



# State Legislation to Require Drug Testing as a Condition of Eligibility for Unemployment Insurance

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# State Legislation to Require Drug Testing as a Condition of Eligibility for Unemployment Insurance (UI)

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## Current State UI Laws and Recent Legislative Activity

- Today, no state has a UI law under which an applicant or claimant is denied benefits after failing a randomly or universally applied “suspicionless” test for drugs.
- As of January 2011, however, approximately 20 states had provisions in their UI laws disqualifying a worker from unemployment insurance if the worker lost his or her job due to drug use and/or failure to undergo testing, or a related violation. (To receive UI, workers generally must have lost their jobs due to no fault of their own. States disqualify workers from receipt of UI if they voluntarily left work without cause or were discharged due to misconduct connected with work. State laws defining these conditions of receipt vary.) [Click here to see “States with Drug and/or Alcohol Provisions” from USDOL’s Comparison of State UI Laws.](#)
- Twelve (12) states saw legislative activity around drug testing for UI benefits in 2010 and 2011, and one state (Indiana) enacted a law. [Click here to see 2010 and 2011 State Legislation on Drug Testing for Unemployment Benefits.](#) As the chart shows, several states recently considered, but have not enacted, legislation that would result in “suspicionless” testing of UI applicants or recipients.
- Indiana’s enacted law, which applies to UI claimants, does not involve random, suspicionless testing. Rather, the law is tied to provisions of state UI law regarding refusal of suitable work. Under Indiana’s law, an individual receiving UI is considered to have refused an offer of suitable work if an offer of work is withdrawn by an employer after an individual either (1) tests positive for drugs after the employer gives a drug test, or (2) refuses to submit to a drug test required by a prospective employer. [Click here to see P.L. 12-2011, An Act to amend the Indiana Code Concerning Labor and Safety.](#)

## Possible Legal Issues Regarding “Suspicionless” Drug Testing in Public Benefit Programs

### *Constitutional issues*

- Until recently, when Florida passed a similar law, Michigan was the only state that had passed a law conditioning receipt of public benefits on a positive drug test. [Click here to see the provisions of Michigan’s 1999 law pertaining to substance abuse testing.](#)

- Michigan’s law, which applied to Temporary Assistance for Needy Families (TANF) applicants and recipients, was enacted following passage of national welfare reform legislation in 1996. Section 902 of the 1996 national welfare act contained a provision providing that, “[n]otwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances.”<sup>i</sup>
- Despite Section 902, Michigan’s policy was halted by a court injunction within a few weeks of enactment over concerns the law violated the Fourth Amendment to the Constitution, which protects citizens against unreasonable search and seizure. Generally, courts have ruled governmental, suspicionless drug testing programs need to demonstrate a special need concerning public safety. [Click here to see the ruling of the U.S. District Court, Eastern District of Michigan, Northern Division, \*Marchwinski v. Howard\*.](#) Subsequently, a three-judge panel of the U.S. Court of Appeals, Sixth Circuit, reversed the district court ruling, arguing Michigan could demonstrate both a “special need’ for its drug-testing program and...[that]the government’s interests outweigh the plaintiff’s reasonable expectations of privacy.”<sup>ii</sup> [Click here to see the ruling of the three-judge panel of the U.S. Court of Appeals, Sixth District, \*Marchwinski v. Howard\*.](#) The case was finally settled in 2003 when the full panel of the U.S. Court of Appeals, Sixth Circuit, upheld the district court’s ruling in a close vote<sup>iii</sup>.
- Despite the 2003 U.S. Court of Appeals ruling on the Michigan law, Florida passed a law in June 2011 requiring that all TANF applicants be tested for drugs. Thus, Florida is the only state with a current law requiring suspicionless drug testing as a condition of benefit receipt. On October 24, 2011, a federal district court judge halted implementation of Florida’s new law, and will soon hold a hearing on the matter. In her order, the judge ruled the state did not demonstrate a special need (related to either public safety or the preservation of public funds) for suspicionless drug testing. She also noted “other states competently administer TANF funds without drug tests or with suspicion-based drug testing.” [Click here to read the ruling of the U.S. District Court, Middle District of Florida, Orlando Division, \*Lebron v. Wilkins\*.](#)
- The Congressional Research Service (CRS) found that 13 states in addition to Florida have statutory or regulatory provisions regarding the drug testing or screening of TANF applicants or recipients, but these states do not impose suspicionless drug testing. Some focus drug testing on recipients with felony drug convictions, and others have implemented broad-based or targeted screening<sup>iv</sup> (as opposed to drug testing) combined with referral to treatment. [Click here to see the CRS memorandum regarding \*State Policies on Drug Testing for TANF Assistance Applicants and Recipients\*.](#)

## ***Statutory conformity issues***

- In two letters of January and April 2011, the USDOL UI Administrator, Gay Gilbert, provided comments to Larry Temple, Executive Director of the Texas Workforce Commission, regarding a proposed UI bill in Texas that would, in part, “require claimants to take and pass a drug test conducted by the [Texas Workforce] commission as a condition of eligibility to receive UC.” [Click here to see a copy of Texas HB 126.](#) In addition to discussing the requirement that states pay benefits promptly, and options for paying for testing, Ms. Gilbert raised a statutory conformity issue regarding the part of the bill related to suspicionless testing. Referring to an earlier USDOL decision on a 1964 conformity case, she wrote:

“The payment (or non-payment) of UC must be based on the reasons related to the individual’s unemployment, not on some other factor unrelated to unemployment. . . . Passing a drug test is not related to the fact or cause of the current unemployment. Therefore, this bill raises an issue.”

The USDOL administrator advised Mr. Temple the state could accomplish a similar purpose by fashioning the legislation around the state UI law provision regarding availability for work:

“..the state could implement a drug testing program and condition finding that an individual is available for work on submitting to and passing a drug test. The drug test would then be a test of whether the individual was available for work. If the individual refused to provide a sample, or failed the test, they could be held not available for work and ineligible for benefits until such time as they take and pass the test.”

