



Policy solutions that work for low-income people

Ms. Adele Gagliardi  
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,

The Center for Law and Social Policy (CLASP) writes to comment on the above-referenced notice of proposed rulemaking (NPRM) issued by the U.S. Department of Labor (DOL) and published in the Federal Register on November 5, 2018. CLASP is a national, nonpartisan, anti-poverty nonprofit advancing policy solutions for low-income people. We work at both the federal and state levels, supporting policy and practice that makes a difference in the lives of people living in conditions of poverty.

CLASP strongly opposes the proposed rule to condition UI eligibility on a required drug test. CLASP shares DOL's concern about the effects substance use disorders have on individuals, families, and communities. However, there is no credible evidence to support the claim that expanding the classification of employment subject to drug tests is an appropriate or effective means to address substance use disorders. By denying workers the benefits they have earned, the proposed rule would only increase the harm to workers and their families.

These comments draw on CLASP's deep experience with Temporary Assistance for Needy Families (TANF), where a number of states have implemented drug screening and testing regimes. These comments also draw on CLASP's experience in working with six states under the Work Support Strategies (WSS) project, where state agencies sought to dramatically improve the delivery of key work support benefits to low-income families, including health coverage, nutrition benefits, and child care subsidies through more effective, streamlined, and integrated approaches. From this work, we learned that unnecessary steps in the application process both increased burden on agencies and made it harder for families to access the supports they need to thrive in work and school.

The proposed rule is entrenched in stereotype rather than facts and evidence. It would be costly and burdensome for the applicant, for medical providers, for states (if they choose to implement the

rule), and futile in achieving the purported goal of connecting individuals in need of substance use treatment with appropriate services.

We believe that the authority DOL is attempting to devolve to the states is beyond that which current law allows it to delegate. Furthermore, the proposed scope of drug testing far exceeds what the statute authorizes, and could well be implemented in a manner that is unconstitutional under the Fourth Amendment. Finally, given the constitutional concerns and the wealth of research on the outcomes of similar drug testing regimes, it is clear that states would spend far more in resources to implement such a program than it would save in denied benefits.

## **Background**

In 2012, as part of the Middle Class Tax Relief and Job Creation Act of 2012 (MCTRA),<sup>1</sup> Congress authorized, but did not require, states to conduct mandatory drug testing of UI applicants in two very limited circumstances:

- If 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
- If 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 circumstance, a state may deny that applicant UI. (Even prior to MCTRA, in most circumstances, individuals terminated due to unlawful use of controlled substances would be considered to have lost their job for cause, and therefore ineligible to receive benefits.)

DOL previously promulgated final rules in compliance with this legislation defining “occupation” as position or class of positions that are required, or may be required in the future, by state or federal law to be drug tested. Specifically, the department 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; and
- Railroad operating crews.<sup>2</sup>

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<sup>1</sup> P.L. 112-96, <https://www.gpo.gov/fdsys/pkg/PLAW-112publ96/html/PLAW-112publ96.htm>.

<sup>2</sup> DOL also provided that the above list could expand as additional state laws are passed to require drug testing for specific occupations.

Dissatisfied with these regulations, which closely adhered to MCTRA, Congress passed a joint resolution under the Congressional Review Act to invalidate the regulations and the President signed it into law. DOL is now seeking to essentially re-regulate and increase the scope of when states may test UI applicants for drug use.

The new proposed regulation, however, would expand the manner by which an occupation can be determined to be one which “regularly conducts drug testing.” The definition of such an occupation is dramatically expanded to include not only those professions that test on a regular basis, but those which require *pre-employment screening* as well. Furthermore, in this rule the department would abdicate its authority to determine the full scope of professions that drug test by allowing states to develop—with unfettered autonomy—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.”<sup>3</sup>

### **REASONS TO REJECT THE PROPOSED RULE**

***The Department of Labor has no authority to delegate the responsibility of defining which occupations regularly drug test to the states, and in so doing, proposes a regulation that would allow drug testing that far exceeds 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 with 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 because of its desire “to provide flexibility to States to choose a system that matches its workforce best.” By doing so, it acts in an arbitrary and capricious manner that is in violation of the Administrative Procedures Act.<sup>4</sup> Congress clearly assigned 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 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 superseded the clear and plain language in the MCTRA and what it contemplates. If implemented, the proposed regulation would allow states to establish a “factual basis” for allowing drug testing for workers using sources including “[l]abor market surveys; reports of trade and professional organizations; and academic, government, and other studies.” This standard is rife with potential for abuse and inappropriate motives. Trade associations have their own agendas and financial incentives that may not comport with the narrow strictures of the

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<sup>3</sup> 20 C.F.R. §620.3(j).

