

Testimony of Douglas J. Holmes
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Committee on Ways and Means
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Hearing on Moving from Unemployment Checks to
Paychecks: Implementing Recent Reforms
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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

unemployment checks to paychecks, particularly with reference to unemployment insurance reform as enacted in the Middle Class Tax Relief and Job Creation Act of 2012 (The Act) that was signed into law by President Obama on February 22, 2012.

I am Douglas J. Holmes, President of UWC- Strategic Services on Unemployment & Workers' Compensation (UWC). UWC counts as members a broad range of large and small businesses, trade associations, service companies from the Unemployment Insurance (UI) industry, third party administrators, and unemployment tax professionals. The organization traces its roots back to 1933 at the time when unemployment insurance was first being considered for enactment.

We recently joined with 36 national and state business associations interested in unemployment insurance reform in delivering a letter to Secretary of Labor Solis requesting that the Secretary repeal current federal regulations at 20 CFR 604 and to develop new regulations consistent with the able to work, available to work and actively seeking work requirements included in the Act. I have attached a copy of the letter to my testimony.

The Act included a series of important reforms in the unemployment insurance program that require changes in federal regulations and policy as well as changes in state statute, rules and administrative policy.

Of particular importance is the adoption of clear standards in the Act requiring that state laws require that individuals be able to work, available to work and actively seeking work. Section 2101 of the Act adds a requirement to be met by states in order to receive federal funding for the administration of the UI federal/state program. Section 303(a) of the Social Security Requires that

(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provisions for--

(12) A requirement that as a condition of eligibility for regular compensation for any week, a claimant must be able to work, available to work, and actively seeking work.

The new federal statute requires that this apply to weeks beginning after the end of the first session of the State legislature which begins after the date of enactment of the Act (February 22, 2012). For those states currently in legislative sessions beginning before February 22, 2012 the time period to enact changes in state law extends through the current legislative session and through the following legislative session providing sufficient time to develop the required changes in law. For those states with legislative sessions beginning in 2013 the time frame may be shorter.

The federal statutory language is a simple expression of some of the basic tenets of the federal/state unemployment insurance program as it was originally enacted. However,

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”.

6. The new amendments to Section 303(a) of the Social Security Act with respect to the able, available and actively seeking work requirements must be read in conjunction with existing provisions in Section 303(a) and new amendments addressing short-time compensation and self employment assistance.

The UI program is designed to provide temporary partial wage replacement for individuals who become unemployed through no fault of their own in connection with their work and who are able to work, available to work and actively seeking work. Determinations required **before** a payment may be made include 1) a determination that the individual had sufficient employment to meet the state requirements with respect to workforce attachment (e.g. wages paid and/or weeks worked) during a base period, 2) the reason for becoming unemployed is not disqualifying under the applicable state law, and 3) if the individual otherwise meets the requirement to establish eligibility to be paid for weeks of unemployment during a benefit year, that the individual must be able to work, available to work, and actively seeking work. There should be no “waiver” of these requirements. Instead, there should be a determination of the method used to assure that claimants meet the requirements. Clear standards set the appropriate tone for the program and establish and maintain integrity for the UI trust fund.

Able to work

The current federal regulations should be amended to meet the new statutory requirement that an individual be able to work as a condition of being paid unemployment compensation for a week or weeks.

20 CFR 604.3(b) currently provides that whether an individual is able to work “must be tested by determining whether the individual is offering services for which a labor market exists. This requirement does not mean that job vacancies must exist, only that, at a minimum, the type of services the individual is able and available to perform is generally performed in the labor market. The State must determine the geographical scope of the labor market for an individual under its UC law”

This provision is inconsistent with the new statutory provision in that it limits the ability requirement to a determination of the services that the individual is “offering” and the geographical scope of the labor market. This definition permits individuals to subjectively determine the work that they are able to perform, and requires the agency to determine the geographic area in which the ability test is to be applied. In today’s labor market jobs are available through electronic systems and the internet, and in many cases jobs may be performed at a location that is remote from corporate headquarters.

The “ability to work” under the new statutory provision is not limited to the claimant’s own determination of what he or she is able to do or a determination by the state agency about the geographic size of the labor market. There should be no artificial statutory geographic limitation as part of the determination of “ability to work”.

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 new statute applies a statutory standard that individuals to be eligible to be paid for unemployment compensation with respect to a week must be able to work throughout the week and available to work throughout the week. The question of “suitability” may be relevant in determining whether there may be a denial of unemployment compensation if the claimant is otherwise eligible, but it is not relevant to the determination of whether the claimant is available for work.

3. Permits an individual to meet “availability” requirements if he or she is on temporary lay-off and is available to work only for the employer that has temporarily laid-off the individual.