In the letter, USDOL does not speak to any constitutional issues that may arise from applying suspicionless testing within the framework of the UI program requirement regarding availability for work. [Click here to see USDOL’s January and April 2011 letters commenting on Texas HB 126.](#)

## **Cost and Other Issues States Might Consider**

Arguments for implementing suspicionless drug testing of UI applicants and claimants rest mainly on potential budgetary savings to taxpayers. As a lawmaker in Ohio recently said, “Hard working taxpayers of the state of Ohio should not have to pay for the drug habits of illegal drug users. This assistance from the state is for those who need these funds for food and shelter, not illegal drugs.”<sup>v</sup> In this line of reasoning, a suspicionless test is justified because the state’s interest in making sure the individual is drug free and not wasting or abusing public funds outweighs the degree of intrusion such a test presents. But before proceeding to enact legislation, even strong proponents of the idea are likely to need to evaluate the costs versus benefits of testing, and whether a particular approach

will pass legal and constitutional tests. South Carolina Governor Nikki Haley recently said, “We have to pull the numbers. We have to make sure this works. We have to see what the return is on it. And, we have to see federally and legally if we can do it.”<sup>vi</sup>

While the cost of a drug test is reported to run around \$25 to \$40 per test, the cost per person identified is much higher (for example, widely reported figures from a 1992 study on workplace testing are “the federal government spent \$11.7 million to find 153 drug users among almost 29,000 employees tested in 1990, a cost of \$77,000 per positive test”<sup>vii</sup>). On the savings side, limited implementation experience means there are few data to suggest how many individuals would be found ineligible based on a test, and even fewer data to suggest how many may be deterred from applying for UI in the first place.

Beyond drug testing costs and legal issues, other issues have surfaced in debates over universal or random drug testing in public benefit programs. These issues include the costs of legal challenges, already-noted concerns about privacy and governmental intrusion, possible ethical issues raised by targeting and potentially stigmatizing a large and disadvantaged class of citizens, and the practical concern that drug testing generally is better at identifying drug use than addiction or abuse.

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<sup>i</sup> Section 902 of P.L. 104-193.

<sup>ii</sup> Regarding the special need, the court wrote, “...we think it is beyond cavil that the state has a special need to insure that public moneys....are used by the recipients for their intended purposes and not for procuring controlled substances.” Regarding privacy interest, the court wrote, “...it is clear that the plaintiffs have a somewhat diminished expectation of privacy....[a]pplicants for welfare benefits are required by...regulations to relinquish important and often private information, and are aware that their receipt of benefits is accompanied by a diminished expectation of privacy with regard to that information....the plaintiffs have not demonstrated their privacy interests are outweighed by the interests of the state.”

<sup>iii</sup> For case history, see <http://www.povertylaw.org/poverty-law-library/case/52600/52642>

<sup>iv</sup> A July 19, 2000 report funded by the U.S. Department of Health and Human Services for state and local TANF administrators discusses common screening instruments for identifying substance abuse.

<sup>v</sup> [http://www.middletonjournal.com/blogs/content/shared-gen/blogs/dayton/ohiopoltics/entries/2011/08/25/bill\\_would\\_require\\_drug\\_test\\_t.html](http://www.middletonjournal.com/blogs/content/shared-gen/blogs/dayton/ohiopoltics/entries/2011/08/25/bill_would_require_drug_test_t.html)

<sup>vi</sup> <http://lexington-sc.patch.com/articles/haley-no-jobless-benefits-for-drug-users>

<sup>vii</sup> <http://www.time.com/time/nation/article/0,8599,1211429,00.html> and <http://www.aclu.org/FilesPDFs/drugtesting.pdf>

## CHAPTER 5

### NONMONETARY ELIGIBILITY

#### IN GENERAL

Along with monetary requirements, each state's UI law requires workers to meet nonmonetary requirements. Federal law mandates some of these requirements. The general rule is that workers must have lost their jobs through no fault of their own and must be able, available, and actively seeking work. By examining the worker's current attachment to the labor force, these provisions delineate the type of risk covered by UI law – primarily, unemployment caused by economic conditions.

This chapter is organized from the perspective of a worker experiencing the claim process. First, the state would determine if there are any issues related to the worker becoming unemployed. Second, issues concerning week-to-week eligibility would be explored. Third, the state would examine whether the worker received any “deductible income” causing a reduction in benefits payable.

*Caution:* Nonmonetary requirements are, in large part, based on how a state interprets its law. Two states may have identical laws, but may interpret them quite differently.

*Usage Note:* There is often a distinction between issues that result in disqualification and issues that result in weeks of ineligibility. A disqualified worker has no right to benefits until s/he requalifies, usually by obtaining new work or by serving a set disqualification period. In some cases, benefits and wage credits may be reduced. An ineligible worker is prohibited from receiving benefits until the condition causing the ineligibility ceases to exist. Eligibility issues are generally determined on a week-to-week basis.

#### SEPARATIONS

**VOLUNTARILY LEAVING WORK**—Since the UI program is designed to compensate wage loss due to lack of work, voluntarily leaving work without good cause is an obvious reason for disqualification from benefits. All states have such provisions.

In most states, disqualification is based on the circumstances of separation from the most recent employment. These disqualification provisions may be phrased in terms such as “has left his most recent work voluntarily without good cause.” In a few states, the agency looks to the causes of all separations within a specified period. A worker who is not disqualified for leaving work voluntarily with good cause is not necessarily eligible to receive benefits. For example, if the worker left because of illness or to take care of a family member who is ill, the worker may not be able to or available for work. This ineligibility would generally last only until the individual was again able and available.

## NONMONETARY ELIGIBILITY

**Good Cause for Voluntarily Leaving**—In all states, workers who leave their work voluntarily must have good cause if they are not to be disqualified.

In many states, good cause is explicitly restricted to good cause connected with the work, attributable to the employer, or involving fault on the part of the employer. However, in a state where good cause is not explicitly linked to the work, the state may interpret its law to include good personal cause or it may limit it to good cause related to work. Since a state law limiting good cause to the work is more restrictive, it may contain specific exceptions that are not necessary in states recognizing good personal cause. (For example, an explicit provision not disqualifying a person who quits to accompany a spouse to a new job might not be necessary in a state which recognizes good personal cause; it would be necessary in a state restricting good cause to that related to the work.)