<sup>4</sup> See, e.g., *Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 328 (5th Cir. 2001).

MCTRA. And the inclusion of the catchall, "other studies," is so broad as to provide no limit on which occupations may be included.

Delegating this responsibility to states creates the potential for interested parties to affect the decisions. As states select providers to administer drug tests, those providers will have an interest in ensuring the broadest possible occupational definition in order to maximize the number of applicants available for testing. Depending on the experience rating system in a state, employers could also be incentivized to adopt new drug testing regimes solely for the purpose of minimizing their liability for unemployment benefits. Under MCTRA, DOL was directed to set standards for such testing, not to abdicate this responsibility to states.

***The broader the authority states hold to conduct suspicionless drug testing, the greater the risk of a successful legal challenge.***

Courts have consistently held that government-mandated drug testing is a search subject to the restrictions of the Fourth Amendment. Absent probable cause, a suspicionless drug test can only be constitutional if the Government shows a "special need" to conduct testing.<sup>5</sup> The U.S. Supreme Court has recognized such "special need" in only two classes of cases: those relating to employment and schools.<sup>6</sup> 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.<sup>7</sup>

The proposed regulation makes no attempt to limit states' use of this authority in light of constitutional boundaries of a "special need." The open-ended invitation to impose drug testing on UI applicants based on a standardless exercise in alleged fact-finding creates the possibility of broad application of this authority in a manner in clear violation of the Fourth Amendment. Such a practice would ill serve applicants potentially subject to unconstitutional drug testing as well as states encouraged to expend scarce UI program resources in an attempt to impose a drug-testing regime that no Federal Court is likely to allow.

***Requirements that add unjustified and needless hurdles to UI reciprocity are unfair to claimants and undermine the program.***

One of the lessons from our work with states is that any additional requirement imposed upon recipients adds to the amount of paperwork and administrative program costs incurred, deterring eligible individuals from receiving benefits. Some people may be so offended by the requirement

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<sup>5</sup> See Nat'l Fed'n of Fed. Emps.-IAM v. Vilsack, 681 F.3d 483, 490 (D.C. Cir. 2012).

<sup>6</sup> 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).

<sup>7</sup> See, e.g., Lebron v. Sec'y of Fla. Dep't of Children & Families, 772 F.3d 1352 (11th Cir. 2014) (This case struck down the state's TANF drug-testing program); Chandler v. Miller, 520 U.S. 305 (1997) (striking down drug testing of certain political candidates).

that they choose not to apply for benefits they have earned. Others 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 drug tests. While the department has legislative authority to devise a rule that allows narrow circumstances under which states can test claimants for drug use, any expansion of that authority expands the chance that workers who need their earned benefits will be unable to access them.

Finally, regardless of the narrow provisions of the MCTRA, drug testing stigmatizes unemployment insurance usage. Giving states a blanket license to violate the privacy of Americans who happen to lose their job reinforces the assumption that unemployed workers are the cause of their own unemployment. Requiring a urine sample from a jobless worker to apply for UI, allows state governments to legitimize an unseemly stereotype that—among other things—will be detrimental to the reemployment efforts of the unemployed. Scapegoating those who have earned unemployment benefits is inconsistent with UI's purpose and history.

The number of unemployed workers who receive Unemployment Insurance has fallen 25 percent since 2007—from 36 percent of workers to 27 percent nationally.<sup>8</sup> This continued erosion of the program hurts more than the workers who have involuntarily found themselves out of work—it damages families and communities, too. UI is meant in part to serve as a ballast against economic shock during recessionary periods. Rather than imposing additional hurdles to UI receipt (which is already at historic lows for reasons unrelated to the current unemployment rate),<sup>9</sup> DOL and state UI agencies should make every effort to ensure that workers receive the benefits for which they are entitled. Making it harder for workers to access such support blunts UI's capacity to act as a counter-cyclical economic tool.

### ***Drug testing UI applicants will drive up administrative costs.***

It is well documented that states are without adequate funding to operate their UI programs.<sup>10</sup> As states are experiencing record low administrative funding, which is based on unemployment levels (also historically low), they scarcely can 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. At a time when they are already struggling to administer their UI programs because of reductions in federal administrative funding, this is a cost they cannot afford.

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<sup>6</sup> Ibid.

<sup>9</sup> George Wentworth, "Closing Doors on the Unemployed: Why Most Jobless Workers Are Not Receiving Unemployment Insurance and What States Can Do About It," National Employment Law Project, December 2017, <https://www.nelp.org/publication/closing-doors-on-the-unemployed/>.

