STATE OF WISCONSIN

DWD

Department of Workforce Development

Unemployment Insurance Advisory Council

Council Members: Please bring your calendars to schedule future meetings.
https://dwd.wisconsin.gov/uibola/uiac/

MEETING

Date: October 22, 2019

Time: 10:00 a.m. – 4:00 p.m.

Place: Department of Workforce Development
201 E. Washington Avenue
Madison, Wisconsin
GEF-1, Room F305

AGENDA ITEMS AND TENTATIVE SCHEDULE:

1. Call to Order and Introductions
2. Approval of Minutes of the September 19, 2019 Council Meeting
3. Department Update
4. Report on the Unemployment Insurance Reserve Fund
5. Update on Court Cases
   - *Varsity Tutors LLC vs. LIRC, DWD & Holland Galante*
6. Update on Federal Rulemaking – Occupational Drug Testing
7. Department Proposals for Agreed Bill
8. Labor and Management Proposals for Agreed Bill
9. Research Request
10. Agreed Bill Timeline
11. Future Meeting Dates
12. Adjourn

Notice:

- The Council may not address all agenda items or follow the agenda order.
- The Council may take up action items at a time other than that listed.
- The Council may discuss other items, including those on any attached lists.
- The Council members may attend the meeting by telephone.
- The employee or employer members of the Council may convene in closed session at any time during the meeting to deliberate any matter for potential action or items posted in this agenda, under sec. 19.85(1)(ee), Stats. The employee or employer members of the Council may thereafter reconvene again in open session after completion of the closed session.
- This location is accessible to persons with disabilities. If you have a disability and need assistance (such as an interpreter or information in an alternate format), please contact Robin Gallagher, Unemployment Insurance Division, at 608-267-1405 or dial 7-1-1 for Wisconsin Relay Service.
- Today's meeting materials will be available online at 10:00 a.m. at https://dwd.wisconsin.gov/uibola/uiac/meetings.htm

UNEMPLOYMENT INSURANCE ADVISORY COUNCIL

Meeting Minutes

Offices of the State of Wisconsin Department of Workforce Development
201 E. Washington Avenue, GEF 1, Room F305
Madison, WI

September 19, 2019

The meeting was preceded by public notice as required under Wis. Stat. § 19.84.

Members Present: Janell Knutson (Chair), Scott Manley, Mike Gotzler, Susan Quam, John Mielke, Sally Feistel, Dennis Delie, Shane Griesbach, and Terry Hayden.

Department Staff Present: Andrew Rubsam, Jim Moe, JoAnna Richard (Deputy Secretary), John Keckhaver (Legislative Liaison), Mark Reihl, Patrick Lonergan, Tom McHugh, Pam James, Janet Sausen, Robert Usarek, Emily Savard, Maureen McShane and Robin Gallagher.

Members of the Public Present: Mike Duchek (Legislative Reference Bureau), Ryan Horton (Legislative Fiscal Bureau), Mary Beth George (office of Representative Christine Sinickis), BJ Dernbach (office of Representative Warren Petryk), Wyatt Cooper (office of Representative James Edming), Emily Conklin (office of Representative Katrina Shankland) Anita Krasno (General Counsel, Labor & Industry Review Commission),

1. Call to Order and Introduction

Ms. Knutson called the Unemployment Insurance Advisory Council meeting to order at 10:05 a.m. under Wisconsin's Open Meetings law. Council members introduced themselves and Ms. Knutson recognized DWD Deputy Secretary, JoAnna Richard and introduced the new DWD Legislative Liaison, John Keckhaver. Ms. Knutson also recognized BJ Dernbach of Rep. Warren Petryk's Office, Wyatt Cooper of Rep. James Edming's Office, Mary Beth George of Rep. Christine Sinicki's Office, Emily Conklin of Rep. Katrina Shankland's Office, Mike Duchek of the Legislative Reference Bureau, Ryan Horton of the Legislative Fiscal Bureau and Anita Krasno, General Counsel with the Labor & Industry Review Commission.

2. Approval of Minutes of the July 18, 2019 Meeting

Motion by Mr. Gotzler, second by Mr. Hayden to approve the July 18, 2019 meeting minutes without correction. The motion carried unanimously.

3. Department Update

Mr. Reihl informed the Council that the department is moving forward in the process to appoint someone to fill the current vacancy on the Management side of the Council.

Mr. Reihl mentioned that the first meeting of the Governor's Joint Enforcement Task Force on Payroll Fraud and Worker Misclassification took place on August 28, 2019. At that meeting, Governor Evers stressed to the Task Force the importance of addressing the issues of worker misclassification and is hopeful that the Task Force will develop recommendations on possible solutions to those issues. The next meeting of the Task Force is scheduled for Wednesday, September 25, 2019 and will take place in Wisconsin Rapids.

4. Report on the UI Reserve Fund

Mr. McHugh provided the following UI Reserve Fund highlights through August 2019:

- Benefit payments declined by $10.4 million (3.7%) when compared to benefits paid through August 2018. Mr. McHugh looked at the 20-week moving average for benefits paid going back to 2015. Year-to-year comparisons have shown a continued decline in benefit payments from the previous year; however, a comparison of the most recent 20-week moving average shows that benefit payments are up 2% compared to the same 20-week average in 2018. Benefit payments are still very low compared to 20-week moving averages from 2017 and previous years, but the slight increase from 2018 could indicate the continued decline in benefit payments may be leveling out.

- Total year-to-date tax receipts declined by $32.9 million (6.5%) when compared to tax receipts paid through August 2018. Since both tax years were rated in Schedule D, any change in taxes are a result of lower employer tax rates due to improved employer experience rating and not the result of a schedule change.

- Interest earned on the Trust Fund is received quarterly. Interest earned for the first two quarters of 2019 was $21 million compared to $16.9 million for the first two quarters of 2018. The U.S. Treasury annualized interest rate for this quarter is 2.4%, currently earning the Trust Fund about $128,000 in daily interest. Total interest earned on the Trust Fund for the year is expected to be about $45 million.

- The UI Trust Fund balance is nearly $2 billion, an increase of 14% when compared to the same time last year. The Average High Cost Multiple (AHCM) is the measure used by USDOL to determine whether a state's UI Trust Fund is sufficient to pay benefits in the event of a recession. USDOL recommends states' UI Trust Funds support at least a 1.0 AHCM which means the state could pay benefits for one year during an average recession without taking in any additional revenue. A Trust Fund balance of $2 billion is required for Wisconsin to achieve a 1.0 AHCM.

Mr. Reihl noted that USDOL is placing an emphasis on states to achieve a 1.0 AHCM and is discussing potential penalties to impose on states that fail to maintain an adequate AHCM. Mr. Reihl added that this increased focus is making the AHCM an even more crucial metric and it is important Wisconsin have a financing mechanism in place to achieve and maintain a 1.0 AHCM.

Mr. Gotzler asked what kinds of penalties USDOL is contemplating for failure to maintain an adequate AHCM.

Mr. Rubsam responded that for the past few years, USDOL's federal budget proposal has included a provision to strengthen the incentive for states to maintain an adequate AHCM. Under USDOL's federal budget proposal, states that fail to maintain an AHCM of 0.5 for two consecutive January firsts would be subject to the same FUTA tax credit reductions applied to states that go below a zero Trust Fund balance. However, this is a proposal that Congress has not enacted but USDOL continues to push for it.

5. Department Proposals for Agreed Bill

Ms. Knutson presented the Council with a new department proposal (D19-22 Collection of DWD-UI Debts) for the agreed bill. This proposal refers to a recurring issue regarding UI collections that is the result of a law change several years ago to provide that DOR will collect debts for all state agencies under certain circumstances.

Mr. Rubsam explained that a law change included in the 2009 state budget requires state agencies and DOR to enter into an agreement to have DOR collect debt owed to agencies. DOR collecting debts owed to agencies may be appropriate for smaller agencies or in cases where agencies don't have the resources or mechanisms to do collections; however, the UI program has its own collection mechanisms that are just as effective as DOR's, if not better.

Mr. Rubsam raised the following issues that could occur if DOR were to assume collection of UI debts:

- When a debt is referred to DOR, DOR charges the debtor a collection fee (expected to be about 15% of the total debt) which is then added to the debt amount. Payments would be applied to DOR's fee first, before going towards repayment of the underlying UI debt. This could negatively impact the Trust Fund because dollars that claimants and employers are paying would go to DOR first instead of going to the Trust Fund. If DWD is unable to recover delinquent contributions and benefit overpayments, which are deposited into the Trust Fund due to the imposition of the collection fee, the Reserve Fund balance will decrease. This could result in a change to a tax schedule with higher rates.

- The department estimates it would require about 5,000 to 7,000 hours of IT work to cease DWD's collections which would cost the department between $430,000 to $602,000 in IT costs alone to refer DWD-UI debts to DOR. This sum does not include DWD collections staff time to handle the referral of debts. This amount would be payable from the employer interest and penalty fund.

- The department collected about $428 million during the period of 2011 through March 2018. If the 15% fee applied to that entire amount, DOR would have charged $64.2 million in fees to collect the same amount of debt as DWD during that period.

- DOR charges 12% annual interest on unpaid taxes that are not delinquent and charges 18% annual interest on delinquent taxes. DWD charges 9% annual interest on delinquent

contributions and does not assess interest on interest, penalties, or benefit overpayments. It is unclear whether DOR would charge the 12% interest on interest that accrued before the debt is referred to DOR. If so, it would result in interest being charged on interest, which DWD does not currently do.

- DOR must apply payments to debts according to a statutory priority list which would make UI debts referred to DOR a lower priority. The department expects a reduced collection rate due to recovery of UI debts being a lower priority will likely result in delayed satisfaction of the debt causing a negative impact on the Trust Fund and an increase in employer taxes.

The department proposes a law change to prohibit DOR from collecting debts on behalf of the UI Division. This change will ensure that employers and claimants are not assessed additional fees when repaying their debts. And, this law change will ensure that state recoveries of debts owed to the UI Division continue to be maximized for the benefit of the Trust Fund.

Mr. Mielke asked for clarification that DOR charges an additional 15% fee when collecting a debt but DWD does not, so how would the estimated $64.2 million DOR would have collected in fees between 2011 and 2018 negatively affect the Trust Fund. Mr. Rubsam responded that estimate is a hypothetical dollar amount that DOR would have charged which would have been paid to DOR before the debt to the Trust Fund could have been recovered. The Trust Fund would not have been reduced by that amount, but recovery of the debt owed would have been delayed. If the entire debt is collected, the Trust Fund is fully repaid. But, if only a portion of the debt is recovered, the recovered amount would go towards the 15% fee to DOR first, which would reduce the amount collected for the Trust Fund.

Ms. Quam asked if a debtor owes additional amounts for other debts that are higher on the statutory priority list, would those amounts also be paid before the UI debt would be recovered. Mr. Rubsam responded that is correct.

Mr. Reihl added there are some states that have taken the approach of having their DOR collect UI debts and those states have seen a significant decrease in their collections of UI debt. Mr. Reihl turned the floor over to Mr. McHugh for confirmation.

Mr. McHugh responded that is correct and noted that Minnesota used this process and their collection rate went down to 25% of all debt referred. Mr. McHugh added that Minnesota said the main issues they experienced with this approach was the order of priority and needing to pay the 15% fee and other debts on the priority list first resulted in less amounts being collected for the UI debt. Mr. McHugh added Utah implemented this as well and they experienced similar problems.

6. Labor and Management Proposals for Agreed Bill & Research Requests

There were no new Labor or Management proposals or pending research requests at this time.

7. Agreed Bill Timelines

Ms. Knutson reviewed the agreed bill timeline with the Council. There was no UIAC meeting in August due to a lack of a quorum so the Council may want to consider possibly having some additional meeting dates in October or early November to stay on track with the timeline.

8. Future Meeting Dates

Ms. Knutson informed the Council that there would not be a quorum for the next regularly scheduled UIAC meeting on October 17, but polls of the Council members show that there would be a quorum on Tuesday, October 22, 2019.

Caucus

Motion by Mr. Hayden, second by Mr. Manley to go into closed caucus under Wis. Stat. § 19.85 (1)(ee) to deliberate items on the agenda. The motion carried unanimously and the Council convened in closed caucus at 10:33 a.m.

The Council reconvened the public meeting at 2:14 p.m. Mr. Manley reported the Council has reached an agreement on three department proposals and will continue its work on the remaining department proposals as well as continue negotiations based on the Labor and Management proposals. The Council reached an agreement on the following department proposals:

- D19-19 – Department Reports to the Legislature (with minor amendments)
- D19-21 – Eligibility for Certain Employees
- D19-22 – Prohibit DOR Collection of UI Debts

Mr. Rubsam reported the amendments to department proposal D19-19 were as follows:

The proposal originally included a provision that would strike the portion of the statute requiring the department to distribute the report to all members of the Legislature. The proposal was amended to retain that portion of the statute.

The proposal was also amended to restore the stricken portion requiring the department to include in the report a statement explaining why Trust Fund dollars should be retained in the Trust Fund and not used for other purposes.

Motion by Mr. Manley, second by Ms. Feistel to approve department proposals D19-19 as amended, D19-21, and D19-22. The motion carried unanimously.

9. Adjourn

The next meeting is scheduled for Tuesday, October 22. The department will conduct a poll of Council members to verify availability for the November Council meeting.

Motion by Ms. Feistel, second by Mr. Manley to adjourn. The motion carried unanimously, and the Council adjourned at 2:16 p.m.

UI Reserve Fund Highlights

October 22, 2019

The September 30, 2019 Trust Fund ending balance was $1,944,765,893, an increase of $238,637,045 when compared to $1,706,128,848 at the same time last year.

FINANCIAL STATEMENTS

For the Month Ended September 30, 2019

Division of Unemployment Insurance

Bureau of Tax and Accounting

DEPARTMENT OF WORKFORCE DEVELOPMENT
U.I. TREASURER'S REPORT
BALANCE SHEET
FOR THE MONTH ENDED September 30, 2019

	CURRENT YEAR	PRIOR YEAR
ASSETS		
CASH:		
U.I. CONTRIBUTION ACCOUNT	333,734.47	723,262.15
U.I. BENEFIT ACCOUNTS	(1,096,232.07)	(1,295,811.11)
U.I. TRUST FUND ACCOUNTS (1) (2)	1,958,154,422.29	1,716,158,428.00
TOTAL CASH	1,957,391,924.69	1,715,585,879.04
ACCOUNTS RECEIVABLE:		
BENEFIT OVERPAYMENT RECEIVABLES	70,467,987.95	77,341,452.89
LESS ALLOWANCE FOR DOUBTFUL ACCOUNTS (3)	(33,223,947.68)	(35,908,432.33)
NET BENEFIT OVERPAYMENT RECEIVABLES	37,244,040.27	41,433,020.56
TAXABLE EMPLOYER RFB & SOLVENCY RECEIV (4) (5)	31,819,181.44	34,526,281.84
LESS ALLOWANCE FOR DOUBTFUL ACCOUNTS (3)	(15,709,818.13)	(18,961,504.91)
NET TAXABLE EMPLOYER RFB & SOLVENCY RECEIV	16,109,363.31	15,564,776.93
OTHER EMPLOYER RECEIVABLES	21,952,033.59	22,138,359.86
LESS ALLOWANCE FOR DOUBTFUL ACCOUNTS	(7,879,250.46)	(8,866,939.49)
NET OTHER EMPLOYER RECEIVABLES	14,072,783.13	13,271,420.37
TOTAL ACCOUNTS RECEIVABLE	67,426,186.71	70,269,217.86
TOTAL ASSETS	2,024,818,111.40	1,785,855,096.90
LIABILITIES AND EQUITY		
LIABILITIES:		
CONTINGENT LIABILITIES (6)	27,329,012.14	29,061,124.50
OTHER LIABILITIES	12,820,153.94	9,529,106.32
FEDERAL BENEFIT PROGRAMS	183,083.23	179,933.67
CHILD SUPPORT HOLDING ACCOUNT	31,619.00	33,960.00
FEDERAL WITHHOLDING TAXES DUE	149,818.00	126,329.00
STATE WITHHOLDING TAXES DUE	1,582,392.65	1,480,725.23
DUE TO OTHER GOVERNMENTS (7)	367,448.69	405,675.14
TOTAL LIABILITIES	42,463,527.65	40,816,853.86
EQUITY:		
RESERVE FUND BALANCE	2,428,043,874.77	2,294,067,836.50
BALANCING ACCOUNT	(445,689,291.02)	(549,029,593.46)
TOTAL EQUITY	1,982,354,583.75	1,745,038,243.04
TOTAL LIABILITIES AND EQUITY	2,024,818,111.40	1,785,855,096.90

1. $1,891,913 of this balance is for administration purposes and is not available to pay benefits.

2. $2,141,227 of this balance is the remaining amount set aside for charging of benefits financed by Reimbursable Employers in cases of Identity Theft.

3. The allowance for uncollectible benefit overpayments is 50.3%. The allowance for uncollectible delinquent employer taxes is 42.5%. This is based on the historical collectibility of our receivables. This method of recognizing receivable balances is in accordance with generally accepted accounting principles.

4. The remaining tax due at the end of the current month for employers utilizing the 1st quarter deferral plan is $652,801. Deferrals for the prior year were $762,289.

5. $8,268,504, or 26.0%, of this balance is estimated.

6. $13,415,310 of this balance is net benefit overpayments which, when collected, will be credited to a reimbursable or federal program. $13,913,702 of this balance is net interest, penalties, SAFI, and other fees assessed to employers and penalties and other fees assessed to claimants which, when collected, will be credited to the state fund.

7. This balance includes SAFI Payable of $8,507. The 09/30/2019 balance of the Unemployment Interest Payment Fund (DWD Fund 214) is $12. Total LIfe-to-date transfers from DWD Fund 214 to the Unemployment Program Integrity Fund (DWD Fund 298) were $9,501,460.