The following table identifies states that restrict good cause for quitting to reasons connected to work.

<b>Table 5-1: VOLUNTARILY LEAVING – MUST BE CONNECTED TO WORK</b>					
State	Basis	State	Basis	State	Basis
AL	L	AZ	L	AR	L
CO	L	CT	L	DE	L
DC	L	FL	L	GA	L
ID	L, R	IL	L	IN	L
IA	L	KS	L	KY	L
LA	L	ME	L, R	MD	I
MA	L	MI	L	MN	L
MO	L	MT	L, R	NE	L
NH	L	NJ	L, R	NM	L
NC	L	ND	L	OK	L
PR	I	SC	I	SD	I
TN	L	TX	L	VT	L
WA	L	WV	L	WI	I
WY	L				

KEY: L = law R = regulation I = interpretation

The following table indicates common “good cause” provisions. Other provisions are discussed in the text following the table. The American Recovery and Reinvestment Act of 2009 (Public Law 111-5) has resulted in changes to many state laws to modernize their unemployment compensation programs, including providing for “compelling family reasons” to voluntarily leave employment. Please note that the following table does not align with the requirements established by P.L. 111-5.

<b>Table 5-2: VOLUNTARILY LEAVING – GOOD CAUSE</b>									
State	Leaving to Accept Other Work	Compulsory Retirement	Sexual or Other Harassment	Domestic Violence	Worker’s Illness	To Join Armed Forces	To Marry	To Move with Spouse	To Perform Marital, Domestic, or Filial Obligations
AL	L		L <sup>1</sup>		L				
AK	L <sup>2</sup>	I	I	L	I	I		L <sup>5</sup> , R <sup>3</sup>	R <sup>6</sup>
AZ	R	R <sup>4</sup>	R	L	R	R		R	R
AR			L	L	L			L <sup>5</sup>	L <sup>6</sup>
CA	R	L, R	L	L	R		R <sup>7</sup>	L <sup>5</sup>	L <sup>6</sup> , R <sup>20</sup>



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CO	L <sup>8</sup>	L	L	L	L	I	L <sup>9</sup>	L <sup>5,12</sup>	L <sup>6</sup>
CT	L <sup>10</sup>	R	R	L	R, I <sup>11</sup>			L <sup>5</sup>	L <sup>6</sup>
DE		I	I	L	L			L <sup>5</sup>	L <sup>6</sup>
DC			R	L	R <sup>11</sup>			L <sup>5</sup>	L <sup>6</sup>
FL	L <sup>10</sup>	I			L			L <sup>12</sup>	
GA	I	I <sup>4</sup>	R <sup>13</sup>		R <sup>11,13</sup>	I		L <sup>12</sup>	
HI	R	R	L	L	I	I		L <sup>5</sup>	L <sup>6</sup>
ID	L, R	L, R	L		L, R	L			
IL	L	I	L	L	L <sup>11</sup>			L <sup>5</sup>	L <sup>6</sup>
IN	L	L	L	L	L	L		L	
IA	L	R	I	I	L	R		L <sup>12</sup>	
KS	L	L	L	L	L	L		L <sup>5</sup>	I
KY	L	I	I <sup>1</sup>		I <sup>11</sup>			L <sup>12</sup>	
LA	I <sup>10</sup>	I	I						
ME	L, R	L, R	R	L, R	L, R <sup>20</sup>	I		L <sup>5,14</sup> , R	L, R <sup>20</sup>
MD		I <sup>4</sup>	I	L <sup>15</sup>	L <sup>15</sup>			L <sup>9,12</sup>	
MA	L	L	L	L	I	I		I	I <sup>6</sup>
MI	L	I <sup>4</sup>	I		I <sup>16</sup>	I		L <sup>12</sup>	
MN	L	I	I	L	I	I		L <sup>5</sup>	L <sup>20</sup>
MS	I	L <sup>4</sup>	L	R	I			R <sup>12</sup>	
MO	L <sup>2,10</sup>		I		I	I <sup>2</sup>		I <sup>17</sup>	
MT		L, R	L, R <sup>18</sup>	L <sup>18</sup>	L, R			L <sup>12</sup>	
NE	L <sup>8</sup>	L <sup>4</sup>	L <sup>19</sup>	L	L			L	
NV	L	I <sup>4</sup>	I	I	I	I		L <sup>5</sup>	L <sup>20</sup>
NH	L, R <sup>2</sup>	I	I	L, R	L <sup>11</sup> , R			L <sup>5</sup>	L <sup>6</sup>
NJ	R	I <sup>4</sup>	I	L, R	R			L <sup>12</sup>	
NM	L	L	L, R	L	L	L, R		L <sup>12</sup>	
NY	I	I	I	L	I	I		L <sup>5</sup> , I	L <sup>6</sup> , I
NC		L <sup>4</sup>	L	L	L			L <sup>5</sup>	L <sup>21</sup>
ND	L <sup>10,22</sup>				L				
OH	L <sup>10</sup>	I	I		I	L <sup>23</sup>	L <sup>9</sup>	L <sup>9</sup>	L <sup>9</sup>
OK		I	I	L	L			L <sup>5,12</sup>	L <sup>6</sup>
OR	R <sup>2</sup>	I <sup>4</sup>	I <sup>20</sup>	L, R	I <sup>20</sup>	I <sup>2</sup>	I <sup>20</sup>	L <sup>5</sup>	L <sup>20</sup>
PA	I	I	I <sup>13</sup>	I	I <sup>13</sup>	I		I <sup>24</sup>	I <sup>20</sup>
PR	I	I	I	I	I				
RI	I	I <sup>4</sup>	L	L	I	I		L <sup>5,9</sup>	L <sup>6</sup>
SC		I	I	L				L <sup>5</sup>	L <sup>6</sup>
SD	L <sup>10</sup>	I	I	L	L				
TN		L <sup>4</sup>	L			L			
TX	L	I	L	L	L			L <sup>9,12</sup>	L <sup>20</sup>
UT	R	I <sup>4</sup>	R	I	R	I			I
VT	I <sup>25</sup>	I <sup>4</sup>	I						