This provision would permit an individual’s availability and eligibility for benefits to be determined only with reference to his or her availability to work for the employer that has temporarily laid-off the individual. While a claimant maintaining his or her availability to work with an employer that has temporarily laid-off the individual may reasonably avoid an availability issue being raised with respect to this employer, the determination of “availability” must be determined with reference to any work that may arise with respect to the week and not be restricted to a single employer.

4. Permits an individual to meet availability requirements even if not available for work due to jury service.

There is no special exclusion in the new statute that would permit an individual to meet the availability requirements by attending jury duty. Although there may be good policy reasons to encourage citizens to participate in the judicial system, it is inconsistent with the requirements of the statute to permit individuals to be paid unemployment compensation for weeks for which they admittedly are not available for work.

5. Prohibits the state from denying unemployment compensation for failure of individual to be available to work during a week if, during such week, the individual is in approved training.

This provision is inconsistent with the statute as it prohibits a state from denying unemployment compensation with respect to a week when there is no question that the claimant is not available for work. While it may be reasonable to conclude that the fact that an individual is in approved training during a week may not itself mean that the individual is not available for work, the fact that the individual is in training should not be the basis upon which the agency may determine that the individual is available for work to meet the federal statutory requirements.

6. The availability requirement in Rule 20 604.5(d) with respect to self employment assistance is inconsistent with the provisions of the Act addressing self employment assistance.

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.

Short Time Compensation

A number of states are currently considering whether to enact legislation to authorize short time compensation (worksharing) programs, and employers are reviewing the federal and state requirements of participation.

The Employment and Training Administration has begun outreach efforts to explain the terms of the new STC law and included employers in webinars that have begun.

One question of particular import for employers is the interpretation of Section 2163 with respect to the temporary federal financing of short-time compensation agreements. Subsection (a)(3) of this section provides that any short-time compensation plan entered into by an employer must provide that the employer will pay the State an amount equal to one-half of the amount of short-time compensation paid under such a plan. Such amount shall be deposited in the State's unemployment fund and shall not be used for purposes of calculating an employer's contribution rate.

It would be helpful to know how the amount to be paid by the employer will be determined, when it is due, and whether the payment, although not used to compute the experience rate, is considered to be "contributions" for purposes of state UI trust fund balances, repayment of Title XII loans and other purposes of the UI program.

Improved Overpayment Recovery

Section 2103 of the Act requires that states "shall deduct from unemployment benefits otherwise payable to an individual an amount equal to any overpayment made to such individual under an unemployment benefit program of the United States or of any other State, and not previously recovered. The amount so deducted shall be paid to the jurisdiction under whose program such overpayment was made."

This reciprocal overpayment recovery between states was previously permissive. Many states participated in reciprocal agreements but some did not. The effect of this new requirement will be more effective collection of overpayments across state lines. The deduction from unemployment benefits for previous overpayments is the primary way in which states collect overpayments. Expanding this will improve trust fund solvency and improve integrity.

In order to implement the new requirement guidance and coordination is needed from the US Department of Labor to assist states in the development of common data exchange and collection methods that build on the existing permissive systems.

There should be time to make the necessary systems and process changes before the effective date for this new requirement, but the sooner the process begins the better.

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.

Reemployment Services and Reemployment and Eligibility Assessment Activities (REA)

The Act in Section 2142 provided increased funding for reemployment and eligibility assessment activities that have been shown to be effective in some states, but limited the use of such funds to new EUC applicants, focusing attention on claimants who have already exhausted regular unemployment compensation. Such services would be more cost effective for the federal/state UI system and assist in returning unemployed workers more quickly to work if available at the earliest point in a claimant's period of unemployment.

Such services are most effective when targeted to UI claimants who are able to benefit from them. Instead of implementing these programs across the entire claimant population, agencies should be given guidance and permitted to target services based on resources available.

State employment security agencies generally do not have the capacity to effectively provide the range of REA services to all regular or even all new EUC claimants. If implemented for all claimants, the level of service on average will be diminished and the effectiveness of the services will not demonstrate the level of success of more targeted programs.

To be most effective, REA services should be expanded from the current profiled and REA pilot program participants to an increasing number of non-job attached claimants based on available resources. Reemployment efforts should be coordinated with community resources as well as with staffing agencies and employers generally in the private sector. Consistent with resource limitations, state employment security agencies should also be permitted to use the full range of electronic communication devices to address the "in person" contacts required for EUC and in expanding REA for regular UC claimants. Person to person video as well as audio contact is increasingly available and should be used to reach a larger number of individual claimants at lower cost to the individual and lower administrative cost.