DEPARTMENT OF WORKFORCE DEVELOPMENT
U.I. TREASURER'S REPORT
RESERVE FUND ANALYSIS
FOR THE MONTH ENDED September 30, 2019

	CURRENT ACTIVITY	YTD ACTIVITY	PRIOR YTD
BALANCE AT BEGINNING OF MONTH/YEAR:			
U.I. TAXABLE ACCOUNTS	2,889,087,715.09	2,794,896,813.36	2,635,459,959.45
BALANCING ACCOUNT	(904,460,802.36)	(1,030,187,761.19)	(1,125,485,495.65)
TOTAL BALANCE	1,984,626,912.73	1,764,709,052.17	1,509,974,463.80
INCREASES:			
TAX RECEIPTS/RFB PAID	1,310,484.67	339,570,299.07	369,021,136.41
ACCRUED REVENUES	3,283,893.72	2,656,960.94	2,474,059.88
SOLVENCY PAID	317,772.69	131,790,457.62	135,874,376.23
FORFEITURES	3,598.00	30,587.00	204,372.16
BENEFIT CONCEALMENT INCOME	45,812.14	536,840.16	622,530.97
INTEREST EARNED ON TRUST FUND	11,810,634.19	32,806,064.13	26,761,133.34
FUTA TAX CREDITS	(37.87)	17,335.91	31,302.00
OTHER CHANGES	16,084.23	310,084.80	362,981.12
TOTAL INCREASES	16,788,241.77	507,718,629.63	535,351,892.11
DECREASES:			
TAXABLE EMPLOYER DISBURSEMENTS	15,635,555.50	245,381,354.71	254,428,086.49
QUIT NONCHARGE BENEFITS	2,338,021.03	35,458,969.05	35,339,781.55
OTHER DECREASES	53.21	(2,379,957.28)	(761,120.85)
OTHER NONCHARGE BENEFITS	1,086,941.01	11,612,731.57	11,281,365.68
TOTAL DECREASES	19,060,570.75	290,073,098.05	300,288,112.87
BALANCE AT END OF MONTH/YEAR:			
RESERVE FUND BALANCE	2,428,043,874.77	2,428,043,874.77	2,294,067,836.50
BALANCING ACCOUNT	(445,689,291.02)	(445,689,291.02)	(549,029,593.46)
TOTAL BALANCE (8) (9) (10)	1,982,354,583.75	1,982,354,583.75	1,745,038,243.04

8. This balance differs from the cash balance related to taxable employers of $1,944,765,893 because of non-cash accrual items.

9. $1,891,913 of this balance is set up in the Trust Fund in two subaccounts to be used for administration purposes and is not available to pay benefits.

10. $2,141,227 of this balance is the remaining amount set aside for charging of benefits financed by Reimbursable Employers in cases of Identity Theft.

10/11/19

DEPARTMENT OF WORKFORCE DEVELOPMENT
U.I. TREASURER'S REPORT
RECEIPTS AND DISBURSEMENTS STATEMENT
FOR THE MONTH ENDED 09/30/19

RECEIPTS	-CURRENT ACTIVITY--	--YEAR TO DATE---	PRIOR YEAR TO DATE
TAX RECEIPTS/RFB	$1,310,484.67	$339,570,299.07	$369,021,136.41
SOLVENCY	317,772.69	131,790,457.62	135,874,376.23
ADMINISTRATIVE FEE	84.72	708.37	939.75
ADMINISTRATIVE FEE - PROGRAM INTEGRITY	6,292.14	2,927,744.41	2,873,065.74
UNUSED CREDITS	193,626.58	4,055,215.55	3,930,868.99
GOVERNMENTAL UNITS	767,692.32	8,093,917.09	8,595,760.01
NONPROFITS	935,097.11	7,927,530.14	8,841,592.26
INTERSTATE CLAIMS (CWC)	157,274.77	3,648,120.25	3,339,524.20
ERROR SUSPENSE	(4,001.18)	(1,214.40)	(15.19)
FEDERAL PROGRAMS RECEIPTS	(15,441.76)	(258,072.38)	130,630.83
OVERPAYMENT COLLECTIONS	1,157,917.24	13,932,526.95	15,533,180.42
FORFEITURES	3,598.00	30,587.00	204,372.16
BENEFIT CONCEALMENT INCOME	45,812.14	536,840.16	622,530.97
EMPLOYER REFUNDS	(840,845.49)	(4,203,690.13)	(5,260,439.59)
COURT COSTS	36,987.83	359,125.84	398,550.36
INTEREST & PENALTY	245,724.98	2,786,232.77	2,921,265.39
CARD PAYMENT SERVICE FEE	929.68	3,363.12	0.00
BENEFIT CONCEALMENT PENALTY-PROGRAM INTEGRITY	60,975.05	806,823.10	859,171.20
MISCLASSIFIED EMPLOYEE PENALTY-PROG INTEGRITY	200.00	26,038.64	1,730.41
SPECIAL ASSESSMENT FOR INTEREST	3,031.78	16,665.90	14,819.93
INTEREST EARNED ON U.I. TRUST FUND BALANCE	11,810,634.19	32,806,064.13	26,761,133.34
MISCELLANEOUS	8,644.55	60,966.11	54,793.51
TOTAL RECEIPTS	$16,202,492.01	$544,916,249.31	$574,718,987.33
DISBURSEMENTS			
CHARGES TO TAXABLE EMPLOYERS	$16,732,064.56	$257,274,376.07	$266,836,589.32
NONPROFIT CLAIMANTS	838,860.80	7,382,611.57	8,355,507.43
GOVERNMENTAL CLAIMANTS	599,910.17	7,166,833.10	7,681,419.77
INTERSTATE CLAIMS (CWC)	234,055.87	2,966,669.65	2,951,731.15
QUITS	2,338,021.03	35,458,969.05	35,339,781.55
OTHER NON-CHARGE BENEFITS	1,016,622.25	11,947,746.44	11,527,327.03
CLOSED EMPLOYERS	(1,110.00)	(12,348.84)	6,311.93
FEDERAL PROGRAMS			
FEDERAL EMPLOYEES (UCFE)	68,050.95	937,302.34	1,054,954.02
EX-MILITARY (UCX)	29,727.10	308,609.18	406,835.94
TRADE ALLOWANCE (TRA/TRA-NAFTA)	86,776.90	904,432.18	1,981,692.49
DISASTER UNEMPLOYMENT (DUA)	0.00	19,310.00	0.00
2003 TEMPORARY EMERGENCY UI (TEUC)	(1,794.12)	(17,554.12)	(13,372.59)
FEDERAL ADD'L COMPENSATION $25 ADD-ON (FAC)	(16,601.63)	(215,459.24)	(327,056.90)
FEDERAL EMERGENCY UI (EUC)	(170,864.98)	(2,008,280.05)	(2,597,163.65)
FEDERAL EXTENDED BENEFITS (EB)	(13,236.84)	(151,379.14)	(211,479.96)
FEDERAL EMPLOYEES EXTENDED BEN (UCFE EB)	0.00	(1,331.67)	(1,928.88)
FEDERAL EX-MILITARY EXTENDED BEN (UCX EB)	(2,303.15)	(7,412.17)	(4,334.75)
INTERSTATE CLAIMS EXTENDED BENEFITS (CWC EB)	(168.88)	(1,163.66)	(3,233.53)
INTEREST & PENALTY	376,010.45	2,789,018.31	2,896,879.82
CARD PAYMENT SERVICE FEE TRANSFER	557.30	2,433.44	0.00
PROGRAM INTEGRITY	65,769.37	3,766,004.59	3,740,826.79
SPECIAL ASSESSMENT FOR INTEREST	0.00	11,439.97	16,241.51
COURT COSTS	30,271.46	359,124.31	401,697.69
ADMINISTRATIVE FEE TRANSFER	77.61	718.76	934.29
FEDERAL WITHHOLDING	(80,330.00)	26,778.00	(99,798.00)
STATE WITHHOLDING	(474,975.00)	5,095.15	84,774.00
STC IMPLEMENT/IMPROVE & PROMOTE/ENROLL EXP	0.00	114,151.84	8,871.23
FEDERAL LOAN REPAYMENTS	37.87	(17,335.91)	(31,302.00)
TOTAL DISBURSEMENTS	$21,655,429.09	$329,009,359.15	$340,002,705.70
NET INCREASE(DECREASE)	(5,452,937.08)	215,906,890.16	234,716,281.63
BALANCE AT BEGINNING OF MONTH/YEAR	$1,962,844,861.77	$1,741,485,034.53	$1,480,869,597.41
BALANCE AT END OF MONTH/YEAR	$1,957,391,924.69	$1,957,391,924.69	$1,715,585,879.04

DEPARTMENT OF WORKFORCE DEVELOPMENT
U.I. TREASURER'S REPORT
CASH ANALYSIS
FOR THE MONTH ENDED September 30, 2019

	CURRENT ACTIVITY	YEAR TO DATE ACTIVITY	PRIOR YTD ACTIVITY
BEGINNING U.I. CASH BALANCE	$1,950,208,590.04	$1,730,835,304.79	$1,471,761,579.73
INCREASES:			
TAX RECEIPTS/RFB PAID	1,310,484.67	339,570,299.07	369,021,136.41
U.I. PAYMENTS CREDITED TO SURPLUS	496,792.67	134,850,643.04	140,303,144.97
INTEREST EARNED ON TRUST FUND	11,810,634.19	32,806,064.13	26,761,133.34
FUTA TAX CREDITS	(37.87)	17,335.91	31,302.00
TOTAL INCREASE IN CASH	13,617,873.66	507,244,342.15	536,116,716.72
TOTAL CASH AVAILABLE	1,963,826,463.70	2,238,079,646.94	2,007,878,296.45
DECREASES:			
TAXABLE EMPLOYER DISBURSEMENTS	15,635,555.50	245,381,354.71	254,428,086.49
BENEFITS CHARGED TO SURPLUS	3,425,015.25	47,818,247.44	47,312,490.59
TOTAL BENEFITS PAID DURING PERIOD	19,060,570.75	293,199,602.15	301,740,577.08
SHORT-TIME COMPENSATION EXPENDITURES	0.00	114,151.84	8,871.23
ENDING U.I. CASH BALANCE (11) (12) (13)	1,944,765,892.95	1,944,765,892.95	1,706,128,848.14

11. $1,607,328 of this balance was set up in 2009 in the Trust Fund as a subaccount per the ARRA UI Modernization Provisions and is not available to pay benefits.

12. $284,585 of this balance was set up in 2015 in the Trust Fund as a Short-Time Compensation (STC) subaccount to be used for Implementation and Improvement of the STC program and is not available to pay benefits.

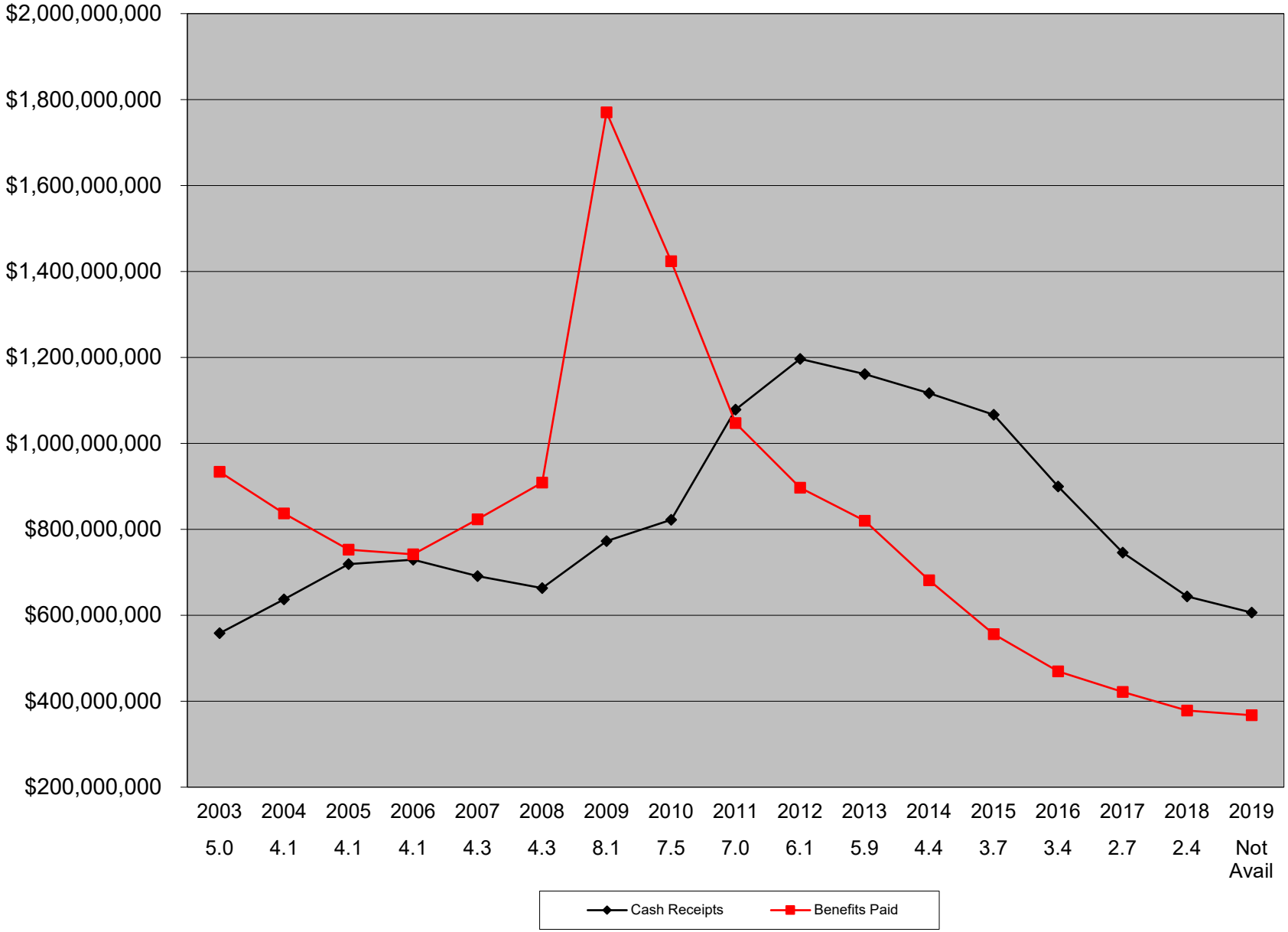
13. $2,141,227 of this balance is the remaining amount set aside for charging of benefits financed by Reimbursable Employers in cases of Identity Theft.

10/11/19

DEPARTMENT OF WORKFORCE DEVELOPMENT
U.I. TREASURER'S REPORT
BALANCING ACCT SUMMARY
FOR THE MONTH ENDED September 30, 2019

	CURRENT ACTIVITY	YEAR TO DATE ACTIVITY	PRIOR YTD ACTIVITY
BALANCE AT THE BEGINNING OF THE MONTH/YEAR	($492,152,750.75)	($617,016,324.88)	($715,103,113.34)
INCREASES:			
U.I. PAYMENTS CREDITED TO SURPLUS:			
SOLVENCY PAID	317,772.69	131,790,457.62	135,874,376.23
FORFEITURES	3,598.00	30,587.00	204,372.16
OTHER INCREASES	175,421.98	3,029,598.42	4,224,396.58
U.I. PAYMENTS CREDITED TO SURPLUS SUBTOTAL	496,792.67	134,850,643.04	140,303,144.97
TRANSFERS BETWEEN SURPLUS ACCTS	(7,604.81)	13,996,699.26	7,389,906.49
INTEREST EARNED ON TRUST FUND	11,810,634.19	32,806,064.13	26,761,133.34
FUTA TAX CREDITS	(37.87)	17,335.91	31,302.00
TOTAL INCREASES	12,299,784.18	181,670,742.34	174,485,486.80
DECREASES:			
BENEFITS CHARGED TO SURPLUS:			
QUITS	2,338,021.03	35,458,969.05	35,339,781.55
OTHER NON-CHARGE BENEFITS	1,086,994.22	12,359,275.39	11,972,709.04
MISCELLANEOUS EXPENSE	0.00	3.00	0.00
BENEFITS CHARGED TO SURPLUS SUBTOTAL	3,425,015.25	47,818,247.44	47,312,490.59
SHORT-TIME COMPENSATION EXPENDITURES	0.00	114,151.84	8,871.23
BALANCE AT THE END OF THE MONTH/YEAR	(483,277,981.82)	(483,277,981.82)	(587,938,988.36)

Cash Activity Related to Taxable Employers with WI Unemployment Rate
(for all years from October to September)



COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2019

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2018AP1951

Cir. Ct. No. 2017CV3102

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

VARSITY TUTORS LLC,

PLAINTIFF-RESPONDENT,

V.

LABOR & INDUSTRY REVIEW COMMISSION,

DEFENDANT-APPELLANT,

DEPARTMENT OF WORKFORCE DEVELOPMENT AND HOLLAND GALANTE,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Affirmed*.

Before Brash, P.J., Kessler and Dugan, JJ.

¶1 DUGAN, J. The Wisconsin Labor and Industry Review Commission (LIRC) appeals the trial court's order reversing LIRC's determination that Holland Galante was an employee of Varsity Tutors LLC (Varsity), an online business that connects tutors with students.[1] The trial court concluded that Varsity proved the minimum six out of the nine statutory conditions necessary to establish that Galante was an independent contractor—not an employee—pursuant to WIS. STAT. § 108.02(12)(bm)2.

¶2 On appeal, LIRC argues that Varsity failed to prove that Galante was an independent contractor because Varsity only proved two of the statutory conditions. Therefore, LIRC asserts we should affirm its determination that Galante is an employee of Varsity. We are not persuaded. We agree with the trial court's conclusion that Varsity proved at least six out of the nine statutory conditions necessary to establish that Galante was an independent contractor.[2] Therefore, we affirm the trial court's decision.

BACKGROUND

¶3 Varsity utilizes a website to connect students with academic tutors in a variety of subjects. In 2014, although Galante's primary employment was as a

[1] LIRC's notice of appeal states that it appeals the trial court's August 28, 2018 decision that affirmed LIRC's March 17, 2017 decision in part, reversed in part, and remanded the matter to LIRC for further proceedings. Our review of that decision is limited to rulings adverse to LIRC. *See* WIS. STAT. RULE 809.10(4) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] Because we agree with the trial court's conclusion, we need not address the three remaining statutory conditions that the trial court concluded Varsity did not prove. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (stating that appellate courts should resolve appeals "on the narrowest possible grounds").

research technologist, she entered into a contract with Varsity to tutor students as a "side job."

¶4 As a part of its standard vetting process, Varsity required that Galante take tests in the subjects for which she intended to provide tutoring services. The tests confirmed that Galante was eligible to tutor in the chemical and biological sciences. After Galante passed the exams, Varsity interviewed her online. After the interview process was completed, Galante signed her contract with Varsity.

¶5 Pursuant to her contract with Varsity, Galante created an online profile with Varsity that included (1) her first name; (2) her test scores for the subjects in which she intended to provide tutoring services; (3) a personal statement; and (4) her photograph. Varsity paid Galante $15.00 per hour for tutoring. She used her own computer, materials, vehicle, equipment, and internet connection to provide tutoring services. Varsity requires that tutors maintain a minimum level of automobile insurance if the tutor wants to drive to and from tutoring sessions.