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VA	L <sup>2</sup>	I	L <sup>20</sup>		L <sup>11</sup>			L <sup>12</sup>	
VI	I	I	I	L	I	I		L <sup>5</sup>	L <sup>26</sup>
WA	L <sup>27</sup>	I	L, R	L	L <sup>20</sup>	L		L <sup>5</sup>	L <sup>20</sup>
WV			I		L		L <sup>9</sup>		L <sup>9</sup>
WI	L	L	L	L	L			L <sup>5</sup>	L <sup>6, 28</sup>
WY				L	L			L <sup>12</sup>	

KEY: L = law R = regulation I = interpretation

<sup>1</sup> AL and KY – only if the sexual harassment occurred on the job.

<sup>2</sup> AK and MO – only when the pay is more remunerative; NH – other work must be “better” and must begin within a “reasonable period”; OR – eligible if offer of work is definite, begins in shortest time reasonable, is reasonably expected to continue, and pays more than previous employment or WBA (also applies to claimants who leave work to join the armed forces); VA – only if new work is deemed to be “better”.

<sup>3</sup> If claimant leaves work to accompany or join a spouse at a change of location, if commuting from the new location to the claimant’s work is impractical. Change of location must be a result of spouse’s employment or spouse’s discharge from military service.

<sup>4</sup> Separations due to compulsory retirement addressed under misconduct section of the rules; separations considered a discharge for reasons other than misconduct.

<sup>5</sup> AK, AR, CO, CT, DE, DC, HI, IL, MN, NH, NY, NV, NC, OK, OR, RI, SC, VI, and WI – if claimant separates from employment to accompany spouse to a place from which it is impractical to commute and due to a change in location of spouse’s employment; CA – if claimant leaves employment to accompany spouse or domestic partner to a place from which it is impractical to commute; KS – if individual left work because of the voluntary or involuntary transfer of the individual's spouse from one job to another job at a geographic location which makes it unreasonable for the individual to continue work at the individual's job; ME – to accompany or follow a spouse to, or join a spouse in a new place of residence, and claimant is in all respects able, available and actively seeking suitable work; WA – to relocate for the employment of spouse or domestic partner that is outside the existing labor market area, provided that claimant remained employed for as long as was reasonable prior to the move

<sup>6</sup> AR – if claimant leaves work due to illness, injury, pregnancy or disability of an immediate family member; AK, CA, CT, DC, HI, NH, NY, OK, RI, SC, and WI – illness or disability of immediate family member; CO – if claimant separates from job to care for immediate family member who is suffering from an illness or disability for a period of time that exceeds the greater of the employer’s medical leave of absence policy or the provisions of Family and Medical Leave Act of 1993; DE – to care for spouse, child, or parent with verified illness or disability; IL – if claimant’s assistance is necessary for the purpose of caring for spouse, child, or parent who is in poor physical or mental health or mentally or physically disabled and employer unable to accommodate claimant; MA – urgent, compelling and necessitous if due to poor health and the need to care for a spouse or family member.

<sup>7</sup> If claimant leaves work due to circumstances relating to the claimant's prospective or existing marital status of such a compelling nature as to require the claimant's presence, and claimant has taken reasonable steps to preserve employment relationship.

<sup>8</sup> CO – if claimant quits a construction job that is outside the state of Colorado in order to accept a construction job within the state of Colorado, if such construction worker has maintained Colorado residency; NE – if individual is a construction worker and left his or her employment voluntarily for the purpose of accepting previously secured insured work in the construction industry. Specific criteria apply.

<sup>9</sup> Special disqualification provisions for these issues. CO – benefits deferred for 10 weeks for individuals who quit to marry; MD – individuals who quit to move with spouse are disqualified until they earn 15 times their WBA; does not apply to military spouses; OH – individuals who quit to marry or to perform marital, domestic, or filial obligations are disqualified until they earn \$60 or ½ of AWW, whichever is less; RI – individuals who quit to follow a spouse who has retired are disqualified until they have worked for 8 weeks and earned 20 times the minimum wage; TX – individuals who quit to move with spouse are disqualified for 6 to 25 weeks; does not apply to military spouses; WV – individuals who quit to marry or to perform marital, domestic or filial obligations disqualified until they have worked 30 days in insured employment.

<sup>10</sup> CT – benefits awarded only if claimant left part-time work to accept full-time work; FL – quit must have been from temporary employer with the purpose of returning to work immediately when recalled by worker’s former permanent employing unit that temporarily terminated claimant within the previous 6 calendar months; LA – only if claimant quit part-time employment to protect full-time employment; MO and SD – to return to regular employer; ND – to accept a bona fide job offer with a base-period employer who laid off the individual and with whom the individual has a demonstrated job attachment; OH – only if claimant (1) obtained other employment while still employed or started other employment within 7 calendar days after date of the quit to accept other employment; and (2) worked 3 or more weeks in other employment and earned wages = the lesser of 1½ X claimant’s AWW or \$180.

<sup>11</sup> CT – eligible per regulation for work-related illness; eligible per interpretation for non-work-related illness; DC, KY – illness or disability caused or aggravated by the work; GA – job must have made the condition worse, and quitting must be advised by a doctor; IL – if deemed physically unable to perform work by a licensed physician; NH – pregnancy, illness or injury that is not work-related, provided that physician has attested in writing to claimant’s inability to perform work duties; VA – if advised by doctor to quit for medical reasons.