<sup>10</sup> Rebecca Dixon, "Federal Neglect Leaves State Unemployment Systems in a State of Disrepair," National Employment Law Project, November 2014, <https://www.nelp.org/publication/federal-neglect-leaves-state-unemployment-systems-in-a-state-of-disrepair/>; Judy Conti, "Unemployment Insurance: An Overview of the Challenges and Strengths of Today's System," September 2016, <https://waysandmeans.house.gov/wp-content/uploads/2016/09/20160907HR-Testimony-Conti.pdf>.

It is instructive to look at the results of drug testing TANF claimants. Ten states have spent substantial amounts of money in recent years to organize and administer drug testing regimes for TANF recipients, finding few claimants who tested positive. In 2015, for example, states spent over \$850,000 on tests with 321 people testing positive—a cost of roughly \$2650 per positive test.<sup>11</sup> Indeed, all testing regimes reveal positive results in rates substantially lower than the Centers for Disease Control and Prevention’s estimate of 9.2 percent drug use among the general population.<sup>12</sup>

**Figure 1: State TANF Drug Testing Outcomes**

	<b>Effective Date</b>	<b>Screening Method</b>	<b>Drug Testing Results</b>	<b>Drug Testing Costs</b>
<b>Arizona</b>	November 24, 2009	Completion of <a href="#">Illegal Drug Use Statement</a> .	Over 2017, 3,461 of 81,286 TANF recipients answered questions about illegal drug use and related employment or problems in the preceding 30 days. Two people submitted drug tests, which were both returned negative.	Total cost for the two tests was \$45.60.
<b>Arkansas</b>	April 8, 2018	<a href="#">Questionnaire</a> with two questions. An answer of “yes” to any question is cause for suspicion.	Some 3,430 of the 19,228 applicants for TANF in 2017 were screened for drug use. Five were given drug tests and only two tested positive. Another eight refused to take the test.*	The testing costs alone were a couple hundred dollars, but staffing costs increased the overall cost to \$32,506.65 (more than \$6,500 per test).*

<sup>11</sup> Bryce Covert & Josh Israel, “Drug Testing Welfare Recipients Is a Popular New Policy That Cost States Millions. Here Are the Results.” ThinkProgress, February 2016, <https://thinkprogress.org/drug-testing-welfare-recipients-is-a-popular-new-policy-that-cost-states-millions-here-are-the-cf829257ade0/>.

<sup>12</sup> Victoria Palacio, “Drug Testing SNAP Applicants is Ineffective and Perpetuates Stereotypes,” Center for Law and Social Policy, July 2017, <https://www.clasp.org/sites/default/files/publications/2017/08/Drug-testing-SNAP-Applicants-is-Ineffective-Perpetuates-Stereotypes.pdf>.

<b>Kansas</b>	July 1, 2014	Arrest records from drug related charges within the last 12 months; employment records; self-declaration; visual observation of drug use or drug paraphernalia; Substance Abuse Subtle Screening Inventory (SASSI) indicators; prior refusal to drug test.	In 2017, 220 out of 22,523 Kansans applicants were tested for drugs; 46 of tests came back positive (50 refused to take the test).*	Associated drug testing costs, staff expenses, and other operating costs totaled \$43,879.70.*
<b>Mississippi</b>	July 1, 2014	Online version of the Substance Abuse Subtle Screening Inventory (SASSI).*	Over 2017, 464 of 11,407 TANF applicants (26 did not complete the tests for various reasons). Six tests were returned positive.*	The state spent in total \$8,493.*
<b>Missouri</b>	March 2013	Screening tool; Missouri State Highway Patrol law enforcement records.	Missouri tested 108 of 32,774 TANF applicants. Eleven came back positive (305 applicants did not show up for a drug test or refused).* †	The state spent in total \$336,297.*
<b>North Carolina</b>	August 1, 2014	Weighted 10-question drug use <a href="#">survey</a> .	258 of 28,828 applicants were given drug tests in 2017.*	The state spent \$14,410.*
<b>Oklahoma</b>	November 1, 2012	<a href="#">SASSI-3</a>	In 2017, 3,915 of 13,361 TANF applicants were screened; 1,196 were sent to a second round of screening; and 841 were given tests, 77 of whom tested positive.*	The state spent in total \$50,294.48.*
<b>Tennessee</b>	July 1, 2014	Written questionnaire with three questions. An answer of "yes" to any question is cause for suspicion.*	Out of 13,058 new applicants, 164 were given drug tests. 26 tested positive, another 95 did not complete the required	The state spent in total \$5,279.25.*

			test within the 45-day time limit.*	
<b>Utah</b>	May 8, 2012	<a href="#">SASSI-3</a>	3,068 Utahans were screened, 450 recipients given a drug test, 94 tested positive (another 94 were rejected for refusal or failure to take the test). The state paid \$30,775.50 for this program, plus staffing costs.*	The state spent in total \$30,775.50 for the program, plus staff costs.*
<b>West Virginia</b>	October 20, 2017	15 question DAST-10 <a href="#">drug use questionnaire</a>	Of 798 applicants who were screened, 83 were given drug tests, with 4 testing positive.*	The state spent in total \$50,172.*