¶6 Any student who wants tutoring services through Varsity purchases tutoring hours through Varsity's online platform. Each time a student receives a tutoring session, Varsity charges the student's account.

¶7 Interested students browse tutor profiles on Varsity's website to aid them in selecting a tutor. When a student was interested in being tutored by Galante, Varsity notified her electronically. She then decided whether to accept, deny, or ignore the request. If Galante accepted a tutoring request, then she and the student entered into a customized contract. Each contract specified session dates and locations, materials that would be used, billing rates, and any additional

billable activities outside of tutoring. Tutors are not required to work a certain number of hours or maintain a minimum number of tutoring sessions.

¶8 Varsity does not provide any instructional content to tutors and does not assess the quality of the tutoring sessions. Varsity also does not provide any instructional training to tutors. Tutors are responsible for creating their own individualized lesson plans for each student and are not required to be licensed as teachers.

¶9 Varsity never provided Galante with a critique of her work performance. Although Varsity encouraged tutors to complete "session notes" about the tutoring sessions, it only retained the notes for advertising or marketing purposes. Although students were given the opportunity to rate their tutor after completing a session, Varsity did not use those ratings for any type of performance review. Further, Varsity did not assess any student's post-tutoring results.

¶10 Galante listed that she tutored for Varsity on her LinkedIn business profile.

¶11 In 2016, Galante applied for unemployment benefits. The Department of Workforce Development (DWD) determined that she was an employee of Varsity for purposes of unemployment benefits. LIRC affirmed DWD's findings with some modifications, and concluded that Galante performed services for Varsity as an employee and did not meet the relevant statutory criteria for an independent contractor.

¶12 Varsity filed an action seeking judicial review of LIRC's decision. In a written opinion, the trial court affirmed LIRC's decision in part, reversed in part, and remanded for further proceedings. The trial court found that Galante

provided services to Varsity. However, it further found that Varsity proved that Galante was an independent contractor within the meaning of the applicable statute. This appeal followed.

¶13 Additional relevant facts are included in the discussion section.

DISCUSSION

¶14 The central issue on appeal is whether Varsity met its burden of proving that Galante was an independent contractor for purposes of unemployment compensation. LIRC argues that it correctly interpreted and applied WIS. STAT. § 108.02(12)(bm) when it concluded that Galante provided services for Varsity as its employee and not as an independent contractor.

I. Standard of review and substantive law

¶15 We review LIRC's decisions in unemployment insurance cases pursuant to WIS. STAT. § 108.09(7). *See* ***Schiller v. DILHR***, 103 Wis. 2d 353, 355, 309 N.W.2d 5 (Ct. App. 1981). We review LIRC's decision, not that of the trial court, *see* ***Virginia Surety Co., Inc. v. LIRC***, 2002 WI App 277, ¶11, 258 Wis. 2d 665, 654 N.W.2d 306, although we may benefit from the trial court's analysis, *see* ***Heritage Mutual Insurance Co. v. Larsen***, 2001 WI 30, ¶25 n.13, 242 Wis. 2d 47, 624 N.W.2d 129.

¶16 In reviewing LIRC's decision, we "may not set aside an order or award unless 'the findings of fact by [LIRC] do not support the order or award.'" *See* ***id.***, ¶24 (citation omitted). Furthermore, "findings of fact made by [LIRC] acting within its powers shall, in the absence of fraud, be conclusive," and this court "shall not substitute its judgment for that of [LIRC] as to the weight or credibility of the evidence on any finding of fact." *See* ***id.***

¶17 We review LIRC's "conclusions of law under the same standard [that] we apply to a [trial] court's conclusion of law—*de novo*." *See* ***Tetra Tech EC, Inc. v. DOR***, 2018 WI 75, ¶84, 382 Wis. 2d 496, 914 N.W.2d 21 (italics added).[3] Although we no longer defer to administrative agency decisions, we give those decisions "due weight[.]" *See* ***id.***, ¶78. "Due weight is a matter of persuasion, [and] not [one of] deference"; it does not "oust the court as the ultimate authority or final arbiter"; and it affords "respectful, appropriate consideration" of LIRC's determination and also affords us "independent judgment in deciding questions of law." *See* ***id.*** (quotation marks omitted).

¶18 WISCONSIN STAT. § 108.02(11) states that "[a]n employee shall be deemed 'eligible' for [unemployment] benefits for any given week of the employee's unemployment[.]" An employee is defined as "any individual who is or has been performing services for pay for an employing unit[.]" *See* § 108.02(12)(a). The following exception to the definition of employee is set forth in § 108.02(12)(bm):

> Paragraph (a) does not apply to an individual performing services for an employing unit … if the employing unit satisfies the department that the individual meets the conditions specified in subds. 1. and 2., by contract and in fact:
>
> 1. The services of the individual are performed free from control or direction by the employing unit over the performance of his or her services.…[4]

[3] In ***Tetra Tech EC, Inc. v. DOR***, 2018 WI 75, ¶108, 382 Wis. 2d 496, 914 N.W.2d 21, our supreme court ended the practice of Wisconsin courts "deferring" to the conclusions of law of administrative agencies, such as LIRC.

[4] LIRC agrees that Galante's services were performed free from Varsity's control or direction. *See* WIS. STAT. § 108.02(12)(bm)1. Therefore, we need only address whether Varsity proved that Galante met at least six of the nine conditions set forth in § 108.02(12)(bm)2.

> . . . .
>
> 2. The individual meets 6 or more of the following conditions:
>
> a. The individual advertises or otherwise affirmatively holds himself or herself out as being in business.
>
> b. The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual and uses his or her own equipment or materials in performing the services.
>
> c. The individual operates under multiple contracts with one or more employing units to perform specific services.
>
> d. The individual incurs the main expenses related to the services that he or she performs under contract.
>
> e. The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work.
>
> f. The services performed by the individual do not directly relate to the employing unit retaining the services.
>
> g. The individual may realize a profit or suffer a loss under contracts to perform such services.
>
> h. The individual has recurring business liabilities or obligations.
>
> i. The individual is not economically dependent upon a particular employing unit with respect to the services being performed.

¶19 Statutory interpretation is a question of law. *See* ***Bank Mut. v. S.J. Boyer Constr. Inc.***, 2010 WI 74, ¶21, 326 Wis. 2d 521, 785 N.W.2d 462. Courts give effect to the language of a statute when interpreting it. ***State ex rel. Kalal v. Circuit Ct. of Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory interpretation begins with interpreting the language within the statute

and if the meaning is clear, we stop the inquiry. *See* ***id.*** "Statutory language is given its common, ordinary, and accepted meaning[.]" ***Id.***

¶20 This court assumes that the legislature says what it means and means what it says. *See* ***Heritage Farms, Inc. v. Markel Ins. Co.***, 2009 WI 27, ¶14 n.9, 316 Wis. 2d 47, 762 N.W.2d 652; *see also* ***Ball v. District No. 4, Area Bd. of Vocational, Tech. & Adult Educ.***, 117 Wis. 2d 529, 539, 345 N.W.2d 389 (1984) (stating that "[t]he ... presumption is that the legislature chose its terms carefully and precisely to express its meaning").

II. Varsity met its burden of establishing that Galante was an independent contractor

¶21 In order to establish that Galante was an independent contractor for purposes of unemployment compensation benefits, Varsity had to prove that Galante met six of the nine conditions set forth in WIS. STAT. § 108.02(12)(bm)2. LIRC agrees that Galante met the following two conditions: (1) Galante performed her tutoring services in a location chosen by her and used her own materials; and (2) Galante was obligated to redo unsatisfactory work for no additional compensation or was subject to a monetary penalty for unsatisfactory work. *See* §§ 108.02(12)(bm)2.b. & e. However, LIRC contends that Varsity did not meet its burden of proving that Galente satisfied four or more of the other statutory conditions required to establish that she was an independent contractor. We address each of the four remaining conditions that the trial court found Varsity had proved, in sequence.

A. Galante advertised she was a business

¶22 LIRC argues that Varsity failed to establish that Galante advertised herself as a tutor with the aim of attracting students to her tutoring business

because she did not have business cards, did not publish newspaper notices, did not have a physical business place, and did not promote her tutoring services other than through Varsity's website. LIRC argues that although Galante completed an online tutoring profile on Varsity's platform, the webpage is related to Varsity's business, not any independent business of Galante.

¶23 Pursuant to WIS. STAT. § 108.02(12)(bm)2.a., Varsity must prove that Galante "advertises or otherwise affirmatively holds … herself out as being in business." In ***Ebenhoe v. Lyft, Inc.***, UI Dec. Hearing No. 16002409MD (LIRC Jan. 20, 2017), LIRC concluded that the driver for the Lyft ride sharing mobile application had satisfied the advertisement condition because his availability as a driver was accessible on both the Lyft and Uber mobile applications.[5]

¶24 LIRC attempts to distinguish ***Ebenhoe***. It argues, based upon the nature of the internet based ride sharing business, the mobile applications were the only avenues available for the driver to advertise his transportation services, whereas Galante could have advertised her tutoring services in a number of other ways.[6] We are not persuaded.

¶25 The trial court found that as a digital platform—a business model nearly identical to that of Lyft or Uber—Varsity merely provides a way for

[5] Although LIRC's decisions are not binding authority, we may consider prior LIRC decisions on review. *See, e.g.*, ***Gilbert v. LIRC***, 2008 WI App 173, ¶10, 315 Wis. 2d 726, 762 N.W.2d 671.

[6] In a footnote, LIRC also briefly argues that its application of the statutory employee test in ***Ebenhoe*** constituted an alternative basis upon which to resolve the issue of whether the driver was an employee of Lyft. *See* ***Ebenhoe v. Lyft, Inc***., UI Dec. Hearing No. 16002409MD (LIRC Jan. 20, 2017). However, LIRC does not develop this argument and, therefore, we decline to further address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

students who want to be tutored to connect to qualified tutors. We agree. By advertising herself as a tutor on Varsity's online platform, Galante affirmatively held herself out as being in the business of tutoring. Thus, we conclude that the advertising condition has been met.

B. Galante incurred the main expenses related to the tutoring services she performed under her contract with Varsity

¶26 LIRC argues that Varsity incurred the main expenses as opposed to Galante because Galante relied on materials that she already owned and, although she paid for her own internet, phone, and car insurance, these costs were not specifically related to her tutoring services. Further, LIRC argues that Varsity incurred expenses on behalf of Galante, such as those associated with recruiting and vetting qualified tutors; operating an online platform; matching qualified tutors and interested students; and managing its online system.

¶27 We disagree. We conclude that Galante, not Varsity, incurred the main expenses associated with the tutoring services that she performed. Varsity did not incur any specific expenses attributable to Galante's services. Varsity did not teach or train Galante how to tutor; Varsity did not cover the cost of educating Galante so that she could qualify as a tutor; Varsity did not incur any transportation expenses associated with Galante's in-person tutoring sessions; and Varsity did not incur any incidental expenses for tutoring students such as books or other materials.

¶28 Moreover, Varsity's contract with Galante expressly states "[t]he Company shall not be responsible for nor shall it reimburse Tutor for any expenses Tutor incurs in providing the Services[.]" The foregoing provision is consistent with the trial court's finding that Galante was required to furnish, at her own

expense, worksheets, curriculum, textbooks, writing supplies, and academic enhancement materials for her students.

¶29 We further note that LIRC has held that the only expenses relevant to this inquiry are those necessary to perform the actual services of the individual and not those relating to other costs outside of what the individual was contracted to perform. *See* ***J. Lozon Remodeling***, Hearing No. S9000079HA (LIRC Sept. 24, 1999) (concluding that the cost of procuring siding materials was not relevant to the analysis of expenses borne by an individual who installed siding and occasionally also installed windows or performed miscellaneous other services for a remodeler). Applying the reasoning of ***Lozon***, the expenses that Varsity incurred for recruiting and vetting qualified tutors; operating an online platform; matching qualified tutors and interested students; and the costs relating to managing its online system are not related to the actual services that Galante performed. Thus, we conclude that Varsity proved this condition—Galante incurred the main expenses for tutoring students under her contract with Varsity.

C. Galante performed services that do not directly relate to Varsity's business of connecting students with tutors through its digital platform

¶30 The next condition at issue is whether the services Galante performed directly relate to Varsity as the employing unit retaining the services. *See* WIS. STAT. § 108.02(12)(bm)2.f. LIRC argues that Galante's tutoring services were "completely integrated" into Varsity's business of providing and locating academic support, and that her services were not tangential to that business. It argues that, for example, Galante did not clean Varsity's offices or cater luncheons for Varsity executives.

¶31 We previously held that the condition of integration is best explained by:

> the example of a tinsmith called upon to repair a company's gutters when the company is engaged in a business unrelated to either repair or manufacture of gutters. Because the tinsmith's activities are totally unrelated to the business activity conducted by the company retaining his services, the services performed by the tinsmith do not directly relate to the activities conducted by the company retaining those services, and those services were, therefore, not integrated into the alleged employer's business.

See ***Keeler v. LIRC***, 154 Wis. 2d 626, 633, 453 N.W.2d 902 (Ct. App. 1990).

¶32 Here, the record does not support LIRC's assertion that Galante's services were integrated into Varsity's online business of connecting students with tutors. Varsity generates revenue by facilitating business relationships between students and tutors. However, that does not transform Varsity's business into a tutoring business. As stated, Varsity's business provides a digital platform to connect students who want to be tutored with qualified tutors who want to teach them.

¶33 We conclude that Galante's tutoring services are not directly related to Varsity's business of facilitating tutorial relationships through its online platform. Varsity is an entity that connects students who want tutoring with people who want to provide tutoring services. In ***Keeler***, we held that activities that do not relate to the "activities conducted by the company retaining [those] services … [are,] therefore, not integrated[.]" *See* ***id.*** Galante's services are similar to those described by the tinsmith example. *See* ***id.*** Galante provided tutoring services—an activity separate from Varsity's business of being an online platform that connects students with tutors. Although Varsity has an online platform to assist students with academic support, Varsity itself does not provide

any tutoring services. Additionally, Varsity does not teach or train tutors how to tutor the students. It also does not assess the quality of the tutoring sessions or critique the tutor's performance. Further, Varsity does not assess any student's post-tutoring results.

¶34 In contrast to Varsity's business of providing a digital platform to connect students and tutors, Galante tutors students. Like all the tutors who connect with students through Varsity, Galante created her own individualized lesson plans for each student. She chose and paid for whatever materials would be used during tutoring sessions and the dates and locations of those sessions. Galante, not Varsity, incurred transportation expenses associated with her in-person tutoring sessions and any incidental expenses for tutoring students such as a computer, internet connection, equipment, books or any other materials.

¶35 Thus, we conclude that Varsity met its burden of establishing this condition—Galante's tutoring services are not integrated with Varsity's services.

D. Galante had recurring business liabilities and obligations

¶36 The next condition that Varsity had to prove was that Galante had recurring business liabilities and obligations. *See* WIS. STAT. § 108.02(12)(bm)2.h. LIRC interprets this condition as including overhead expenses—for example, membership dues, liability insurance, and other recurring business costs. LIRC argues that this condition "must be met for business purposes alone" and states that there is no evidence to suggest that Galante's automobile insurance was purchased specifically so she could tutor students. It also argues that Galante's automobile insurance was for personal purposes and was not intended to be a recurring business obligation.

¶37 We disagree. Under her contract with Varsity, Galante was required to maintain a specific level of auto insurance. The requirement of the auto insurance qualifies as a recurring business liability and obligation, and that requirement is sufficient to fulfill this condition. In ***Quality Communications Specialists Inc.***, Hearing No. S0000094MW (LIRC July 30, 2001), LIRC held "the recurring obligation to pay premiums for insurance which must be maintained in order for the individual to be able to perform their services under the contract … fit[s] within the intended meaning of the phrase, 'recurring business liabilities or obligations.'" Thus, we conclude that Varsity established that Galante's auto insurance qualifies as a recurring business liability and obligation.

CONCLUSION

¶38 In summary, we conclude that Varsity proved that Galante met at least six of the nine statutory conditions to qualify as an independent contractor pursuant to WIS. STAT. § 108.02(12)(bm)2. As previously noted, LIRC stipulated that Galante met two of the nine conditions because (1) Galante performed her tutoring services in a location chosen by her and used her own materials; and because (2) Galante was obligated to redo unsatisfactory work for no additional compensation or was subject to a monetary penalty for unsatisfactory work. As discussed above, Varsity proved that (1) Galante advertised or otherwise affirmatively held herself out as being in business; (2) Galante incurred the main expenses related to her tutoring services; (3) Galante performed services that did not directly relate to Varsity's business of facilitating relationships between tutors and students through its digital platform; and (4) Galante had recurring business liabilities or obligations. Therefore, we conclude that LIRC erred when it concluded that Varsity had not proven at least six statutory conditions required to

establish that Galante was an independent contractor.[7] For the reasons stated above, we affirm the trial court's order.

By the Court—*Order affirmed.*

Not recommended for publication in the official reports.

[7] Varsity also argues that Galante was not an employee of Varsity as that term is defined in WIS. STAT. § 108.02(12)(a), because she did not provide "services for" Varsity and, therefore, she was not entitled to unemployment compensation. However, § 108.02(12)(bm) provides that § 108.02(12)(a) does not apply to an individual who falls within paragraph (bm), which includes independent contractors. Because we decide that Galante was an independent contractor pursuant to § 108.02(12)(bm), we need not address this argument.

To: Unemployment Insurance Advisory Council
From: Bureau of Legal Affairs
Date: October 22, 2019
Re: US-DOL's 2019 regulations regarding drug testing occupations

Background

State law instructs the Department to create a program to test unemployment insurance applicants for controlled substances.[1] But, federal law limits the scope of unemployment insurance drug testing to applicants "for whom suitable work (as defined under the State law) is only available in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary of Labor)."[2] US-DOL issued regulations listing occupations that regularly conduct drug testing, but those regulations were nullified.[3] US-DOL published its new final rule identifying occupations that regularly conduct drug testing on October 4, 2019.[4] The new final rule is effective **November 4, 2019**.