<sup>12</sup> Military spouses only; CO – if claimant quit to relocate to new residence because claimant’s spouse, who was stationed in Colorado, was killed in combat while serving on active duty in the United States armed forces (repealed effective 7/1/2019); GA, MS – only when spouse has been reassigned from one military assignment to another; KY – state of relocation must have similar statute; MD and MT – mandatory military transfer of the individual’s spouse, in MD the spouse may be a civilian employee of the military or a federal agency involved in military operations; NJ – military spouse or civil union partner must relocate out of state and the relocation must occur within 9 months after the

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Table 5-2: VOLUNTARILY LEAVING – GOOD CAUSE									
State	Leaving to Accept Other Work	Compulsory Retirement	Sexual or Other Harassment	Domestic Violence	Worker's Illness	To Join Armed Forces	To Marry	To Move with Spouse	To Perform Marital, Domestic, or Filial Obligations
<p>military member is transferred; <u>OK</u> – if claimant separated from employment to move with spouse to new location and spouse is or was a member of the military or has a service-connected disability; <u>VA</u> – (this contingent upon 100% federal funding of benefits paid pursuant to this provision) if spouse is on active duty, relocation is pursuant to permanent change of station order, new location is not readily accessible from claimant's place of employment, and new duty assignment is located in a state that does not consider a person accompanying a military spouse to be leaving work voluntarily without good cause (last provision does not apply to Virginia National Guard members).</p> <p><sup>13</sup> <u>GA</u> and <u>PA</u> – claimant must notify employer and try to resolve issue before leaving; must inform employer of limitation before leaving.</p> <p><sup>14</sup> Defines 'spouse' as a person to whom the claimant is legally married, or a person to whom the claimant was legally married within 14 days of arrival at the new place of residence.</p> <p><sup>15</sup> Law contains a three-part voluntary quit provision – good cause, without good cause, and without good cause but with valid circumstances; quitting due to domestic violence, claimant's illness, or illness in claimant's family may be determined to be valid circumstances and would result in a 5 to 10 week time delay penalty.</p> <p><sup>16</sup> Considered involuntary leaving rather than good cause.</p> <p><sup>17</sup> Only if the spouse is also employed by the same employer (for military spouses all employers within the federal government are considered the same employer).</p> <p><sup>18</sup> If individual or child of individual is a victim of domestic violence, sexual assault or stalking, and individual quit work to protect self or child from domestic violence, sexual assault or stalking.</p> <p><sup>19</sup> If individual leaves employment due to workplace harassment on the basis of race, sex, or age.</p> <p><sup>20</sup> <u>CA</u> – if claimant leaves work due to circumstances relating to health, care, or welfare of claimant's family of such a compelling nature as to require claimant's presence, and claimant has taken reasonable steps to preserve employment relationship; <u>ME</u> – illness or disability of claimant or immediate family member if precautions to protect employment were taken by notifying employer and being advised by employer that notification cannot or will not be accommodated; <u>MN</u> – illness, injury or disability of immediate family member if claimant informs employer of medical problem and no reasonable accommodation available; <u>NV</u> – compelling family circumstances, provided no reasonable alternative was available prior to quitting; <u>OR</u> – if reasonable available alternatives are pursued; <u>PA</u> – if reason was necessitous and compelling and claimant exhausted all alternatives; <u>TX</u> – medically verifiable illness of claimant's minor child or medically verifiable terminal illness of claimant's spouse, provided no reasonable alternative was available; <u>VA</u> – if claimant has explored all alternatives and had no choice but to quit; <u>WA</u> – illness or disability of claimant, or death, illness or disability of immediately family member, provided that claimant pursued all reasonable alternatives to preserve employment status and is not entitled to be reinstated to same or comparable position.</p> <p><sup>21</sup> If unable to accept work during a particular shift as a result of an undue family hardship.</p> <p><sup>22</sup> If individual leaves work which is 200 miles or more from the individual's home to accept work which is less than 200 miles from the individual's home provided the work is a bona fide job offer with a reasonable expectation of continued employment.</p> <p><sup>23</sup> If claimant is inducted into the armed forces within 30 days after separation, or 180 days after separation if date of induction is delayed solely at the discretion of the armed forces.</p> <p><sup>24</sup> Only if reason for move was beyond spouse's control and there were insurmountable economic circumstances.</p> <p><sup>25</sup> Only if the new job never materializes due to lack of work.</p> <p><sup>26</sup> Uses responsible person test such as: would failure to move break up the marriage/family?</p> <p><sup>27</sup> New job must be covered by unemployment insurance.</p> <p><sup>28</sup> If claimant quit due to shift change which resulted in loss of child care (must be available for full-time work on original shift).</p>									

*Other Good Cause Provisions*—Several states also specify various circumstances relating to work separations that, by statute, require a determination that the worker left with good cause. Arizona and Connecticut do not disqualify a worker for voluntarily leaving because of transportation difficulties. Several states do not disqualify workers for voluntarily leaving if they left work to accompany their spouse to a place from which it is impractical to commute. Arizona does not disqualify unemancipated minors for voluntarily leaving if they left work to accompany their parent to a place from which it is impractical to commute. Colorado does not disqualify a worker who was absent from work due to an authorized and approved voluntary leave of absence. North Carolina does not disqualify a worker for leaving work due to a unilateral and permanent reduction in full time work hours of more than 20% or reduction in pay of more than 15% and does not deny benefits to a worker based on separation from work resulting from undue family hardship when a worker is unable to accept a particular job because the individual is unable to obtain adequate childcare or elder care. In Arkansas and Utah, if an employer announces a pending reduction in force and asks for volunteers, individuals who participate are not disqualified; any incentives received are reportable as receipt of other remuneration. Illinois does not deny a worker benefits for giving false statements or for failure to disclose information if the previous benefits are being recouped or recovered. In Maine, a claimant who offers to be included in a planned layoff or reduction in force, announced in writing, is not subject to disqualification.

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*Some states treat a worker's quitting to attend school as a voluntary quit. See section on Students, page 5-31 of this chapter.*

Louisiana does not apply the voluntarily leaving disqualification if a worker left part-time or interim employment in order to protect full-time or regular employment. A similar Wisconsin provision says the disqualification will not be applied to a worker who leaves part-time work because of the loss of a full-time job that makes it economically unfeasible to continue the part-time work. Colorado does not disqualify a worker who quits a job outside his/her regular apprenticeable trade to return to work in the regular apprenticeable trade.

