provision should be developed in collaboration with employers, particularly those who already include drug testing as part of the hiring process. To be most effective, state administered or supervised testing should be developed to meet proven standards upon which employers may rely in hiring decisions.

## **Reemployment Strategies**

The Act included significant new requirements for emergency unemployment compensation claimants in order to be paid emergency unemployment compensation. The requirements included that such claimants 1) be able to work, available to work, and actively seeking work, and 2) that "actively seeking work" means that the claimants must be a) registered for employment services, b) have engaged in an active search for employment available in light of the employment available in the labor market, c) the individual's skills and capabilities, and d) includes a number of employer contacts as determined by the State.

In addition, such claimants must maintain a record of work search, including employers contacted, method of contact, and when requested, provide work search records to the state agency.

These measures included in Section 2141 of the legislation are the kinds of measures that have been shown to be effective in a number of states in improving reemployment and reducing the duration of regular unemployment compensation.

The Act, however, limited these new requirements only to the long term unemployed when attention is needed to reemployment as part of the regular unemployment compensation system.

Reduced duration of regular unemployment compensation not only improves trust fund solvency and reduces employer unemployment tax rates over time, but it minimizes the impacts of longer term unemployment that may otherwise be the result of lesser efforts early in an individual's period of unemployment.

April 3, 2012

The Honorable Hilda L. Solis  
Secretary  
U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210

Dear Madam Secretary:

We are writing in support of the UI Reform provisions that were enacted in the Middle Class Tax Relief and Job Creation Act of 2012 (The Act). The Act was signed by President Obama on February 22, 2012. The provisions in the Act set clear federal standards and require states to be consistent in protecting the UI safety net for individuals who become involuntarily unemployed and are searching for work.

Section 2101 of the Act codifies the general requirement, as a condition of states receiving federal grants to administer the state UI law, that claimants “must be able to work, available to work, and actively seeking work.” Although this has long been understood as a basic tenet of the UI program, federal regulations at 20 CFR 604 permit states to pay unemployment compensation to claimants who voluntarily limit their availability for work, or are not able to work.

Under the Act, a state violates federal law if it does not administer the new requirements. No “waivers” are permitted.

Specific provisions under the current 20 CFR 604 that are in conflict with the new law include those that

- 1) permit a claimant to be paid a full week of unemployment when the claimant is not able to work or available for work during the full week (604.3; 604.4; 604.5)
- 2) permit claimants to be paid unemployment compensation when they are unable to work due to illness or injury (604.3)
- 3) permit claimants to refuse offers of work when they are capable of performing the work (604.5); and
- 4) permit claimants to limit the types of work, or hours of work for which they are available while continuing to claim unemployment compensation (604.5).

In light of the significant conflicts between the new Act and regulations, we ask that 20 CFR 604 be repealed and new regulations promulgated that are consistent with the Middle Class Tax Relief and Job Creation Act of 2012. Employers stand ready to assist in developing clear federal regulations to assure that the new requirements are met.

Sincerely,

American Staffing Association  
Arkansas State Chamber of Commerce  
Associated Industries of Arkansas

Associated Industries of Florida  
Associated Industries of Massachusetts  
Associated Oregon Industries