US-DOL's New Rule

US-DOL's new 2019 rule identifies ten categories of occupations that regularly conduct drug testing:

(a) An occupation that requires the employee to carry a firearm;
(b) An occupation identified in 14 CFR 120.105 by the Federal Aviation Administration, in which the employee must be tested;
(c) An occupation identified in 49 CFR 382.103 by the Federal Motor Carrier Safety Administration, in which the employee must be tested;
(d) An occupation identified in 49 CFR 219.3 by the Federal Railroad Administration, in which the employee must be tested;
(e) An occupation identified in 49 CFR 655.3 by the Federal Transit Administration, in which the employee must be tested;
(f) An occupation identified in 49 CFR 199.2 by the Pipeline and Hazardous Materials Safety Administration, in which the employee must be tested;
(g) An occupation identified in 46 CFR 16.201 by the United States Coast Guard, in which the employee must be tested;

[1] Wis. Stat. § 108.133(2).
[2] 42 U.S.C. § 503(l)(1)(a)(ii).
[3] 2017 CONG US SJ 23.
[4] https://federalregister.gov/d/2019-21227.

(h) An occupation specifically identified in Federal law as requiring an employee to be tested for controlled substances;
(i) An occupation specifically identified in the State law of that State as requiring an employee to be tested for controlled substances;[5] and
(j) An occupation where the State has 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 the occupation.

This new US-DOL rule will permit (but not require)[6] states to identify occupations with drug testing as a standard employment eligibility requirement and, accordingly, drug test unemployment applicants whose only suitable work is in those occupations. Subsection 620.3(j) provides that states may identify additional occupations if there is 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 the occupation."[7]

US-DOL's guidance on this new regulation is as follows: "When identifying an occupation that regularly conducts drug testing, the State must identify a factual basis for its finding that employers conduct pre-employment or post-hire drug testing as a standard eligibility requirement for obtaining or maintaining employment in the identified occupation. Factual bases may include, but are not limited to: Labor market surveys; reports of trade and professional organizations; and academic, government, or other studies."[8] US-DOL indicates that it must review and approve any occupation that a state identifies under subsection 620.3(j) for conformity in advance.

[5] The department is unaware of any state law that requires an employee to be tested for controlled substances.
[6] The department is aware of only two other states, Texas and Mississippi, with conforming enabling legislation.
[7] 20 C.F.R. § 620.3(j) (emphasis added).
[8] Federal Register, 84 FR 53037 at 53042.

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 620

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

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (DOL or the Department) is issuing this final rule to permit States to drug test unemployment compensation (UC) applicants and to identify occupations that the Secretary of Labor (Secretary) has determined regularly conduct drug testing. These regulations implement the Middle Class Tax Relief and Job Creation Act of 2012 (the Act) amendments to the Social Security Act (SSA), permitting States to enact legislation that would allow State UC agencies to conduct drug testing on UC applicants for whom suitable work (as defined under the State law) is available only in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary). The Secretary is required under the SSA to issue regulations determining those occupations that regularly conduct drug testing. These regulations succeed a final rule issued on August 1, 2016, that Congress rescinded under the authority of the Congressional Review Act (CRA). These regulations, as required under the CRA, are not substantially the same as the rescinded final rule.

DATES: This final rule is effective November 4, 2019.

FOR FURTHER INFORMATION CONTACT: Gay Gilbert, Administrator, Office of Unemployment Insurance, U.S. Department of Labor, 200 Constitution Avenue NW, Room S–4524, Washington, DC 20210; telephone (202) 693–3029 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

President Obama signed the Middle Class Tax Relief and Job Creation Act of 2012 (the Act), Public Law 112–96, on February 22, 2012. Title II of the Act amended 42 U.S.C. 503 to add a new subsection (l) permitting States to enact legislation to require drug testing of UC applicants as a condition of UC eligibility under two specific circumstances: (1) If the applicant was terminated from employment with his or her most recent employer because of the unlawful use of a controlled substance, *see* 42 U.S.C. 503(l)(1)(A)(i); or (2) if the only available suitable work (as defined in the law of the State providing the UC) for that individual is ''in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary).'' *See* 42 U.S.C. 503(l)(1)(A)(ii). States are not required to drug test in either circumstance; the law merely permits States to enact legislation to do so when either of the two circumstances is present. A State may deny UC to an applicant who tests positive for drug use under either of these circumstances. *See* 42 U.S.C. 503(l)(1)(B).

On October 9, 2014, the Department published a Notice of Proposed Rulemaking (NPRM) determining occupations that regularly conduct drug testing for the purposes of 42 U.S.C. 503(l)(1)(A)(ii). *See* 79 FR 61013 (Oct. 9, 2014). After reviewing the comments received, the rule, as proposed in the 2014 NPRM, was modified, and on August 1, 2016, the Department published regulations determining occupations ''that regularly conduct[ ] drug testing'' in the **Federal Register** as 20 CFR part 620 (81 FR 50298). The 2016 final rule established, as occupations that regularly conduct drug testing, only those occupations ''specifically identified in a State or Federal law as requiring an employee to be tested for controlled substances,'' as well as specific occupations identified in Federal regulations and any occupation that required employees to carry firearms. *See* former 20 CFR 620.3 (81 FR 50298). It became effective on September 30, 2016.

On March 31, 2017, President Trump signed a joint resolution of disapproval under the authority of 5 U.S.C. 801(b), CRA (5 U.S.C. 801 *et seq.*), Public Law 104–121. Section 801(b) provides that a disapproved rule shall not take effect and that such a rule may not be reissued in substantially the same form unless authorized by Congress. Consistent with this law, the Department published the notice of revocation of the regulations in the **Federal Register** at 82 FR 21916 (May 11, 2017).

Because 42 U.S.C. 503(l) was not repealed or amended following the resolution of disapproval, the statute continues to require the Secretary to issue regulations to enable the determination of occupations in which drug testing regularly occurs. To comply with both the mandate to issue regulations to enable the determination of occupations in which drug testing regularly occurs, and the CRA prohibition on reissuing the rule ''in substantially the same form,'' on November 5, 2018, the Department issued a new NPRM substantially departing from the rescinded final rule. *See* 83 FR 55311.

In this final rule, the Department implements a more flexible approach to the statutory requirement that is not substantially the same as the rescinded 2016 final rule, enabling States to enact legislation to require drug testing for a far larger group of UC applicants than the previous final rule permitted. This flexibility recognizes the diversity of States' economies and the different roles of employer drug testing across the States. The Department has determined that imposing a nationally uniform list—like the one-size-fits-all approach that the Department attempted in the disapproved 2016 rule—does not fully effectuate Congress' intent regarding what constitutes employer drug testing in an occupation. Employers exercise a variety of approaches and practices in conducting drug testing of employees. Some States have laws that impose very minimal restrictions on employer drug testing of employees, while other States have very detailed and prescriptive requirements about what actions the employer may take; this means occupations may be regularly drug-tested in some States, but not in others. This diversity among States also renders an exhaustive list of such occupations impractical. This final rule lays out a flexible standard that States can individually meet under the facts of their specific economies and practices. Its substantially different scope and fundamentally different approach satisfies the requirements of the CRA, while still meeting the requirement of 42 U.S.C. 503(l)(1)(A)(ii) to issue regulations addressing what occupations regularly conduct drug testing.

When developing the previous proposed rule published in 2014, the Department consulted with a number of Federal agencies with expertise in drug testing to inform the proposed regulations. Specifically, the Department consulted with the

Substance Abuse and Mental Health Services Administration (SAMHSA) in the U.S. Department of Health and Human Services (HHS); the U.S. Department of Transportation (DOT); the U.S. Department of Defense (DOD); the U.S. Department of Homeland Security (DHS); DOL's Bureau of Labor Statistics (BLS); and DOL's Occupational Safety and Health Administration (OSHA). The Department consulted these agencies because they have experience with required drug testing. DOD and DHS deferred to SAMHSA for interpretation of the drug testing requirements, and the Department gave due consideration to the SAMHSA guidance when developing the 2014 proposed rule.

II. Summary Discussion of the Final Rule

The rule implements the statutory requirement that the Secretary issue regulations determining how to identify ''an occupation that regularly conducts drug testing'' for the purposes of permitting States to require an applicant for UC, for whom suitable work is only available in an occupation that regularly drug tests, to pass a drug test to be eligible for UC.

In this final rule, the Department takes a fundamentally different approach to identifying these occupations than it did in the previous final rule that Congress later rescinded. The list of occupations in the 2016 final rule that ''regularly'' conduct drug testing was limited to certain specifically listed occupations and those in which drug testing is required by Federal or State law. In this final rule, the Department has expanded that list in light of the congressional disapproval of the 2016 final rule. It expands the consideration of what occupations regularly conduct drug testing by accounting for significant variations in State practices with respect to drug testing. An occupation that regularly drug tests in one State may not regularly test in another, making a national one-size-fits-all list impractical and infeasible, and therefore inappropriate. Thus the Secretary has determined in this rule to include in the list of occupations that regularly conduct drug testing those occupations for which each State has a factual basis for finding that employers in that State conduct drug testing as a standard eligibility requirement for employing or retaining employees in the occupation. This new addition provides substantially more flexibility to States and recognizes that, in some States, drug testing is regularly conducted in more occupations than were initially included in the 2016 final rule.

This final rule also provides definitions of key terms. In particular, for the purpose of determining occupations that regularly test for drugs, this rule defines an ''occupation'' as a position or a class of positions with similar functions or duties. While the Department considered adopting a specific taxonomy of occupations, such as the Standard Occupational Classification (SOC), this rule does not do so, in order to provide flexibility to States to choose an approach that best matches its workforce. For further explanation, see the preamble discussion related to § 620.3.

In this rule, the Department is adopting the finding in the 2016 Rule that any occupation for which Federal or State law requires drug testing is among those that are drug tested ''regularly.'' The Department recognizes that Federal and State laws may evolve in identifying which positions or occupations are required to drug test. Thus, this rule allows for occupations identified in future Federal or State laws as requiring drug testing to be occupations that States will be able to consider for drug testing of UC applicants.

This rule also includes a section on conformity and substantial compliance.

Finally, this final rule includes minor changes from the proposed rule to add clarity. Specifically, changes were made to the rule text in the introductory text of section 620.3 and in paragraphs (b) through (g) of that section.

III. Summary of the Comments

Compliance With the Congressional Review Act

Comment: The Department received one comment regarding the CRA and the Department's initiation of new rulemaking. This commenter asserted that the NPRM is inconsistent with the CRA prohibition in 5 U.S.C. 801(b)(2) because that provision, according to the commenter, ''forbids the executive branch from re-regulating the same matter without additional legislation.''

Department's Response: The commenter misunderstands the prohibition in 5 U.S.C. 801(b)(2). That provision does not prohibit re-regulating ''the same matter;'' rather, it prohibits issuing a regulation on the same matter that is ''substantially the same'' as the rescinded regulation.

Section 801(b)(2) provides, in relevant part, that a [disapproved] rule may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule. It is clear from a plain reading of this provision that a reissued or new rule on the same subject is permitted provided that it is not substantially the same. Further, the legislative history for Public Law 115–17 demonstrates Congressional intent that the Department issue a new rule permitting drug testing for a broader scope of occupations than the rescinded rule permitted. *See, e.g.,* 163 Cong. Rec. H1200–01 (Feb. 15, 2017) (Rep. Brady, describing the eventually-rescinded rule as ''incredibly narrow,'' stated that it ''ignored the intent of Congress,'' and noted that a comment was submitted by the House Ways and Means Committee during the rulemaking process calling for the Department to issue a broader rule).

The Department looks to the plain meaning of the term ''substantially.'' The Merriam-Webster Dictionary defines ''substantial,'' the adjective form of the adverb ''substantially,'' as ''being largely but not wholly that which is specified.'' The Oxford English Dictionary provides two slightly different definitions of ''substantially:'' (1) ''[t]o a great or significant extent;'' and (2) ''[f]or the most part; essentially.'' These definitions suggest that a rule is ''substantially the same'' where it is for the most part the same as the prior rule. The changes in this rule clear the bar. The scope of occupations that ''regularly conduct drug testing'' is the central issue, and the change in scope here is a significant change to the previous final rule. Thus, a rule that substantially broadens the list of occupations that ''regularly conduct[ ] drug testing'' clearly is not ''in substantially the same form'' as the much more restrictive final rule that Congress rescinded. Further, there is very little legislative history regarding the CRA interpreting what is meant by a rule ''reissued in substantially the same form,'' or a ''new rule'' that is ''substantially the same,'' and the courts have not ruled on the matter.

In the NPRM, the Department proposed a substantially different and more flexible approach to the statutory requirements than the rescinded final rule, enabling States to enact legislation to require drug testing for a larger group of UC applicants than the previous final rule permitted. The proposed rule's substantially different scope and fundamentally different approach satisfies the requirements of the CRA that the Department not reissue a rule that is ''substantially the same'' as the

rule disapproved by Congress. Thus, no changes have been made to the rule text as a result of the comment.

Additional Comments Received on the Proposed Rule

The analysis in this section provides the Department's responses to public comments received on the proposed rule. If a section or paragraph that appeared in the proposed rule is not addressed in the discussion below, it is because the public comments submitted in response to the proposed rule did not substantively address that specific section, or that no comments were received on that section or paragraph; thus, no changes have been made to the regulatory text. Further, the Department received a number of comments on the proposed rule that were outside the scope of the proposed regulations. Accordingly, the Department offers no response to such comments. These comments expressed support for or opposition to drug testing in general, discussed personal narratives, or were opinions on marijuana legalization.

The Department's proposed rule to implement 42 U.S.C. 503(l)(1)(A)(ii) was published on November 5, 2018 (83 FR 55311). During the 60-day public comment period, the Department received a total of 211 public comments on the proposed rule. Of those, 56 comments were deemed substantive, and three were duplicates. The Department, in the NPRM, sought comments on the entirety of the proposed rule, in addition to specific areas where the Department solicited comments, as noted below. The comments of general application received in response to the solicitation have been grouped by subject matter and are discussed below. No changes have been made to the rule text as a result of any of the comments received.

General Comments

Comments: Several commenters voiced support for the proposed rule as a means to help prevent fraud and waste, and to ensure a more efficient unemployment insurance (UI) program.

Department's Response: The issues raised by the comments point to an important issue for the Department; that is, the integrity of the UI program. This rule and 42 U.S.C. 503(l)(1)(A) provide a means of ensuring continued integrity by enabling States to enact laws that will bolster their findings that a claimant is able and available for work as required by Federal law and, therefore, eligible for benefits.

Comments: A number of commenters asserted that drug testing should be mandatory to receive unemployment benefits, or any government benefit. These commenters asserted that if job applicants and employees are required to undergo drug testing for certain occupations, it stands to reason that individuals seeking unemployment benefits or any form of government assistance should be drug tested as well.

Department's Response: The specific language in 42 U.S.C. 503(l)(1)(A) limits States' authority to test UC applicants for drugs to only two circumstances: Where the individual was fired from his or her last employer for testing positive for drugs; or where suitable work is only available in an occupation that regularly tests for drugs. Thus, the Department is limited in these regulations to implementing the specific terms of the statute, and makes no change to the final rule.

Comments: Several commenters asserted that the drug testing permitted by the NPRM is inconsistent with the prohibition against unreasonable searches in the Fourth Amendment to the U.S. Constitution. The objections cited Federal court decisions that have struck down mandatory drug testing as a condition of benefits under the Temporary Aid to Needy Families program in *Lebron* v. *Secretary of Florida, Department of Children & Families,* 772 F.3d 1352 (11th Cir. 2014), and as a condition of candidacy for elected office in *Chandler* v. *Miller,* 520 U.S. 305 (1997). One commenter asserted that the proposed rule would be ''saddling states with the prospect of costly litigation,'' and that it ''would leave states wide open to likely legal challenges in which most courts would rule against the states.'' Another commenter, citing *Chandler* v. *Miller,* above, asserted that ''a suspicion-less drug test can only be Constitutional if the Government shows a 'special need' to conduct testing,'' and that the ''proposed regulation makes no attempt to limit the State's use of this authority to Constitutional boundaries of a 'special need.' '' A commenter also asserted that the Department, ''as administrator of the Federal-State UI system, has a responsibility to foster compliance with all applicable Constitutional and statutory requirements'' and ''should not issue regulations that specifically authorize drug testing that would clearly violate the Fourth Amendment.''

Most commenters acknowledged that any possible Constitutional issues would arise from inappropriate State implementation of drug testing, rather than from the regulations themselves. For example, several commenters (in identical or nearly identical language) stated:

> The proposed regulation does not attempt to limit the State's use of this authority to drug test UI applicants to Constitutional boundaries. The previous version of this regulation may have passed Constitutional muster because of its close adherence to the language of the authorizing statute. However, in this NPRM, the Department's open-ended invitation to impose drug testing on applicants for unemployment compensation based on a standardless exercise in alleged fact-finding opens the door to widespread application of this authority in a manner in clear violation of the Fourth Amendment.

Department's Response: As the comments acknowledge, the NPRM itself did not conflict with the Fourth Amendment. The NPRM merely proposed adding a provision permitting a State to identify additional occupations in that State where employers ''regularly'' require drug testing as a condition of employment, provided that the State has a factual basis for doing so; the proposed rule did not mandate that States engage in drug testing, and the proposed rule did not relieve the States from the responsibility to ensure that whatever practices they adopt meet Constitutional requirements. Thus, the NPRM did not require any action by States that would conflict with the Constitution, nor did it grant States authority to implement the rule in a way that would not meet Constitutional requirements.

In granting broader flexibility to States to identify occupations that regularly test for drugs in the State where there is a factual basis for doing so, the Department neither encourages nor discourages drug testing as a condition of UC eligibility. The flexibility granted is in keeping with the nature of the UC system as a Federal-State partnership that grants broad discretion to States to implement their UC programs. Granting States broader flexibility to implement drug testing in occupations that regularly test for drugs in their particular State does not violate the Fourth Amendment, and States that choose to drug test under this rule are responsible for implementing drug testing in a manner consistent with Constitutional requirements. Accordingly, the Department makes no changes to the final rule in response to these comments.

Comments: Numerous commenters asserted that some individuals could have difficulty accessing testing services, for a variety of reasons: Distance to testing services and lack of transportation, particularly in rural areas; lack of childcare; and lack of income for transportation.

Department's Response: The Department issued Unemployment Insurance Program Letter (UIPL) No.

2–16 (October 1, 2016) to ensure both physical and meaningful access to the UC program. As a result, State UC agencies are already required to ensure access to services, a requirement that will also cover drug testing under this rule. Thus, the Department has not made any changes to the rule as a result of these comments.

Comments: Several commenters asserted that the drug testing provision in 42 U.S.C. 503(l)(1)(A)(ii) would add unfair and unnecessary hurdles to receipt of UC, and will increase harm to workers and families already struggling to meet basic needs. Still others stated that government, and in particular the Department, should be focused on helping more individuals obtain jobs and on protecting workers by addressing challenges to the unemployment insurance system before the next recession. Other commenters urged the Department to withdraw the proposed rule, with one commenter asserting that the Department should follow the clear intent of 42 U.S.C. 503(l)(1)(A)(ii).