Colorado also does not disqualify workers who leave a job because of personal harassment unrelated to the work. In addition, Colorado does not disqualify workers who have separated from employment because they were physically or mentally unable to perform the work.

Nebraska also includes the following as good cause for voluntarily quitting: accepting a voluntary layoff to avoid bumping another worker, leaving employment as a result of being directed to perform an illegal act, because of unlawful discrimination on the basis of race, sex, or age, because of unsafe working conditions, because the employer required the employee to relocate, to accompany a spouse to the spouse's employment in a different city, or voluntarily leaving as a construction worker to accept previously secured work in the construction industry if certain other conditions are met, or equity and good conscience demand a finding of good cause.

*Good Cause - Relation to Other Laws*—California and Michigan specify that a worker leaves a job with good cause if an employer deprived the individual of equal employment opportunities not based on bona fide occupational qualifications. Colorado, Kansas, and Utah do not disqualify a worker for voluntarily leaving if the individual was instructed or requested to perform a service or commit an act in the course of duties which is in violation of an ordinance or statute. Also, Colorado, Kansas, Michigan, and Utah do not disqualify a worker for voluntarily leaving due to hazardous working conditions.

*Good Cause and Labor Arrangements*—Several state laws explicitly address separations that occur under collective bargaining agreements. California, Colorado, and Illinois do not disqualify a worker who, under a collective bargaining agreement, elected to be laid off in place of an employee with less seniority. Iowa has a similar provision which does not require a collective bargaining agreement to be in place.

Delaware and New York do not disqualify workers for voluntarily leaving if, under a collective bargaining agreement or written employer plan, they exercise their option to be separated, with the employer's consent, for a temporary period when there is a temporary layoff because of lack of work. Oklahoma, Pennsylvania, and Tennessee specify that a worker will not be denied benefits for voluntarily leaving if s/he exercises his/her option of accepting a layoff pursuant to a union contract, or an established employer plan, program, or policy. Georgia and Tennessee permit the worker, because of lack of work, to accept a separation from employment. In Tennessee, however, a worker will be disqualified for a separation due to accepting a program providing incentives for voluntarily terminating employment.

Kentucky does not disqualify workers for voluntarily leaving if they are separated due to a labor management contract or agreement or an established employer plan, program or policy that permits the employer to close the plant or facility for vacation or maintenance. Also, Kentucky does not disqualify workers for voluntarily leaving their next most recent work which was concurrent with the most recent work, or for leaving work that was 100 miles (one-way) from home to accept work less than 100 miles away, or if the worker left part-time work to accept the most recent suitable work.

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Oregon does not disqualify workers for voluntarily leaving if they cease to work or fail to accept work when a collective bargaining agreement between their bargaining unit and their employer are in effect and the employer unilaterally modifies the amount of wages payable under the agreement, in breach of the agreement. Oregon does not disqualify workers for voluntarily leaving work and deems them to be laid off if: the worker works under a collective bargaining agreement; the worker elects to be laid off when the employer has decided to lay off employees; and the worker is placed on the referral list under the collective bargaining agreement.

In Wisconsin, the voluntarily leaving disqualification will not apply to a worker who terminates work with a labor organization which causes the employee to lose seniority rights granted under a union agreement, and if the termination results in a loss of employment with the employer that is a party to that union agreement.

*Good Cause and Suitable Work*—Several states have provisions prohibiting the application of the voluntary quit provision if the work was determined not to be suitable employment for the worker.

Illinois does not impose a disqualification if the worker accepted new work after separation from other work and, after leaving the new work, the new work is deemed unsuitable. Michigan and Missouri do not disqualify workers for voluntarily leaving if they leave unsuitable work within a specified number of days after beginning the work. Minnesota does not disqualify a worker for voluntarily leaving if the accepted employment represents a departure from the individual's customary occupation and experience and the individual left the work within 30 days under specified conditions. New Hampshire allows benefits if a worker, not under disqualification, accepts work that would not have been suitable and terminates such employment within 4 weeks. New York provides that voluntarily leaving is not in itself disqualifying if circumstances developed in the course of employment that would have justified the worker in refusing such employment in the first place. North Dakota does not apply the voluntarily leaving disqualification if a worker accepted work which could have been refused with good cause and terminated the employment with the same good cause within the first 10 weeks after starting work. Wisconsin does not apply the voluntarily leaving disqualification if the individual accepts work which could have been refused because of the labor standard provisions and s/he terminates the work within 10 weeks of starting the work.

Colorado does not disqualify if the separation is determined to have been as a result of an unreasonable reduction in pay or as a result of refusing with good cause to work overtime without reasonable advance notice, or as a result of a substantial change in the working conditions.

North Dakota also has a good cause provision for leaving work with the most recent employer to accept a bona fide job offer with a base period employer who laid off the individual and with whom the individual has a demonstrated job attachment. This requires earnings with the base period employer in each of 6 months during the 5 calendar quarters before the calendar quarter in which the individual files a claim for benefits.

Wisconsin will not apply the voluntarily quit disqualification if a worker left to accept a job and earned wages of 4 times the weekly benefit amount, and the work offered average weekly wages at least equal to the wages earned in the most recent computed quarter in the terminated employment, or if the hours of work are the same or greater, or if the worker was offered the opportunity for longer-term employment, or if the position was closer to the individual's home than the terminated employment. Also in Wisconsin, a disqualification will not apply if a worker claiming partial benefits left to accept work offering an average weekly wage greater than the average weekly wage in the work terminated.

*Good Cause and Jobs for Temporary Service Employers*—Several states' laws provide that, if an employee of a temporary service employer fails to be available for future assignments upon completion of the current assignment, the worker shall be deemed to have voluntarily left employment without good cause connected to the work. These states require the employer to provide the worker with notice that the worker must notify the temporary service upon the completion of an assignment and that failure to do so may result in benefit denial.