\* Source: <https://thinkprogress.org/states-waste-hundreds-of-thousands-on-drug-testing-for-welfare-3d17c154cbe8/>.

‡ Missouri allows applicants to waive submitting a drug test in exchange for being referred to a substance use disorder treatment program.

***Drug testing is an ineffective means to identify people in need of treatment.***

If states are earnest in the desire to identify individuals for whom substance use disorder is a barrier to employment, then chemical drug tests are an ineffective means to identify such use. Some Americans occasionally use drugs without experiencing addiction. Federal data show that while 23.8 percent of adults reported drug use once or more in the past year, only 1 percent were determined to be addicted.<sup>13</sup> (This determination is based on their responses to multiple survey questions.) The tests may identify occasional users of marijuana, but elude alcohol use disorders (not included in chemical screens) or opioid users who have abstained long enough that substances do not remain in their system. The tests also cannot distinguish between those who appropriately use prescription painkillers and those experiencing addiction with a valid prescription. For example, a Florida mother who recently had surgery was investigated for child abuse because the test detected the prescription painkiller she was taking.<sup>14</sup>

Although drug use disorder can pose barriers to economic advancement,<sup>15</sup> occasional drug use alone does not appear to have significant effects on employment outcomes. In a study of Florida

<sup>13</sup> Substance Abuse and Mental Health Data Archive, unpublished data, 2015.

<sup>14</sup> Craig Patrick, "Documents describe 'debacle' of welfare drug testing," Fox 13 Tampa Bay, September 2012, <http://www.myfoxtampabay.com/story/19549851/2012/09/14/documents-describe-debacle-of-welfare-drug-testing>.

<sup>15</sup> Research and literature available finds that women on TANF with substance use disorders exhibit additional barriers to employment than women in the general welfare population. Furthermore, recipients with substance use disorders are less likely to maintain full-time employment over a protracted period. For a general overview of the literature, see Lisa R. Metsch, Margaret



TANF recipients, those who tested positive for drug use had earnings and were employed at nearly the same rate as those who had tested negatively.<sup>16</sup> Other studies found that employed TANF recipients were found to use drugs at similar rates to those of unemployed recipients, and that most drug users are employed full time.<sup>17, 18</sup>

## Conclusion

The reasons above make it clear that the proposed regulation is inconsistent with Congressional intent in setting boundaries on when states can require drug tests of UI applicants and would undermine the purpose of UI in providing social insurance to support people experiencing unemployment. The U.S. Department of Labor should withdraw this rule.

Thank you for your consideration of these comments. Please contact me at [elowerbasch@clasp.org](mailto:elowerbasch@clasp.org) with any questions.

Sincerely,

Elizabeth Lower-Basch  
Director, Income and Work Supports  
Center for Law and Social Policy

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Pereyra, Christine C. Miles, and Clyde B. McCoy, "Welfare and Work Outcomes after Substance Abuse Treatment," *Social Service Review*, June 2003, <https://www.journals.uchicago.edu/doi/pdfplus/10.1086/373907>.

<sup>16</sup> Robert E. Crew, Jr. and Belinda Creel Davis, "Assessing the Effects of Substance Abuse Among Applicants for TANF Benefits: The Outcome of a Demonstration Project in Florida," *Journal of Health & Social Policy*, October 2003, [https://www.tandfonline.com/doi/abs/10.1300/J045v17n01\\_03](https://www.tandfonline.com/doi/abs/10.1300/J045v17n01_03).

<sup>17</sup> Harold Pollack, Sheldon Danziger, Rukmalie Jayakody, et. al., "Drug Testing Welfare Recipients—False Positives, False Negatives, Unanticipated Opportunities," *Women's Health Issues*, January 2001, [https://www.whijournal.com/article/S1049-3867\(01\)00139-6/fulltext](https://www.whijournal.com/article/S1049-3867(01)00139-6/fulltext).

<sup>18</sup> Substance Abuse and Mental Health Services Administration, *Worker Drug Use and Workplace Policies and Programs: Results from the 1994 and 1997*, National Household Survey on Drug Abuse, September 1999.