Department's Response: The purpose of this regulation is to implement 42 U.S.C. 503(l)(1)(A)(ii) permitting States to enact legislation providing for drug testing of UC applicants if the applicant ''is an individual for whom suitable work . . . is only available in an occupation that regularly conducts drug testing[.]'' This rule implements the statute and assists States in determining that individuals are able and available for work, and can accept work when it is offered in their occupations that regularly conduct drug testing.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comments: Several commenters expressed concern that this regulation would adversely affect low-wage workers, low-income communities, and people of color. Among those commenters, one specifically addressed the wage gap between white males and black males, white women and black women, and white men and women and Latinos and Latinas.

Department's Response: The purpose of this rule is to implement the provisions of sec. 2105 of the Middle Class Tax Act (the Act), which amended sec. 303 of the Social Security Act (SSA) to add sec. 303(l)(1)(A), permitting States to drug test UC applicants in the specified limited circumstances.

This rule is not designed to negatively impact any specific demographic among applicants for UC. It permits States to conduct drug testing of UC applicants for whom suitable work is available only in an occupation that regularly conducts drug testing. States that choose to drug test applicants under the rule are responsible for implementing the drug testing program in a manner that does not result in discrimination against protected classes.

States' UI programs remain subject to sec. 188 of the Workforce Innovation and Opportunity Act and 29 CFR 38.2(a)(2), so they are prohibited from discriminating against UC applicants on the bases of, among other protected characteristics, race, color, sex, national origin, and disability. *See* 29 U.S.C. 3248; *see also* 29 CFR 38.2(a)(2) and 38.5. Section 188's prohibition on discrimination extends to policies and procedures that have discriminatory effects as well as those that have discriminatory purposes. *See, e.g.,* 29 CFR 38.6, 38.11, and 38.12. States are required to collect and maintain data necessary to determine whether they are in compliance with the provisions of sec. 188. *See* 29 CFR 38.41.

The Department previously made clear to the States in UI Program Letter (UIPL) No. 2–16 (published October 1, 2015) that nondiscrimination laws applicable to State UC agencies prohibit discrimination based on both disparate treatment and disparate impact.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comments: Numerous commenters expressed concern that drug testing UC applicants stigmatizes both unemployment insurance use and individuals who use or are addicted to drugs. Some of those commenters suggested that the rule is an attempt to demonize UC applicants, or that requiring drug testing of UC applicants would be arbitrary and would result in humiliating UC applicants. One commenter suggested the rule require States to create funded programs for drug treatment.

Department's Response: The purpose of this regulation is to implement the provisions of 42 U.S.C. 503(l)(1)(A)(ii) to permit States to test UC applicants for drugs if the applicant ''is an individual for whom suitable work . . . is only available in an occupation that regularly conducts drug testing[.]''

This rule, and the enabling statute, do not permit states to indiscriminately test UC applicants for illegal drug use. Rather, only UC applicants who meet the statutory threshold set out above may be tested. Those applicants should, based on prior employment in such an occupation, already know that pre-employment or post-hire drug testing is a requirement for the occupation in which suitable work is available to them. Further, such testing is related to the individual being able to and available for work.

There is no intent to stigmatize employment in these occupations or receipt of UI benefits, and no stigma should attach simply because the State UI agency conducts such a test as a condition of the applicant being able and available for work in occupations which regularly conduct drug testing. Nor is such testing intended to demonize or humiliate the UC applicant for whom drug testing is a usual condition of hire, or continued employment, in those occupations that regularly test employees for drugs, either pre-hire or post-hire. Thus, the Department makes no change to the final rule based on these comments.

As noted in the preamble discussion related to § 620.4, below, States may provide information on the availability of treatment for drug use or addiction if they so choose, but may not use federal UI administrative funding to do so.

Discussion of Comments by Section

Comments Regarding § 620.2 Definitions

The NPRM proposed definitions for several key terms used in the proposed regulatory text. These are: Applicant, controlled substance, occupation, suitable work, and unemployment compensation. The Department received no comments on the definitions of occupation, suitable work, and unemployment compensation. Accordingly, the definitions of these terms are adopted in the final rule as proposed.

Definition of Applicant

Comment: The Department received one comment agreeing with the analysis in the Preamble that limited the definition of ''applicant'' to an individual filing an initial claim for unemployment compensation. The commenter asserted that the definition adopts an interpretation of ''applicant'' that has been consistently applied by both the previous and current administrations at DOL, and which appears well supported by analysis of the language of various statutory provisions relating to initial applications for unemployment compensation and claimants for continuing compensation. There were no comments opposed to the proposed definition. Accordingly, the definition of ''applicant'' is adopted in the final rule as proposed.

Definition of Controlled Substance

With regard to the definition of ''controlled substance,'' the Department,

as required by statute (*see* 42 U.S.C. 503(l)(2)(B)), adopted the definition of that term as set forth in sec. 102 of the Controlled Substances Act (Pub. L. 91–513, 21 U.S.C. 802). As explained in that Act, ''[c]ontrolled substance'' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of 21 U.S.C. 801 *et seq.* The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

Comments: The Department received comments related to the proposed definition of ''controlled substances,'' which includes marijuana, and its impact on States with laws that decriminalize the use of marijuana for medical and/or recreational purposes.

One commenter asserted that the Department was acting arbitrarily and capriciously by defining ''controlled substances'' as that term is defined in Federal law in light of the fact that various States have decriminalized the possession of marijuana for medical and/or recreational use. By adopting such a definition, the commenter asserted, some States may ''deny unemployment compensation benefits to an individual using marijuana for either medical or recreational purposes that are not in violation of any State law.'' This commenter also noted that the NPRM preamble did not even discuss marijuana decriminalization in some States ''thus failing the [Administrative Procedures Act] APA requirement that an agency explain the basis for its actions.'' Another commenter argued that ''the implementation of drug testing requirements for UI applicants as endorsed by this proposed rule would disproportionately punish individuals who use marijuana in compliance with State law.''

Several commenters expressed concerns that the proposed rule would exacerbate the existing conflict between Federal and State laws regarding marijuana use and would disproportionately punish individuals whose marijuana use is decriminalized in their respective States. These commenters added that the proposed rule ''could create issues with states [sic] rights and workers who live in states with legal marijuana but work in states without it.'' As a solution, a couple of commenters suggested that States could provide waivers to those UC claimants who live in States that have decriminalized the use of marijuana, noting that the United States Army has adopted such a solution.

Department's Response: Proposed § 620.4(a) of the NPRM provides, in relevant part, that ''[s]tates may require drug testing for unemployment compensation applicants, as defined in sec. 620.2, for the unlawful use of one or more controlled substances, as defined in § 620.2, as a condition of eligibility for unemployment compensation .....'' Proposed § 620.2 defines ''controlled substances'' consistent with how that term is defined in sec. 102 of the Controlled Substances Act (21 U.S.C. 802).

The Department has made no changes to the final rule in response to these comments. As noted above, the statute requires that the Department define ''controlled substance'' according to a provision in a Federal statute, the Controlled Substances Act. Thus, regardless of how State laws treat marijuana, the Department is statutorily required to adopt the definition of ''controlled substances'' as set forth in the Controlled Substances Act. *See* 42 U.S.C. 503(l)(2)(B). The Department does not have the authority to adopt a definition of ''controlled substances'' different from what Congress expressly provided. Furthermore, the Department has no statutory authority to prohibit a State from testing for a substance that is a ''controlled substance'' under Federal law if the other statutory requirements to allow testing are met. This is the case regardless of whether the State has partially or wholly decriminalized marijuana possession or use, or whether an interstate UC claim is filed by a claimant who resides in a State where marijuana is decriminalized and seeks work in another State where it is not decriminalized.

We also note proposed § 620.4(a) is permissive in nature and not mandatory. It provides that a State may drug test, as a condition of UC eligibility, ''for the unlawful use of one or more controlled substances'' as defined in Federal law. The plain language of this regulation allows drug testing; it does not require it. Further, it permits States to omit any controlled substances they so choose from drug testing. Thus, States that choose to drug test as a condition of UC eligibility are permitted to omit marijuana, or any other controlled substance(s), from drug testing. Accordingly, the rule does not conflict with any State laws that partially or wholly decriminalize marijuana, nor can it resolve any conflicts of law within or between States. Regarding the comments that States provide waivers to interstate claimants who live in States that have decriminalized marijuana but work in States that have not, the rule already provides sufficient flexibility for States to exempt claimants from drug testing in such circumstances, or to omit marijuana from drug testing altogether. However, the Department has no authority to require States to provide such waivers.

Comments Regarding § 620.3 Occupations That Regularly Conduct Drug Testing for Purposes of Determining Which Applicants May Be Drug Tested When Applying for State Unemployment Compensation

In this regulation, the Department recognizes both the historic Federal-State partnership that is a key hallmark of the UC program, as well as the wide variation among States' economies and practices. This rule recognizes the need for States' participation in identifying which occupations regularly conduct drug testing in each State, and whether additional occupations should be included. Section 620.3 describes a number of different occupations that the Department has determined regularly drug test. States may use this list, in addition to the broader criterion, in identifying occupations for which drug testing is regularly conducted, based on the criteria set by the Secretary under these regulations. A minor edit to the introductory text of this section, inserting, ''enact legislation to,'' more closely aligns the regulation with the statutory text, but does not change the substance of the requirements in this section.

Paragraph (a) includes the class of positions that requires the employee to carry a firearm as an ''occupation'' that regularly drug tests.

Paragraphs (b)–(g) include various specific occupations that were listed in the previous rule as ones that regularly require drug test, since various Federal laws require drug testing of employees in each of these occupations. This rule identifies in paragraphs (b)–(g) six specific sections of regulations issued by several agencies of DOT and the Coast Guard that identify classes of positions that are subject to drug testing. Any position with a Federal legal requirement for drug testing was determined to constitute an occupation that regularly conducts drug testing. However, this final rule departs from the NPRM by removing the parentheticals describing the categories of occupations. This is because the parentheticals did not fully describe the regulations cited and because the regulations are subject to amendment that could render the descriptions obsolete.

Paragraphs (h) and (i) include in the list of occupations that regularly

conduct drug testing any occupation that is required to be drug tested under any Federal law or under the law of the State seeking to drug test UC applicants in that occupation. The law need not currently exist; future Federal or State law requiring drug testing is included under this provision. As with the previous six sections, any position with a legal requirement for drug testing has been determined to constitute an occupation that regularly conducts drug tests.

Paragraph (j) adds to the list of occupations that regularly drug test a significant provision not contained in the previous final rule, and that fundamentally transforms the regulatory approach and scope of the proposed regulations. This fundamental change satisfies the requirements of the CRA and allows the Department to fulfill its continuing statutory obligation to regulate. Paragraph (j) provides that where there is a factual basis for doing so, a State may identify additional occupations in that State which require pre-hire or post-hire drug testing as a standard eligibility requirement. This provision reflects the Secretary's determination that, because there is wide variation among State economies and employment practices, it is not practicable to exhaustively list all occupations that ''regularly conduct[ ] drug testing.'' Instead, the Department sets out a Federal standard by which it is possible to assess—under Federal, not State, law—whether a State has a sufficient basis to require drug testing of a particular class of UC applicants. The Federal standard is as follows: When identifying an occupation that regularly conducts drug testing, the State must identify a factual basis for its finding that employers conduct pre-employment or post-hire drug testing as a standard eligibility requirement for obtaining or maintaining employment in the identified occupation. Factual bases may include, but are not limited to: Labor market surveys; reports of trade and professional organizations; and academic, government, or other studies. This proposed standard effectuates the plain meaning of the Act's authorization of drug testing where suitable work ''is only available in an occupation that regularly conducts drug testing.'' Section 303(l)(1)(A)(ii). Once this final rule takes effect, the Department will review States' factual bases through reports authorized under 42 U.S.C. 503(a)(6) and 20 CFR 601.3; these reports are currently made through States' submissions of ETA Form MA 8–7 (OMB control number 1205–0222) prior to implementation by the State or any changes to State UI laws. Such reports would similarly be submitted prior to implementation of drug testing of applicants in occupations the State identifies as meeting the Federal standard described above.

The NPRM requested comments on the proposed standard and whether the Department should instead impose a heightened standard of evidence to demonstrate that an occupation is one that regularly conducts drug tests and, therefore, is an occupation for which drug testing is a standard eligibility requirement. The NPRM sought comments also on what heightened level of evidence of drug testing would be appropriate, if commenters believed a different standard than what was proposed in the NPRM should be used.

Comments: The Department received a number of comments regarding the proposed standard, many asserting that the standard was vague. Several commenters favored a heightened standard of evidence, arguing that the standard in the NPRM is insufficient. A few commenters also recommended an alternative standard.

One commenter argued that the proposed rule provides ''little to no guidance concerning how the determination'' of occupations is to be made. The commenter asserted that ''the regulatory text merely requires the State to have an undefined 'factual basis,' '' and that the NPRM preamble ''offers little guidance with its undescriptive and nonexclusive list of vague examples ranging from reports of trade and professional organizations to a virtually standard-less 'other studies'.'' The commenter asserted that this ''is the polar opposite of a determination under DOL regulations.''

Another commenter stated that ''we the regulated community have no idea what the standard is that DOL has proposed, so we don't know how to assess what would be 'heightened' standard.'' The commenter added that ''[a]t the least, a standard should require facts and conclusions that would survive a *Daubert* challenge to an expert witness in federal court.''

Department's Response: The Department does not consider the standard of evidence in the proposed rule to be vague or overly broad. The Department also disagrees with the assertion that the proposed rule provides insufficient guidance on how the determination of occupations must be made. Proposed § 620.3, like the rescinded final rule, contained a list of specific occupations in paragraphs (a) through (g), and a provision permitting drug testing for UC eligibility of any other occupation required to be drug-tested as a condition of employment under Federal or State law in paragraphs (h) and (i). Proposed paragraph (j) was added to account for any variations that may exist from State to State with regard to occupations that regularly conduct drug testing, but where such testing is not required by law. As described elsewhere, the proposed rule required a factual basis for identifying such occupations, and the Department will receive and review such identifications. Acknowledging these variations across States is consistent with the flexibility granted to States in the Federal-State partnership that Federal UC law broadly embraces.

Regarding the portion of the comment suggesting that DOL adopt a standard that would at least survive a *Daubert* challenge, the comment offered no clear alternative standard of evidence. A *Daubert* challenge, originating from the court decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), which established criteria for the admissibility of scientific expert testimony, refers to the process for challenging the validity and admissibility of expert testimony. The expert is required to demonstrate that his/her methodology and reasoning are scientifically valid and can be applied to the facts of the case. However, *Daubert* does not provide an administrable substantive standard of evidence, or a clear level of evidence, that the Department or a State can apply in the context of this regulation.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comments: Many commenters argued that the Department should use submissions from States to narrowly define the relevant occupations into a nationally applicable list.

Department's Response: The Department finds that using submissions of information from States to produce a nationally applicable list of occupations is not administratively feasible. It is extraordinarily difficult to develop a nationally applicable list of occupations that regularly drug test, beyond those that are legally required, while leaving flexibility to account for differences between practices in different States to allow for full implementation of the Congressional mandate. An occupation that is regularly drug-tested in some States might not be regularly drug-tested in others; a national list might not capture this discrepancy, and, indeed, could result in even broader drug testing than is consistent with the statute. Therefore, the Department declines this recommendation and makes no changes

to the final rule as a result of these comments.

Comment: One commenter argued that the Department should impose ''quality standards'' in the States' gathering of information for submissions to the Department on occupations that regularly drug-test; however, the commenter did not specify any recommended ''quality standards.''

Department's Response: The Department finds it is not administratively feasible to provide more definite standards in the rule text while maintaining States' flexibility to provide factual information from a wide range of sources. The Department monitors and exercises oversight of all aspects of all States' UC administration, and works with States to address deficiencies of conformity or substantial compliance with Federal law requirements. Just as with all aspects of oversight of State UC, the Department will provide oversight of States to ensure conformity and substantial compliance with this rule and take appropriate action as necessary. The Department makes no changes to the final rule in response to this comment.

Comment: A commenter criticized abandoning the rescinded regulations' reliance on SOCs established by the Bureau of Labor Statistics (BLS), because these codes ''are used in a variety of other setting [sic] for other uses such as establishing prevailing wages,'' which the commenter asserted undermined a statement in the NPRM that the BLS SOCs ''may not provide the best mechanism to support states in identifying occupations in which employers regularly drug test.''

Department's Response: That the proposed rule does not rely on BLS SOCs does not mean States may not rely on SOCs to identify occupations. Indeed, the rescinded final rule did not define occupations by BLS SOCs, and the NPRM in 2014 that preceded the rescinded final rule (which left unchanged the NPRM definition of ''occupation'') explained that the reliance on a ''class of positions'' in the definition was in contrast to reliance on single occupations identified in the BLS SOCs. The reference to BLS SOCs in the rescinded final rule was merely illustrative, not a requirement to use the system in determining occupations. As in the rescinded final rule, the absence of BLS SOCs in the proposed rule does not discourage States from embracing SOCs. However, the Department does not find it necessary or desirable to impose the SOCs established by BLS, as it may not always be the best system through which to classify occupations for the purposes of these regulations.

Therefore, the Department makes no changes to the final rule in response to this comment.

Comment: A commenter cited the Conference Report accompanying the enactment of the statutory provision on UC drug testing, noting the Conference Report stated that drug testing is permitted under 42 U.S.C. 503(l)(1)(A)(ii) only where passing a drug test is ''a standard eligibility requirement.'' The commenter argued that drug testing is not a standard eligibility requirement in any occupation unless drug testing is conducted for every single employee in that occupation. The commenter argued that a requirement that all employees in an occupation be drug tested would be consistent with the treatment of employees in virtually all of the other categories in proposed § 620.3 with regard to drug testing.