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Table 5-3: STATES WITH TEMPORARY WORKERS PROVISIONS					
States Where Failure to Contact Employer Upon Completion of Assignment is Deemed VQ					
AL	R	AZ	R	AR	L
CO	L	DE	L	FL	L
GA	L	HI	I	ID	L, R
IN	L	IA	L	KS	L
KY	L	LA	I	MA	L
MI	L	MN	L	MO	L
NE	L	NJ	R	NY	I
ND	L	OK	L	PA	I
PR	I	RI	L	SC	R
SD	I	TN	I	TX	L
UT	I	VA	I	WV	I
KEY: L = law , R = regulation, I = interpretation					

**Period of Disqualification**—In most states, the disqualification lasts until the worker is again employed and earns a specified amount of wages. In Alaska and Colorado, the disqualification is a fixed number of weeks (in Colorado, only for separations from the most recent employer); the longest period in either of these states is 10 weeks. Nebraska has a disqualification of 12 weeks. Maryland and North Carolina impose fixed duration disqualifications for certain conditions described in the following table.

**Reduction of Benefit Rights**—In some states, in addition to the postponement of benefits, benefit rights are reduced, usually equal in extent to the weeks of benefit postponement imposed as described in the following table.

Table 5-4: VOLUNTARILY LEAVING - DISQUALIFICATION			
State	Benefits Postponed for:		Amount of Benefits Reduced
	Number of Weeks	Duration of Unemployment Until Requalify <sup>1</sup>	
AL		10 x WBA <sup>2</sup>	6-12 x WBA
AK	W + 5 <sup>2,3</sup>		3 x WBA
AZ		5 x WBA	
AR		At least 30 days of covered work	
CA		5 x WBA	
CO	WF + 10		Wage credits from employer removed from the claim (applies to all BP employers)
CT		10 x WBA <sup>4</sup>	
DE		4 weeks of work and 4 x WBA	
DC		10 weeks of work and wages = to 10 x WBA <sup>3</sup>	
FL		17 x WBA <sup>2</sup>	
GA		10 x WBA <sup>5</sup>	
HI		5 x WBA	

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Table 5-4: VOLUNTARILY LEAVING - DISQUALIFICATION			
State	Benefits Postponed for:		Amount of Benefits Reduced
	Number of Weeks	Duration of Unemployment Until Requalify <sup>1</sup>	
ID		14 x WBA	
IL		Wages = to WBA in each of 4 weeks	
IN		Wages = to WBA in each of 8 weeks	By 25%
IA		10 x WBA <sup>2</sup>	
KS		3 x WBA	
KY		10 weeks of covered work & wages = to 10 x WBA <sup>2</sup>	
LA		10 x WBA <sup>2</sup>	
ME		4 x WBA <sup>2,4</sup>	
MD	W + 5-10 <sup>2,3</sup>	15 x WBA <sup>2,3</sup>	
MA	X <sup>2</sup>	8 weeks of work and wages of 8 x WBA	
MI		12 x WBA	
MN		8 x WBA	
MS		8 x WBA	
MO		10 x WBA <sup>2</sup>	
MT		Wages equal to 6 x WBA <sup>3</sup>	
NE	13 <sup>2,6,7</sup>		Equal <sup>6</sup>
NV		Wages equal to WBA in each of 10 weeks <sup>4</sup>	
NH		5 weeks of work in each of which earned 20% more than WBA	
NJ		4 weeks of work and wages equal to 6 x WBA	
NM		5 x WBA in covered work	
NY		3 days work in each of 5 weeks and 5 x WBA	
NC	X <sup>3</sup>	10 x WBA earned in at least 5 weeks <sup>3</sup>	X <sup>3</sup>
ND		10 x WBA <sup>2</sup>	
OH		6 weeks in covered work + wages equal to 27.5% of AWW <sup>2,8</sup>	
OK		10 x WBA	
OR		4 x WBA	8 x WBA
PA		6 x WBA	
PR		4 weeks of work and wages equal to 10 x WBA	
RI		8 weeks of covered work equaling 20 x minimum hourly wage in each week	

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Table 5-4: VOLUNTARILY LEAVING - DISQUALIFICATION			
State	Benefits Postponed for:		Amount of Benefits Reduced
	Number of Weeks	Duration of Unemployment Until Requalify <sup>1</sup>	
SC		8 x WBA	Equal
SD		6 weeks in covered work and wages = to WBA in each week <sup>2</sup>	
TN		10 x WBA <sup>2</sup>	
TX		6 weeks of work or wages equal to 6 x WBA <sup>6</sup>	
UT		6 x WBA <sup>2</sup>	
VT	X <sup>9</sup>	6 x WBA	
VA		30 days or 240 hours of work <sup>2</sup>	
VI		4 weeks of work and 4 x WBA	
WA		7 weeks and earnings in bona fide work of 7 x WBA	
WV		At least 30 working days of covered employment	Equal
WI	X <sup>9</sup>	7 weeks and 14 x WBA	Wage credits from employer removed from the claim
WY		8 x WBA	

KEY: W = Week of separation, WF = Week of filing  
 "Equal" indicates reduction equal to WBA multiplied by number of weeks of disqualification.

<sup>1</sup> Minimum employment or wages to requalify for benefits.

<sup>2</sup> Separation preceding the most recent separation may be considered under the following circumstances. AL – if last employment not considered bona fide work; AK, FL, IA, MD, MA, MO, OH, and UT – when employment or time period subsequent to separation does not satisfy potential disqualification; LA – disqualification applicable to base period or last employer; ME – disqualification applicable to most recent previous separation if last work was a voluntary quit and was not in usual trade or intermittent; VA – disqualification applicable to last 30-day or 240 hour employing unit; DC, SD, and WV – if employment was less than 30 days unless on an additional claim; KY and NE – reduction or forfeiture of benefits applicable to separations from any BP employer; ND - any employer with whom the individual earned 8 x WBA; TN - any employer with whom the individual earned 10 WBA.

<sup>3</sup> In AK, disqualification is terminated if claimant returns to work and earns at least 8 x WBA; In MT, disqualification is terminated after claimant attends school for 3 consecutive months and is otherwise eligible; In MD, the duration disqualification imposed unless a valid compelling or necessitous circumstance exists; In NC, the agency may reduce permanent disqualification to 5 weeks, with a corresponding reduction in total benefits; In NC, if an employer gives notice of future work separation, disqualification of 4 weeks imposed if the worker establishes good cause for his failure to work out the notice.