Department's Response: The Department disagrees that ''a standard eligibility requirement'' necessarily requires that all employers drug test all employees in an occupation in order to include the occupation as among those subject to drug-testing. Such an interpretation is not required by the statute or the Conference Report language cited by the commenter. An occupation that ''regularly'' drug tests, or for which drug testing is ''a standard eligibility requirement,'' need not uniformly require testing under the plain meaning of either term. The plain meaning of ''standard'' does not support the commenter's recommendation. The Merriam-Webster Dictionary defines ''standard'' in the most relevant definition as ''regularly and widely used.'' The Oxford Dictionary in the relevant definition describes ''standard'' as something ''used or accepted as normal or average.'' The Cambridge Dictionary defines ''standard'' as ''usual or expected.'' None of these definitions requires that a practice be universal in order to be ''standard.'' Thus, the Department does not find a ''standard eligibility requirement'' need be universal in order to be standard. To be ''regular'' or ''standard'' it is sufficient that drug testing in an occupation be usual. While the other categories listed in this regulation do cover occupations in which drug testing is required by all employers, that is not the statutory requirement.

Therefore, the Department makes no changes to the final rule in response to this comment.

Comments: Commenters also suggested that the Department consider the reason an occupation regularly tests employees and whether that reasoning has a ''nexus with unemployment in general or with whether the claimant is able and available for work in particular.''

Department's Response: The Department did not make changes in response to the comments suggesting that the standard should connect drug testing to unemployment. The purpose of the standard is to implement the requirements of 42 U.S.C. 503(l). Section 503(l) of 42 U.S.C. does not require a connection between unemployment and drug testing, only that it be established that an occupation regularly conducts drug testing. However, though no such connection is required, if the only suitable work available to an individual is in an occupation that regularly conducts drug testing, there is a strong connection between being able to pass a drug test and being able and available for work as required by 42 U.S.C. 503(a)(12). Under the final rule, the Department intends to give States the flexibility to consider these reasons in their particular circumstances.

Comments: Several commenters expressed a concern that the proposed standard set forth in the NPRM for identifying occupations that regularly conduct drug testing ''is rife with potential for abuse and for inappropriate motives.'' These commenters suggested that the Department should require States to provide more information about the fact-finding conducted than is specified in the proposed rule. In general, these commenters did not specify the abuse or inappropriate motives that would be risked, nor did they recommend an alternative heightened standard for the Department to consider. A few of the commenters elaborated that drug test providers contracted by States might have an inappropriate financial self-interest to encourage broader drug testing by States than is merited by evidence, which could inappropriately influence the decisions of policy makers to authorize broad drug testing.

Department's Response: The Department did not make changes in response to these comments. These assertions are unrelated to the requirements of 42 U.S.C. 503(l), and issues such as these, if they arise, will be addressed administratively by the Department's monitoring and oversight of § 620.3(j).

Comments: Several commenters argued that the proposed rule could lead, in various ways, to discrimination. One commenter argued that the proposed standard could allow States to ''depress equal access to earned benefits,'' and that the Department should take steps to minimize this

possible consequence by ''working with states to make sure working people have fair access to earned benefits.'' However, this commenter did not recommend an alternative standard of evidence. Relatedly, one commenter argued for heightened standards of evidence because drug testing ''should not be permitted as a blanket for all occupations which could lead to discriminatory implementation.'' This commenter also did not specify an alternative standard of evidence. Another commenter argued that ''[t]he degree of flexibility this regulation gives to states has tremendous potential to target occupations that are more likely to employ working people of color.'' Similarly, another commenter argued that it is ''problematic'' that each ''state can decide which professions to routinely drug test,'' because the ''tendency is to administer drug tests to industries which disproportionately employ people of color.'' These commenters also did not recommended a specific alternative standard.

Department's Response: Commenters' concerns relate to a State's implementation of paragraph (j), rather than to the proposed Federal standard for drug testing by States. This particular provision does not provide States with unfettered discretion to drug test UC applicants and it must be viewed in connection with the other requirements of this rule, namely that drug testing of UC applicants in general is not permitted unless the only suitable work for an applicant is in an occupation that regularly conducts drug testing. As discussed above, States' UI programs are subject to sec. 188 of the Workforce Innovation and Opportunity Act, and States are prohibited from discriminating against UC applicants on the bases of the protected characteristics listed above, which include race and color. Also, States will be subject to Department monitoring and oversight of occupations to be drug tested under proposed § 620.3(j). Therefore, the Department made no changes to the final rule in response to these comments.

The Department also asked for comments on any suggested additions, deletions, or edits to the list and descriptions of occupations that regularly conduct drug testing, or on the scope of the latitude accorded to States in the proposed approach.

Comments: The Department received a number of comments that proposed paragraph (j) constitutes an unlawful delegation to the States of the Department's authority to determine which occupations regularly conduct drug testing. In general, commenters advanced two types of arguments toward this conclusion. One was that Federal law prohibits a Federal agency from delegating its authority to an outside entity absent clear Congressional authorization to do so. A second argument was that proposed paragraph (j) is arbitrary and capricious under § 706 of the APA.

In support of the unlawful delegation argument, commenters relied on several court decisions that have held that ''[a]n agency [unlawfully] delegates its authority when it shifts to another party almost the entire determination of whether a specific statutory requirement has been satisfied or where the agency abdicates its final reviewing authority.'' *Fund for Animals* v. *Kempthorne,* 538 F.3d 124, 133 (2d Cir. 2008), citing *U.S. Telecom Ass'n* v. *FCC,* 359 F.3d 554, 567 (D.C. Cir. 2004), *and Nat'l Park & Conservation Ass'n* v. *Stanton,* 54 F.Supp.2d 7, 19 (D.D.C. 1999). According to these commenters, paragraph (j) impermissibly shifts the entire determination of which occupations regularly drug test by allowing each State to identify those occupations within its State that regularly drug test without providing guidance concerning how the States should make such determinations.

One commenter noted that ''[w]hile an agency may be able to delegate some amount of 'fact gathering' to an outside party [citing the *U.S. Telecom* court decision above], the grant of authority to States to determine occupations that regularly drug test goes far beyond fact gathering.'' Specifically, the commenter argued that ''[d]etermining how to interpret and define the concept of 'regularly' is the antithesis of fact gathering. It is exercising discretion and policy-making.'' The commenter added—

> [T]he requirement to determine which occupations regularly drug test leaves states with another substantial interpretative task. While ''occupations'' do not drug test, employers drug test and employees are drug tested. Thus, a decision has to be made in interpreting how to determine what to measure. To the extent that this provision can be interpreted to carry out Congressional intent, DOL, not state agencies, must exercise discretion to decide whether an occupation regularly drug tests when measured by the percentage of employers of that occupation drug testing employees in that occupation or when measured by the percentage of employees in that occupation who are drug tested.

Separately, regarding delegation, some commenters asserted that the State UC agencies in their respective States have a pattern of administrative practices that are inconsistent with State and Federal Constitutional requirements. These commenters argued that ''[t]here is no basis whatsoever to assume that state agencies delegated with new administrative authority to deny benefits will use such authority consistent with the U.S. Constitution or the rules and regulations of the Social Security Act.''

Department's Response: The Department disagrees with the comments that the rule improperly shifts to the States the determination of which occupations regularly conduct drug testing. The proposed rule explicitly determined, in paragraphs (a) through (g) of proposed § 620.3, specific occupations that may be drug-tested, thus directly determining many occupations that are regularly drug tested. Similarly, paragraphs (h) and (i) specify that States may drug test for occupations in which employees are required by Federal or State law to be drug tested. Paragraph (j) of § 620.3 allows each State to identify occupations in that State that regularly drug test and relies on each State as a fact-finder with regard to its local circumstances. Furthermore, the Department will review additional occupations identified by the State. Each State will be required to submit for Departmental review and oversight the occupations that the State finds regularly conduct drug testing as a standard eligibility requirement for obtaining or maintaining employment in the State, and the factual bases on which it relied. Thus, contrary to the commenters' assertions, this rule does not abdicate the Department's responsibility to determine the occupations that regularly drug test. It simply allows each State to identify factual bases for finding that additional occupations regularly conduct drug testing in that particular State. Such a grant of limited discretion is lawful, particularly as the Department will retain reviewing authority over the States' identification of occupations that regularly conduct drug testing, as well as the authority to take action to ensure conformity and substantial compliance with Federal law requirements. *See Kempthorne,* 538 F.3d 124 (finding that the Fish and Wildlife Service did not abdicate its authority to regulate the takings of migratory birds when it granted limited discretion to state agencies to determine whether the killing of a migratory bird in the agency's State was necessary to prevent the depredation of fish, wildlife, plants, and their habitats in the State's local area); *see also Stanton,* 54 F.Supp.2d at 19 (finding that ''[t]he relevant inquiry'' is whether the Federal agency ''retained

sufficient final reviewing authority'' over the subordinate's actions.)

Finally, regarding some commenters' assertions that a State UC agency might not administer the program consistent with State or Federal Constitutional requirements if given discretion, the Department monitors and exercises oversight of all aspects of all States' UC administration, and works with States to address deficiencies of conformity or substantial compliance with Federal law requirements. Just as with all aspects of oversight of State UC, the Department will monitor States to ensure conformity and substantial compliance with this rule and take appropriate action as necessary.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comments: Separately from the above arguments regarding improper delegation, many commenters asserted that proposed § 620.3(j) is arbitrary and capricious under the APA. One commenter in particular elaborated in detail this argument. This commenter argued that the Department:

> was arbitrary and capricious in adding section 620.3(j) of the NPRM after determining in its 2016 Final Rule that (1) ''whether an occupation is subject to 'regular' drug testing was not chosen as a standard here it would be very difficult to implement in a consistent manner'' and (2) ''we are unable to reliably and consistently determine which occupations require 'regular' drug testing where not required by law.''

See 81 FR 50300 (August 1, 2016).

The commenter continued that the proposed rule provides ''no specific explanation of its change in position on those two statements in the preamble to the 2016 Final Rule,'' as required by law. The commenter made four additional assertions arguing the proposed rule is arbitrary and capricious in its delegation of authority. First, the commenter argued that it is arbitrary and capricious ''to assign responsibility for determining which occupations regularly drug test to States.'' Second, the commenter argued that it is arbitrary and capricious ''to allow States to have inconsistent determinations of which occupations drug test in the face of a Congressional provision clearly calling for one uniform determination on that issue by specifically assigning that responsibility to DOL.'' Third, the commenter argued that it is arbitrary and capricious ''to allow States to individually determine how to interpret the concepts of 'regular' and 'standard eligibility requirement' without [the Department] explaining why . . . [such an approach] was consistent with the statutory requirement that occupations that regularly drug test be determined under regulations issued by DOL and why a uniform application of the drug testing requirements for unemployment compensation applications is not required.'' Fourth, the commenter argued that it is arbitrary and capricious ''to allow States to gather facts concerning which occupations drug test without detailed quality standards setting forth how that fact gathering should be conducted.''

Some commenters argued that the Department failed to set out with any specificity what would constitute a sufficient factual basis for identifying occupations that regularly drug test. These commenters stated that ''[r]eports by trade and professional organizations may reflect initiatives that do not comport with the narrow strictures of [Sec. 303(l)(1)(A)(ii), SSA] and may not establish a 'factual basis' for testing. In addition, allowing 'other studies' provides so little guidance that it is rendered essentially meaningless.'' Commenters added, ''Congress clearly assigned to the DOL, in the plain language of the authorizing statute, the responsibility to define which occupations are covered.''

The commenters argued that sec. 303(l), SSA, was drafted as it was in order ''to limit inappropriate influence in the determination of which working people could be required to take drug tests as a condition of receiving UI.'' Another commenter suggested that proposed § 602.3(j) was subject to potential inappropriate influence, that ''[d]epending 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.''

Department's Response: The Department has considered the various assertions that the proposed rule is arbitrary and capricious in violation of the APA and, for the following reasons, disagrees.

First, the assertion that the 2016 final rule has any bearing on this proposal is inconsistent with the CRA. 5 U.S.C. 801(f) provides that ''[a]ny rule that takes effect and later is made of no force or effect by enactment of a joint resolution under sec. 802 shall be treated as though such rule had never taken effect.'' Public Law 115–17 invalidated the 2016 final rule, stating that the rule ''shall have no force or effect.'' As this rule is not an amendment to the prior, rescinded final rule, it is not necessary under the APA to explain the rationale for taking a different approach in this rule than was taken in the 2016 rule.

Second, even if the Department was required to explain why it had changed its earlier position, the argument that the Department did not give an adequate rationale for departing from the rescinded 2016 final rule is inaccurate. By rescinding the previous rule, Congress rejected the approach in the 2016 rule of limiting the standard to occupations drug tested as a condition of employment under State or Federal law. Given the CRA's prohibition on republishing the 2016 rule in substantially the same form and the requirement that the Department promulgate a regulation to implement sec. 303(l) of the SSA, the Department was legally required to adopt a different regulatory approach. The rescinded final rule noted that it rejected the regularity of drug testing in private employment as a standard because it would be very difficult to implement in a consistent manner and that the Department determined that it would be unable to reliably and consistently determine which occupations regularly require drug testing beyond those required by law. In developing its new proposal, the Department, for the reasons explaining proposed § 602.3(j) in the preamble to the NPRM, adopted a standard that overcomes the issues identified by the commenter by utilizing States' expertise to research and identify which occupations drug test regularly in their own States.

Regarding other arguments that the proposed rule is ''arbitrary and capricious,'' first, the proposed rule does not assign responsibility for determining which occupations regularly drug test to States. Rather, under the proposed rule, the Department is leveraging the expertise of the States to identify occupations in which employers regularly drug test in their States, while the Department retains authority to review, monitor, and oversee States' identification of those occupations and the factual bases for their identification. Second, 42 U.S.C. 503(l), by its terms, does not require a determination of occupations which regularly test for drugs in all States; it simply prohibits the Department from interfering with State requirements for drug testing of an applicant in an occupation that regularly conducts drug testing. As mentioned above, the proposed rule is consistent with the rescinded final rule, which also allowed differences across States based on the occupations each State's law required to be drug-tested as a condition of employment. The proposed rule departs from the rescinded final rule, not in

allowing ''inconsistent'' choices of occupations across States, but in whether drug testing must be a State law requirement to consider the occupation one in which drug testing is a regular requirement for employment. Third, it is inaccurate to describe the proposed rule as deferring to States the interpretation of what constitutes ''regular'' drug testing and what constitutes a ''standard eligibility requirement.'' Rather, the proposed rule articulates a Federal standard—the *Secretary's* interpretation of those statutory terms, not the *States'* interpretations—under which States make factual findings, *i.e.,* as the NPRM preamble clearly states, the proposed rule requires States to have a factual basis for identifying additional occupations that regularly conduct drug testing, which is subject to the Department's review. Further, the Department has never required a ''uniform application of the drug testing requirements'' across the States. As noted above, the rescinded final rule also permitted States to drug test different occupations based on what occupations must be drug-tested as a condition of employment under different States' laws. Fourth, there is no requirement that regulations contain specific ''quality standards'' for fact-gathering by States, nor is it arbitrary or capricious for the proposed rule to let the ''factual basis'' standard be fleshed out through Department review of States' particular findings. Rather, this flexible approach is consistent with case law discussed above, and with the Federal-State UC partnership, by which the Department is responsible for monitoring and overseeing broad requirements that States must meet to receive administrative grants, and for employers in a State to receive credits against their Federal unemployment taxes.

Regarding assertions that the proposed rule is arbitrary and capricious because it lacks specificity, and that the Department has deferred the decision-making regarding which occupations regularly conduct drug testing to States, proposed § 620.3(j) does not remove the Department from exercising independent judgment in the determination of occupations. Rather, the NPRM made clear that any ''factual basis'' by a State for identifying an occupation that regularly conducts drug testing is subject to Departmental review. The Department retains authority to find that a State lacks sufficient factual basis to include an occupation it wishes to drug test. Therefore, the Department retains independent judgment.

Finally, regarding incentives to drug test, it is highly unlikely that employers in an occupation will adopt drug testing based upon the distant potential that other employers will adopt testing to result in the occupation being one which regularly requires drug testing in order to reduce their experience rating. Further, as a number of commenters pointed out, Federal funding for administration of the UI program is currently low, and States will have a strong incentive to control the cost of drug testing because they will receive no additional Federal funding for those costs. Thus, these objections are unsupported, and are not a basis to find proposed § 620.3(j) to be arbitrary or capricious.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comment: One commenter expressed that States should be permitted to drug test for occupations that are potentially dangerous or those that regularly involve drug testing, and another commenter stated that drug testing should be limited to those positions with legitimate safety concerns and proper justification for what the commenter characterized as invasive testing.

Department's Response: The purpose of this regulation is to implement the provision in 42 U.S.C. 503(l)(1)(A)(ii) that States may drug test applicants for UC for whom the only suitable work is in an occupation that regularly conducts drug testing. Safety concerns can be a reason why drug testing is regularly conducted for some occupations. However, limiting those occupations for which a UC applicant may be tested for drugs to only those where there are safety concerns is inconsistent with the statutory language permitting drug testing where an occupation regularly conducts such testing.

Congress disapproved the earlier regulation implementing 42 U.S.C. 503(l)(1)(A)(ii), which limited testing to those positions or occupations where there are certain safety concerns or where drug testing is required by Federal or State law. Thus, it is clear Congress intended the regulation to reflect a broader interpretation of ''occupations that regularly drug test,'' not a narrower one. As a result, the Department makes no changes to the rule based on this comment.

The Department likewise sought comments on its conclusion that it is impracticable to develop a nationally uniform list of occupations that regularly drug test, given the wide variations in regional economies, employer practices, and in State law.

Comments: One commenter stated that creating a uniform list of occupations that drug test is impractical, and the Secretary, in the alternative, should provide national guidelines for categories of positons for which States may drug test.

Several commenters made statements of support for the promulgation of a nationally uniform list of occupations that regularly drug test, stating that, by not creating one, the Department was not adhering to the authorizing statute or the will of Congress. Commenters stated that the Department was avoiding its responsibility by allowing flexibility, and did not explain how it reached its interpretation of Congressional intent. Commenters asked for these occupations to be defined narrowly, because the occupation must be the only viable option available for the applicant to find new employment. In the absence of a nationally uniform list, one commenter suggested, the Department should keep a list of nationally applicable occupations.

One commenter stated the Department suffered a lack of will to exhaustively catalogue all employment-related drug testing requirements under State laws, and to do so for the benefit of this rulemaking is not beyond the Department's capabilities. The commenter asserted that the Department lacked any ''robust'' evidence to support the asserted impracticality of creating such a list.

Department's Response: The Department considered these comments and maintains that the creation of a nationally uniform list is impractical and will not provide the flexibility needed by States to implement the will of Congress. The Department disagrees with the comments that it improperly shifted to the States the determination of which occupations regularly conduct drug testing. The proposed rule explicitly identified, in paragraphs (a) through (g) of proposed § 620.3, specific occupations that may be drug-tested, thus directly determining many occupations that may be drug tested. Similarly, paragraphs (h) and (i) specify that States may drug test for occupations in which employees are required by Federal or State law to be drug tested. Paragraph (j) of proposed § 620.3 provides States with fact-finding authority to identify occupations that regularly drug test in their own State and relies on each State as a fact-finder with regard to its own localized context. Furthermore, the Department will review any occupations the State identifies and the facts presented to substantiate adding them. Each State will be required to submit for

Departmental review and oversight the occupations that the State finds regularly conduct drug testing as a standard eligibility requirement in the State, and will require the State to submit the factual bases it relied on. Thus, contrary to the commenters' assertions, this rule does not abdicate the Department's responsibility to determine the occupations that regularly drug test. It simply grants States fact-finding authority to find factual bases for identifying additional occupations that regularly conduct drug testing in their own States. Such a grant of fact-finding authority is lawful, particularly as the Department will retain reviewing authority over the States' identification of occupations that regularly conduct drug testing, as well as the authority to take action to ensure conformity and substantial compliance with Federal law requirements. *See Kempthorne,* 538 F.3d 124; *see also Stanton,* 54 F.Supp.2d at 19.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comments: Several commenters expressed support for the Department's determination, stating that it recognized the value and importance of giving flexibility to individual States to identify what type of oversight system is most appropriate for employers and employees, and that State governments and officials are more familiar with the industries and occupations of a State. This will alleviate arbitrary determinations, stated one commenter, by recognizing State officials' power to develop policies pertinent to drug testing in the State. Flexible standards based on State-specific economies, one commenter put forth, means the regulations States enact will ensure effectiveness and consistency within the State. These commenters stated that it would be poor public policy to apply the same standards to vastly different economies. Standards for a State with a large manufacturing base may not be appropriate for a State with a primarily rural economy, stated one of these commenters.

Department's Response: The Department considered these comments and will be maintaining the policies and approaches noted in the commenters' supportive statements.

Finally, the Department asked for comments on its planned approach of using submissions through ETA's Form MA 8–7 as the method for reviewing States' factual bases for finding that employers conduct pre-employment or post-hire drug testing as a standard eligibility requirement for obtaining or maintaining employment in the identified occupation.

Comments: Some commenters asserted that the ETA Form MA 8–7 ''requires too little analysis on the part of the States.'' These commenters stated that the form should require reasoned analysis of attached supporting documentation to address the rationale for drug testing in specific occupations and whether that reasoning should extend to prevent deserving claimants from receiving UC.

Department's Response: Form MA 8–7 is not intended to be a stand-alone tool for analyzing materials submitted by States. Rather, it is the form used by the Department to collect the necessary information, authorized under section 303(a)(6), SSA and 20 CFR 601.3, to ensure State laws, regulations, and policies conform to and comply with Federal law. The Department has an established methodology in place to identify and review all changes to States' UI programs. By reviewing materials submitted with ETA Form MA 8–7, which States are already required to use for all changes in law, regulations, policies, and procedures, the Department will analyze a State's factual basis for identifying an occupation as one in which employers conduct pre- or post-employment drug testing as a standard eligibility requirement for obtaining or maintaining employment. As provided in 20 CFR 601.3, the Secretary of Labor requires States to submit State laws and plans of operation for implementing those laws. The Department implements this provision through ETA FORM MA 8–7 which requires States to submit ''all relevant state materials.'' Plans of operation in this context includes states' factual bases for identifying any additional occupations that regularly conduct drug testing pursuant to the Rule. In addition, the Department retains oversight authority and will conduct routine monitoring of State administration of the UI program, including state implementation of the drug testing provisions of 42 U.S.C. 503(l)(1)(A) and this final rule. As a result, the Department makes no changes to the final rule.

Comments Regarding: § 620.4 Testing of Unemployment Compensation Applicants for the Unlawful Use of a Controlled Substance

Consistent with 42 U.S.C. 503(l), § 620.4 provides that a State may require applicants to take and pass a test for the illegal use of controlled substances as a condition of initial eligibility for UC under specified conditions, and that applicants may be denied UC based on the results of these tests. States are not required to drug test as a condition of UC eligibility based on any of the occupations set out under this final rule. States may choose to do so based on some or all of the identified occupations; however, States may not, except as permitted by 42 U.S.C. 503(l)(1)(A)(i) (governing drug testing of individuals terminated for the unlawful use of a controlled substance), conduct drug testing based on any occupation that does not meet the definition in § 620.3 for purposes of determining UC eligibility.

Paragraph (a) provides that an applicant, as defined in § 620.2, may be tested for the unlawful use of one or more controlled substances—also defined in § 620.2—as an eligibility condition for UC, if the individual is one for whom suitable work, as defined by that State's UC law, is only available in an occupation that regularly conducts drug testing, as determined under § 620.3. As discussed in the Summary of the proposed rule, the term ''applicant'' means an individual who is filing an initial UC claim, not a claimant filing a continued claim. Thus, States may only subject applicants to drug testing.

Paragraph (b) provides that a State choosing to require drug testing as a condition of UC eligibility may apply drug testing based on one or more of the occupations under § 620.3. This flexibility is consistent with the statute, which permits, but does not require, drug testing, and the partnership nature of the Federal-State UC system.

Paragraph (c) provides that no State would be required to drug test UC applicants under this part. This provision was not in the 2016 final rule, but again reflects the partnership nature of the Federal-State UC system and the Department's understanding that the Act permits, but does not require, States to drug test UC applicants under the identified circumstances.

Comment: In response to the NPRM's broader, more flexible approach for identifying occupations that regularly drug test, one commenter raised a concern that such an approach ''risks conflicting with statutory protections mandated by the [Americans with Disabilities Act] ADA,'' and noted that ''[t]he Equal Employment Opportunity Commission has been aggressively challenging employers whose drug screens lead to denial of a job without an individualized assessment to determine whether the person's lawful use of prescription drugs may be considered a disability.'' However, the commenter never explained how the

proposed rule risks a conflict with the ADA.

Department's Response: Section 620.3 of the NPRM sets forth a proposed list of occupations for which drug testing is regularly conducted. Proposed paragraph (j) of this section embodied the Department's new, more flexible, approach to identifying the occupations which regularly drug test, by allowing each State to identify additional occupations in that State where employers require pre-hire or post-hire drug testing as a standard eligibility requirement provided that the State has a factual basis for doing so. As explained in the NPRM, factual bases may include, but are not limited to: Labor market surveys; reports of trade and professional organizations; and academic, government, or other studies, and would be reviewed by the Department. *See* 83 FR 55311, 55315 (Nov. 5, 2018).

Section 303(l)(1), SSA, permits States to drug test applicants whose only suitable employment is in an occupation that regularly conducts drug testing or who were terminated from employment with their most recent employer because of the unlawful use of a controlled substance; this rule does not authorize States to engage in conduct that would violate Federal disability non-discrimination laws, including the ADA. Indeed, States must continue to adhere to Federal disability non-discrimination law as a condition of receiving UC administrative grants under Title III of the SSA, and the annual unemployment insurance funding agreements between the Department and each State includes this requirement. Accordingly, the Department makes no changes to the final rule in response to this commenter's concern.

Comments: A number of commenters stated that there is no evidence that unemployed workers are more likely to use drugs, while one commenter stated that there is no evidence suggesting that drug testing deters drug use. Several commenters raised concerns that drug testing UC applicants would do nothing to help people struggling with addiction, or to identify individuals in need of treatment.

Department's Response: These regulations, which implement 42 U.S.C. 503(l)(1)(A)(ii), specifically address drug testing of UC applicants for whom suitable work is only available in an occupation that regularly conducts drug testing.

While the Department is without authority to use this rule to mandate drug treatment, UC applicants who fail drug tests may be encouraged to confront and overcome the challenges associated with substance use disorder by getting treatment, and to successfully return to the workforce.

States may not pay those costs, including costs of providing information on substance use disorder or the cost of treatment, from Federal UI administrative grant funds. However, nothing in this rule prevents States from providing brochures or other information, paid for from other sources, on the availability of drug treatment to UC applicants who have failed a drug test. Moreover, as noted below, the Department has made funds available to States to address the effects of the opioid crisis on the economy.

In March 2018, the Department announced a National Health Emergency demonstration project through Training and Employment Letter (TEGL) No. 12–17, to identify, develop, and test innovative approaches to address the economic and workforce-related impacts of the opioid epidemic. In July 2018, the Department approved six grant awards, totaling more than $22 million, to the following states: Alaska ($1,263,194), Maryland ($1,975,085), New Hampshire ($5,000,000), Pennsylvania ($4,997,287), Rhode Island ($3,894,875), and Washington State ($4,892,659).

In September, 2018, the Department issued TEGL No. 4–18 to describe how the National Dislocated Worker Grant (Disaster Recovery DWG) Program's disaster grants apply to the unique challenges of the opioid crisis. All states, outlying areas, and appropriate tribal entities are eligible to apply for Disaster Recovery DWG assistance as described in TEGL No. 4–18. Eligible applicants use Disaster Recovery DWGs to create disaster-relief employment to alleviate the effects of the opioid crisis in affected communities, as well as provide employment and training activities, including supportive services, to address economic and workforce impacts related to widespread opioid use, addiction, and overdose.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comments: Numerous commenters expressed concern over the possibility of positive test results that could occur because an applicant was taking prescription medication or over-the-counter medication. One commenter addressed drug testing of individuals who are enrolled in medication-assisted treatment for opioid addiction, noting that some drug tests can detect methadone and buprenorphine. A commenter noted that ''conventional urinalysis testing methods are prone to false positives,'' and that urinalysis indicates only the presence of a drug or metabolites in the body. One commenter stated that drug testing of chemically treated hair, or hair that is dark in color, ''can be especially susceptible to external contamination.''

Department's Response: This rulemaking is limited to implementing the statutory requirement to identify occupations that regularly conduct drug testing. These comments regarding potential false positives are outside the scope of this rule, therefore, the Department makes no changes to the regulatory text in response to these comments.

Comment: Another commenter asserted that drug testing UC applicants is a waste of tax dollars, and the ''only ones who will win in this case will be the companies billing the State after the test has been administered.''

Department's Response: The purpose of this regulation is to implement the provision in 42 U.S.C. 503(l)(1)(A)(ii) that States may drug test applicants for UC for whom the only suitable work is in an occupation that regularly conducts drug testing. Thus, whether and to what extent a State's activities may benefit drug testing companies is unrelated to the purpose of this regulation. The Department makes no changes to the final rule as a result of this comment.

Comments: A number of commenters expressed that drug testing of UC applicants undermines the purpose of the UC program. These commenters stated that making it more difficult for unemployed workers to access benefits blunts the UC program's capacity as a counter-cyclical economic tool and weakens the safety net.

Department's Response: The purpose of this regulation is to implement the provision in 42 U.S.C. 503(l)(1)(A)(ii) permitting States to drug test UC applicants for whom the only suitable work is in an occupation that regularly conducts drug testing. The regulation does not require States to implement a drug testing program, and the basic eligibility requirements for UC are unchanged. To be eligible for UC, claimants must be able and available to accept suitable work. This rule allows States to implement drug testing as a means for ensuring that UC applicants for whom the only suitable work is in an occupation that regularly conducts drug testing can demonstrate that they are able and available to accept suitable work by passing a drug test. We also note that the drug testing provisions in 42 U.S.C. 503(l)(1)(A)(ii) are narrowly drawn. There will be minimal effect on the UC program's role in minimizing

economic impacts in an economic downturn.

Therefore, the Department makes no changes to the final rule in response to these comments.

IV. Administrative Information

Paperwork Reduction Act

The Department has determined that any use of the existing form MA 8–7 under this rule is already approved under OMB control number 1205–0222.

Plain Language

The Department drafted this rule in plain language.

Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act

The Regulatory Flexibility Act (RFA), at 5 U.S.C. 603(a), requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis, which describes the impact of this final rule on small entities. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. This rule does not affect small entities as defined in the RFA. Therefore, the rule will not have a significant economic impact on a substantial number of these small entities. The Department has certified this to the Chief Counsel for Advocacy, Small Business Administration, pursuant to the RFA.

Executive Order 13771

Comments: The Department received one comment asserting that the proposed rule did not comply with Executive Order (E.O.) 13771 (Reducing Regulations and Controlling Regulatory Costs).

Department's Response: This final rule is not subject to E.O. 13771 because the cost is *de minimis*. The drug testing of UC applicants as a condition of UC eligibility is entirely voluntary on the part of the States, and because permissible drug testing is limited under the statute and this rule, the Department believes only a small number of States will establish a testing program for a limited number of applicants for unemployment compensation benefits.

Executive Orders 12866 and 13563: Regulatory Planning and Review

Comment: The Commenter argues that the Department's cost and benefits analysis was ''cursory and unrigorous;'' the argument relies on the Department's admission that it lacked data to quantify administrative costs.

Department's Response: E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives, and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. For a ''significant regulatory action,'' E.O. 12866 asks agencies to describe the need for the regulatory action and explain how the regulatory action will meet that need, as well as assess the costs and benefits of the regulation.[1]

This regulation is necessary because of the statutory requirement contained in 42 U.S.C. 503(l)(1)(A)(ii), which requires the Secretary to determine the occupations that regularly conduct drug testing for the purpose of determining which applicants may be drug tested when applying for unemployment compensation. This rule is a ''significant regulatory action,'' as defined in sec. 3(f) of E.O. 12866, because it raises novel legal or policy issues arising out of legal mandates. Before the amendment of Federal law to add the new 42 U.S.C. 503(l)(1), Federal law did not permit drug testing of applicants for UC as a condition of eligibility.

The decision to conduct drug testing for any of the occupations identified in the final rule is entirely voluntary on the part of the States (see § 620.4). To date, only three States (Mississippi, Texas, and Wisconsin) have enacted laws to permit drug testing of UC applicants under the circumstances addressed by this rule. These States, however, have not yet begun testing because the prior rule was rescinded, and this rule was not yet published. As a result, the Department does not have sufficient information to determine how many States will establish a drug testing program, and what the costs and benefits of such a program might be to States. Before the enactment of the Federal law in 2012, States were not permitted to condition eligibility for UC on drug testing. Due to variations among States' laws, and in the number of UC applicants, level of benefits, and prevalence of drug use in a State, the Department is unable to estimate the extent to which States' costs in administering drug testing would be offset by savings in their UC programs.

[1] Exec. Order No. 12866, section 6(a)(3)(B).

The Department requested comments on the costs of establishing and administering a State-wide testing program; the number of applicants for unemployment compensation that fit the criteria established in the law; estimates of the number of individuals who would subsequently be denied unemployment compensation due to a failed drug test; and the offsetting savings that could result. The Department received comments, discussed below, on the costs of establishing and administering a testing program and the cost of drug tests. However, no other comments were received providing specific information on the other issues on which the Department requested comment.

Comments: One commenter wrote that Ohio had a 4.3 percent unemployment rate as of May 2018, which equates to approximately 530,000 unemployed workers in Ohio. At an average cost of $30 per drug test, it would cost $18 million to test UC applicants. The commenter stated that that money could instead be allocated for improving infrastructure issues, drug treatment programs, education programs, and job training programs.

A number of commenters wrote that States would spend much more to implement a drug testing program than it would be worth in savings to the UI trust funds. These commenters stated that when 13 States spent $1.6 million collectively to drug test Temporary Assistance for Needy Families (TANF) applicants in 2016, only 369 people tested positive out of approximately 250,000. The commenters argued that because States are experiencing record-low administrative funding, they cannot afford additional administrative burdens, particularly when few people tested positive.

Only three States have enacted laws to pursue drug testing of UC applicants under this statutory provision to date, and they have not yet begun testing. There are limited data on which to base estimates of the cost associated with establishing a testing program, or the offsetting savings that a testing program could realize. Only one of the three States that enacted conforming drug testing laws issued a fiscal estimate. That State, Texas, estimated that the 5-year cost of administering the program would be $1,175,954, taking into account both one-time technology personnel services to program the system and ongoing administrative costs for personnel. The Department has not evaluated the methodology of Texas' estimate. Separately, it would be inappropriate to extrapolate the Texas cost analysis to all States, in part

because of differences between Texas law and the laws of other States, and because of the variations in States' programs noted above. Therefore, the Department cites this information only for the purpose of disclosing the minimal information available for review.

One commenter wrote that drug tests can be expensive and that funds could be reappropriated for initiatives such as rehabilitation, common-sense drug education, and overdose first aid. The commenter also stated that it is not the States' duty to drug test unemployed workers; rather, it is a potential employer's duty to test applicants if the employer wishes.

Several commenters wrote that the cost of drug testing would be an unnecessary drain on resources that should be made available to workers affected by reductions in force. The commenters argued that the financial costs would far outweigh any savings from drug testing UC applicants and would place further stress on State budgets, especially when the Federal grants that States principally rely on to administer their programs have been reduced significantly. Simply put, these commenters concluded that drug testing is not a good use of scarce resources.

One commenter wrote that studies have shown that the vast majority of individuals receiving public assistance do not use drugs. The commenter supports a policy orientation in favor of an exercise of this authority, if at all, only for occupations in which the rationale for drug testing is truly compelling.

Two commenters wrote that Michigan has unsuccessfully attempted to test recipients of cash assistance. In 2000, a Michigan law providing for random testing of welfare recipients was declared unconstitutional by a federal court. In 2016, Michigan administered a pilot program of suspicion-based drug testing, but no recipients or applicants were tested. The commenters argued that these programs did not save money or reveal any undeserving claimants—they merely increased administrative costs. These commenters asserted that States may be pressured by this final rule to use already-limited UI funding to establish and administer a testing program.

Department's response: The Department carefully reviewed the comments and concluded that they did not adequately provide reliable information on the costs of establishing and administering a State-wide testing program; the number of applicants for UC who would be tested; and individuals who would subsequently be denied UC due to a failed drug test. In the absence of such data, the Department is unable to quantify the administrative costs States would incur if they choose to implement drug testing pursuant to this final rule.

As explained above, nothing in the Act amending section 303, SSA, or in this regulation requires States to establish a drug testing program. *See* § 620.4 of this final rule. States may choose to enact legislation to permit drug testing of UC applicants consistent with Federal law. In doing so, States will make that decision based on many factors, including the costs and benefits of a drug testing program that is limited to only those UC applicants specifically permitted to be drug tested as a condition of UC eligibility in the Act.

The Department reiterates that States will voluntarily make their own determination whether to establish a testing program. States may determine that current funding for the administration of State UC programs is insufficient to support the additional costs of establishing and administering a drug testing program, which would include the cost of the drug tests, staff for administration of the drug testing function, and technology to track drug testing outcomes. States would also incur ramp-up costs to implement the processes necessary for determining whether an applicant is one for whom drug testing is legally permissible; referring and tracking applicants for drug testing; and conducting and processing the drug tests. States would also have to factor in the increased costs of adjudication and appeals of both the determination that an individual is subject to drug testing and resulting determinations of benefit eligibility based on the test results. However, these costs could vary widely across States, and the Department has no ability to develop an estimate that could be relevant across multiple States.

The benefits of the rule are equally difficult to quantify. As explained above, the Texas analysis estimated a potential savings to the Unemployment Trust Fund of $13,700,580 over the 5-year period, resulting in a net savings of approximately $12.5 million. However, due to differences in State laws, the number of claims, benefit levels, and the prevalence of substance use disorder in a State, the Department is unable to use the savings anticipated by Texas as a national norm. In addition, as previously discussed, permissible drug testing is limited under the statute and this rule; the Department expects only a small number of UC applicants will be tested. As such, the Department makes no changes as a result of these comments.

Executive Order 13132: Federalism

Comment: The specific comment regarding noncompliance with E.O. 13132 is that the rule would permit drug testing of UC applicants when testing is required under Federal law, and that the rule would have a substantial effect on States by compelling them to provide a factual basis for imposing a drug-testing requirement using ETA form MA 8–7.

Department's Response: Section 6 of E.O. 13132 requires Federal agencies to consult with State entities when a regulation or policy may have a substantial direct effect on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government, within the meaning of the E.O. Sec. 3(b) of the E.O. further provides that Federal agencies must implement regulations that have a substantial direct effect only if statutory authority permits the regulation and it is of national significance.

E.O. 13132, sec. 3, establishes Federalism Policymaking Criteria that agencies must follow when formulating and implementing policies with Federalism implications. Those criteria include:

- That agencies consider statutory authority for any action that would limit State policymaking discretion;
- That the national government grant States maximum administrative discretion possible; and
- That agencies encourage States to develop their own policies to achieve program objectives and, where possible, defer to States to develop standards.

This rule accomplishes each of the requirements set out above. First, the Department is required by 42 U.S.C. 503(l)(1)(A)(ii) to identify in regulation the occupations that regularly conduct drug testing. State UC agencies are permitted to drug test UC applicants for whom the only suitable work is in an occupation that regularly drug tests. Thus, the Department has statutory authority to issue this regulation.

Second, this rule gives States significant flexibility to identify additional occupations in their State that regularly drug test job applicants, either pre-hire or post-hire based on a factual analysis. See sections 620.3 and 620.4 of this final rule.

Third, this rule encourages States that choose to enact drug testing legislation as permitted by 42 U.S.C. 503(l)(1)(A)(ii) to develop policies and establish standards to achieve the program objectives, consistent with Federal law.

The Department retains oversight responsibility to ensure State law conforms to, and the State is in compliance with, Federal UC law.

Thus, this rule does not have a substantial direct effect on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government within the meaning of the E.O. because drug testing authorized by the regulation remains voluntary on the part of the State—it is not required.

Unfunded Mandates Reform Act of 1995

Comment: The commenter states that the Department incorrectly concluded that the Unfunded Mandates Reform Act of 1995 does not apply to this rule. The commenter's reasoning is that required drug testing under other federal laws would be required of a State that enacts a drug testing law consistent with 42 U.S.C. 503(l)(1)(A), and that the State UC agency would have unfunded mandates conditioned on designating some occupations for drug testing.

Department's Response: The Unfunded Mandates Reform Act of 1995 defines ''Federal Intergovernmental Mandate'' to mean ''any provision in legislation, statute, or regulation that (i) would impose an enforceable duty upon a State..... ''

This regulation does not impose any duty on States; rather, it permits States, consistent with the statutory authority in 42 U.S.C. 503(l)(1)(A) to enact legislation to test UC applicants for drugs under the limited circumstances set out in the statute. The requirement that States submit the factual basis for identifying an occupation under § 620.3(j) of the regulation using ETA form MA 8–7 is consistent with long-standing procedures by which States must inform the Department of changes in State law.

Effect on Family Life

Comment: The commenter referred to at the beginning of this discussion of compliance with several E.O.s and statutory requirements questions the Department's certification that this rule does not impact family well-being. The commenter cites the requirement in section 654(c) of the Treasury and General Government Appropriations Act that agencies must determine whether the action increases or decreases disposable income or poverty of families and children and determine whether the proposed benefits of the action justify the financial impact on the family.

Department's Response: This regulation has no impact on family well-being because it merely affords States an option that they must independently choose. Allowing States to drug test UC applicants in the very limited circumstances set out in 42 U.S.C. 503(l)(1)(A)(ii) does not, in and of itself, increase or decrease disposable income or poverty, or otherwise affect family well-being.

Based on available data (or lack thereof), it is impossible for the Department to predict the number of States that will exercise this option or how broadly they will implement any drug testing in their State. Similarly, there is no existing data or way to predict, positively or negatively, what impact, if any, such State drug testing may have on family well-being. This regulation only implements the provision in 42 U.S.C. 503(l)(1)(A)(ii) that States may drug test applicants for UC for whom the only suitable work is in an occupation that regularly conducts drug testing.

Thus, the Department makes no change to its certifications that the rule complies with each of the Executive Orders and other provisions discussed above.

List of Subjects in 20 CFR Part 620

Unemployment compensation.

■ For the reasons stated in the preamble, the Department amends 20 CFR chapter V by adding part 620 to read as follows:

PART 620—DRUG TESTING FOR STATE UNEMPLOYMENT COMPENSATION ELIGIBILITY DETERMINATION PURPOSES

Sec.
620.1 Purpose.
620.2 Definitions.
620.3 Occupations that regularly conduct drug testing for purposes of determining which applicants may be drug tested when applying for State unemployment compensation.
620.4 Testing of unemployment compensation applicants for the unlawful use of a controlled substance.
620.5 Conformity and substantial compliance.

Authority: 42 U.S.C. 1302(a); 42 U.S.C. 503(l)(1)(A)(ii).

§ 620.1 Purpose.

The regulations in this part implement 42 U.S.C. 503(l). 42 U.S.C. 503(l) permits States to enact legislation to provide for State-conducted testing of an unemployment compensation applicant for the unlawful use of controlled substances, as a condition of unemployment compensation eligibility, if the applicant was discharged for unlawful use of controlled substances by his or her most recent employer, or if suitable work (as defined under the State unemployment compensation law) is only available in an occupation for which drug testing is regularly conducted (as determined under this part). 42 U.S.C. 503(l)(1)(A)(ii) provides that the occupations that regularly conduct drug testing will be determined under regulations issued by the Secretary of Labor.

§ 620.2 Definitions.

As used in this part—

Applicant means an individual who files an initial claim for unemployment compensation under State law. Applicant excludes an individual already found initially eligible and filing a continued claim.

Controlled substance means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of 21 U.S.C. 801 *et seq.,* as defined in Sec. 102 of the Controlled Substances Act (21 U.S.C. 802). The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

Occupation means a position or class of positions with similar functions and duties. Federal and State laws governing drug testing refer to classes of positions that are required to be drug tested. Other taxonomies of occupations, such as those in the Standard Occupational Classification (SOC) system, may be used by States in determining the boundaries of a position or class of positions with similar functions and duties under § 620.3. Use of the SOC codes, however, is not required, and States may use other taxonomies to identify a position or class of positions with similar functions and duties.

Suitable work means suitable work as defined by the unemployment compensation law of a State against which the claim is filed. It must be the same definition the State law otherwise uses for determining the type of work an individual must seek, given the individual's education, experience, and previous level of remuneration.

Unemployment compensation means any cash benefits payable to an individual with respect to the individual's unemployment under the State law (including amounts payable under an agreement under a Federal unemployment compensation law).

§ 620.3 Occupations that regularly conduct drug testing for purposes of determining which applicants may be drug tested when applying for State unemployment compensation.

In electing to test applicants for unemployment compensation under this part, States may enact legislation to require drug testing for applicants for whom the only suitable work is in one or more of the following occupations that regularly conduct drug testing, for purposes of § 620.4:

(a) An occupation that requires the employee to carry a firearm;

(b) An occupation identified in 14 CFR 120.105 by the Federal Aviation Administration, in which the employee must be tested;

(c) An occupation identified in 49 CFR 382.103 by the Federal Motor Carrier Safety Administration, in which the employee must be tested;

(d) An occupation identified in 49 CFR 219.3 by the Federal Railroad Administration, in which the employee must be tested;

(e) An occupation identified in 49 CFR 655.3 by the Federal Transit Administration, in which the employee must be tested;

(f) An occupation identified in 49 CFR 199.2 by the Pipeline and Hazardous Materials Safety Administration, in which the employee must be tested;

(g) An occupation identified in 46 CFR 16.201 by the United States Coast Guard, in which the employee must be tested;

(h) An occupation specifically identified in Federal law as requiring an employee to be tested for controlled substances;

(i) An occupation specifically identified in the State law of that State as requiring an employee to be tested for controlled substances; and

(j) An occupation where the State has 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 the occupation.

§ 620.4 Testing of unemployment compensation applicants for the unlawful use of a controlled substance.

(a) States may require drug testing for unemployment compensation applicants, as defined in § 620.2, for the unlawful use of one or more controlled substances, as defined in § 620.2, as a condition of eligibility for unemployment compensation, if the individual is one for whom suitable work, as defined in State law, as defined in § 620.2, is only available in an occupation that regularly conducts drug testing as identified under § 620.3.

(b) A State conducting drug testing as a condition of unemployment compensation eligibility, as provided in paragraph (a) of this section, may only elect to require drug testing of applicants for whom the only suitable work is available in one or more of the occupations listed under § 620.3. States are not required to apply drug testing to any applicants for whom the only suitable work is available in any or all of the occupations listed.

(c) No State is required to drug test UC applicants under this part 620.

§ 620.5 Conformity and substantial compliance.

(a) *In general.* A State law implementing the drug testing of applicants for unemployment compensation must conform with—and the law's administration must substantially comply with—the requirements of this part 620 for purposes of certification under 42 U.S.C. 502(a), governing State eligibility to receive Federal grants for the administration of its UC program.

(b) *Resolving issues of conformity and substantial compliance.* For the purposes of resolving issues of conformity and substantial compliance with the requirements of this part 620, the provisions of 20 CFR 601.5 apply.

John P. Pallasch,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2019–21227 Filed 10–3–19; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9866]

RIN 1545–BO54; 1545–BO62

Guidance Related to Section 951A (Global Intangible Low-Taxed Income) and Certain Guidance Related to Foreign Tax Credits

Correction

In rule document C1–2019–12437, appearing on page 44223 in the issue of Friday, August 23, 2019 make the following corrections in § 1.951–1:

§ 1.951–1 [Corrected]

1. In the center column, in instruction 2, on the second line, ''(b)(2)(vi)(B)(1)'' should read ''(b)(2)(vi)(B)(*1*)''.

2. In the same column, in the same instruction, the table heading ''TABLE 1 TO PARAGRAPH (b)(2)(vi)(B)(1)'' should read ''TABLE 1 TO PARAGRAPH (b)(2)(vi)(B)(*1*)''.

[FR Doc. C2–2019–12437 Filed 10–3–19; 8:45 am]

BILLING CODE 1300–01–D

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Part 2200

Rules of Procedure; Corrections

AGENCY: Occupational Safety and Health Review Commission.

ACTION: Correcting amendments.

SUMMARY: This document makes technical amendments to the final rule published by the Occupational Safety and Health Review Commission in the **Federal Register** on April 10, 2019 and corrected on August 30, 2019. That rule revised the procedural rules governing practice before the Occupational Safety and Health Review Commission.

DATES: Effective on October 4, 2019.

FOR FURTHER INFORMATION CONTACT: Ron Bailey, Attorney-Advisor, Office of the General Counsel, by telephone at (202) 606–5410, by email at *rbailey@oshrc.gov,* or by mail at: 1120 20th Street NW, Ninth Floor, Washington, DC 20036–3457.

SUPPLEMENTARY INFORMATION: OSHRC published revisions to its rules of procedure in the **Federal Register** on April 10, 2019 (84 FR 14554) and published corrections on August 30, 2019 (84 FR 45654). This document makes further technical amendments to the final rule.

List of Subjects in 29 CFR Part 2200

Administrative practice and procedure, Hearing and appeal procedures.

Accordingly, 29 CFR part 2200 is amended by making the following correcting amendments:

PART 2200—RULES OF PROCEDURE

■ 1. The authority citation for part 2200 continues to read as follows:

Authority: 29 U.S.C. 661(g), unless otherwise noted.

Section 2200.96 is also issued under 28 U.S.C. 2112(a).

■ 2. Amend § 2200.7 by revising paragraph (k)(1)(ii) to read as follows:

§ 2200.7 Service, notice, and posting.

* * * * *

(k) * * *

(1) * * *

UIAC Proposal Tracking – 2019

No.	Department Proposal Title	Proposal Subject	Presented to UIAC	Action
D19-01	Reimbursable Employer Debt Assessment Charging	REDA access to imposter funds	3-21-19	Approved on 6-20-19
D19-02	Assessment for Failure to Produce Records	Subpoena Penalty	3-21-19	
D19-03	Fiscal Agent Election of Employer Status	Fiscal Agents	3-21-19	Approved on 6-20-19
D19-04	Clarification of Employee Status Statute	Employee Status	3-21-19	
D19-05	Clarification of Exemptions Laws	Levy Exemptions	3-21-19	
D19-06	SUTA Dumping Penalty	SUTA Dumping	3-21-19	
D19-07	Departmental Error	Department Error	3-21-19	Approved on 6-20-19
D19-08	Appropriation Revisions and Technical Corrections	Cross Reference & Technical Clean-Up and Appr. Revisions	3-21-19	
D19-09	Creation of Administrative Fund	IP Lapse and Admin Fund	3-21-19	
D19-10	Update Administrative Rules to Convert SIC to NAICS	Amend SIC to NAICS Codes	3-21-19	Scope Approved on 3-21-19
D19-11	Repeal of UI Drug Testing	Drug Testing	3-21-19	
D19-12	Repeal of Substantial Fault	Substantial Fault	3-21-19	
D19-13	Define Suitable Work by Administrative Rule	Suitable Work	3-21-19	
D19-14	Quit Exception for Relocating Spouse	Quit Exception	3-21-19	
D19-15	Increase and Index Maximum Wage Cap for the Partial Benefits Formula	Wage Threshold	3-21-19	
D19-16	Repeal Waiting Week	Waiting Week	3-21-19	
D19-17	Repeal Work Search and Work Registration Requirements	Work Search & Work Registration	Tabled	
D19-18	Increase Maximum Weekly Benefit Rate to $406	Increase WBR to $406	3-21-19	
D19-19	Department Reports to Legislature	Department Reports	6-20-19	Approved on 9-19-19
D19-20	Effect of a Criminal Conviction	Department Determinations	6-20-19	
D19-21	Eligibility for Certain Employees	Benefit Eligibility	6-20-19	Approved 9-19-19

D19-22	Prohibit DOR Collection of UI Debts	Collections	9-19-19	Approved 9-19-19

No.	Labor Proposal Title	Proposal Subject	Presented to UIAC	Action
L19-01	Increased Penalties for Willful Worker Misclassification	Worker Misclassification	6-20-19	
L19-02	Amend UI Tax Schedule Triggers Based on AHCM	Tax Schedule Triggers	6-20-19	
L19-03	Increase Taxable Wage Base and Index in Future Years	Taxable Wage Base	6-20-19	
L19-04	Repeal Waiting Week	Waiting Week	6-20-19	
L19-05	Increase Maximum Weekly Benefit Rate to $406	Increase WBR to $406	6-20-19	
L19-06	Repeal of Substantial Fault and restore prior Wis. Stat. § 108.04(5g)	Substantial Fault	6-20-19	
L19-07	Quit Exception for Relocating Spouse	Quit Exception	6-20-19	
L19-08	Increase and Index Maximum Wage Cap for the Partial Benefits Formula	Wage Threshold	6-20-19	
L19-09	Define Suitable Work by Administrative Rule	Suitable Work	6-20-19	

No.	Management Proposal Title	Proposal Subject	Presented to UIAC	Action
M19-01	Summer Camp Counselor Exclusion	Excluded Employment	6-20-19	
M19-02	Union Referral Service Work Search Criteria	Work Search	6-20-19	
M19-03	Definition of Employee vs. Independent Contractor	Worker Misclassification	6-20-19	
M19-04	Repeal Quit Exception in Wis. Stat. § 108.04(7)(e)	Quit Exception	6-20-19	
M19-05	Link Benefit Eligibility Weeks to State Unemployment Rate	Duration of UI	6-20-19	
M19-06	Clarify Definitions of Misconduct and Substantial Fault	Misconduct & Substantial Fault	6-20-19	

Unemployment Insurance Advisory Council
Tentative Schedule
2019
(Updated 10/22/2019)

January 17, 2019	Scheduled Meeting of UIAC Discuss Public Hearing (Nov. 15, 2018) Comments
February 21, 2019	Scheduled Meeting of UIAC (Cancelled)
March 21, 2019	Scheduled Meeting of UIAC Introduce Department Law Change Proposals
April 18, 2019	Scheduled Meeting of UIAC Discuss Department Proposals
May 22, 2019	Re-Scheduled Meeting of UIAC Approve/Discuss Department Proposals Exchange of Labor & Management Law Change Proposals
June 20, 2019	Scheduled Meeting of UIAC Approve/Discuss Department Proposals Discuss Labor & Management Proposals
July 18, 2019	Scheduled Meeting of UIAC Approve/Discuss Department Proposals Discuss Labor & Management Proposals
August 15, 2019	Scheduled Meeting of UIAC Discussion and Agreement on Law Changes for Agreed Upon Bill (Cancelled)
September 19, 2019	Scheduled Meeting of UIAC Discussion and Agreement on Law Changes for Agreed Upon Bill
October 22, 2019	Re-scheduled Meeting of UIAC Discussion and Agreement on Law Changes for Agreed Upon Bill
November 7, 2019	Tentative Meeting of UIAC Review and Approval of Department Draft and LRB Draft of Agreed Upon Bill
November 21, 2019	**Scheduled Meeting of UIAC** **Review and Approval of LRB Draft of Agreed Upon Bill**
December 2019	**Tentative Meeting of UIAC – If Needed** **Final Review and Approval of LRB Draft of Agreed Upon Bill**
January 2020	**Agreed Upon Bill Sent to the Legislature for Introduction in the Spring 2020 Legislative Session**