<sup>4</sup> In ME, disqualified for duration of unemployment and until claimant earns 6 x WBA if voluntarily retired; In NV, disqualified for W+4 to enter self employment, and for 10 weeks to seek better employment; In CT, voluntary retiree disqualified for the duration of unemployment and until 40 x WBA is earned.

<sup>5</sup> Individual must work for a liable employer and become unemployed through no fault of his own.

<sup>6</sup> In NE, a disqualification for the week of separation plus two weeks if claimant leaves to accept a better job (change from week of separation plus 1 week to week of separation plus 2 weeks effective July 1, 2011); In TX, disqualification begins with week following filing of claim.

<sup>7</sup> Effective July 1, 2011.

<sup>8</sup> If claimant left work for compelling domestic circumstances, can requalify by earning the lesser of ½ of AWW or \$60, in covered employment.

<sup>9</sup> In VT, disqualified for 1-6 weeks if claimant left work due to health reasons; In WI, disqualification for week of termination + 4 weeks if claimant refuses transfer to a job paying less than 2/3 of wage rate.

**DISCHARGE FOR MISCONDUCT CONNECTED WITH THE WORK**—Provisions for disqualification for discharge for misconduct (which may be called a discharge for “just cause” or “a disqualifying act”) follow a pattern similar to that for voluntary leaving. Many states provide for heavier disqualification in the case of discharge for dishonesty or a criminal act, or other acts of aggravated misconduct. (See “Disqualifications for Gross Misconduct” immediately following this section.) Some laws define misconduct in such terms as:



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- Deliberate misconduct in willful disregard of the employing unit's interest (Connecticut, Massachusetts, Missouri, Rhode Island, South Dakota, and Washington).
- Participation in an illegal strike as determined under state or federal laws. Each instance of an absence for 1 day or 2 consecutive days without either good cause or notice to the employer that could have reasonably been provided (Connecticut).
- Failure to obey orders, rules, or instructions, or failure to perform the duties for which the individual was employed (Georgia).
- A violation of duty reasonably owed the employer as a condition of employment. The failure of the employee to notify the employer of an absence, and under certain conditions, repeated absences resulting in absence from work of 3 days or longer (Kansas).
- A legitimate activity in connection with labor organizations or failure to join a company union shall not be construed as misconduct (Kentucky).
- A culpable breach of the employee's duties or obligations to the employer or a pattern of irresponsible behavior, which in either case manifests a disregard for a material interest of the employer (Maine and Missouri).
- Absence from work due to incarceration for 2 workdays for conviction of a criminal offense (Maine).
- Absenteeism or tardiness if it violates the employer's attendance policy and the claimant knew about the policy in advance (Missouri and Virginia).
- Discharge or temporary suspension for willful misconduct connected with the work (Pennsylvania).
- A willful and deliberate violation of a standard or regulation by an employee of an employer licensed or certified by Virginia, which violation would cause the employer to be sanctioned or have its license or certification suspended (Virginia).
- Any action that places others in danger or an intentional violation of employer policy or law, but does not include an act that responds to an unconscionable act of the employer (Texas).
- Violation of a company rule if the individual knew or should have known about the rule, the rule was lawful and reasonably related to the job, and the rule was fairly and consistently enforced (Mississippi).

Detailed interpretations of what constitutes misconduct have been developed in each state's benefit decisions. In determining what constitutes misconduct, many states rely on the definition established in the 1941 Wisconsin Supreme Court Case, Boynton Cab Co. v. Neubeck:

"Misconduct . . . is limited to conduct evincing such willful or wanton disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree as to manifest an equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer."

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**Illegal Drugs and Alcohol**—The following table includes information about states with provisions in their UI law dealing specifically with alcohol and/or illegal drugs, and testing for alcohol or illegal drugs.

<b>Table 5-5: STATES WITH DRUG AND/OR ALCOHOL PROVISIONS</b>	
<b>State</b>	<b>Workers Will Be Disqualified:</b>
AL	For testing positive for illegal drugs after being warned of possible dismissal, or for refusing to undergo drug testing, or for knowingly altering a blood or urine specimen
AK	For reporting to work under the influence of drugs/alcohol, consumption on the employer's premises during work hours, violation of employer's policy as long as policy meets statutory requirements
AZ	For refusing to undergo drug or alcohol testing, or having tested positive for drugs or alcohol
AR	For drinking on the job or reporting for work while under the influence of intoxicants, including a controlled substance; if discharged for testing positive for an illegal drug; for being rejected for offered employment as a direct result of failing to appear for or pass a USDOT qualified drug screen
CA	For chronic absenteeism due to intoxication, reporting to work while intoxicated, using intoxicants on the job, or gross neglect of duty while intoxicated, when any of these incidents is caused by an irresistible compulsion to use intoxicants; also disqualified if individual quit for reasons caused by an irresistible compulsion to use intoxicants
CT	If discharged or suspended due to being disqualified under state or federal law from performing work for which hired as a result of a drug or alcohol testing program mandated and conducted by such law
FL	For drug use, as evidenced by a positive, confirmed drug test
GA	For violating an employer's drug free workplace policy
KS	For refusing to undergo drug or alcohol testing, for having tested positive for drugs or alcohol, or for failing a pre-employment drug screen
KY	For reporting to work under the influence of drugs/alcohol, or consuming them on employer's premises during working hours
LA	For the use of illegal drugs, on or off the job
MI	For failing a drug test, refusing to undergo a drug test, or using drugs at work, for alcohol intoxication at work
MO	For any drug/alcohol use, positive pre-employment drug/alcohol test is considered misconduct
NH	For intoxication or use of drugs which interferes with work, 4-26 weeks
OK	For refusing to undergo drug or alcohol testing, or having tested positive for drugs or alcohol
OR	For failure or refusal to take a drug or alcohol test as required by employer's written policy; being under the influence of intoxicants while performing services for the employer; possessing a drug unlawfully; testing positive for alcohol or an unlawful drug in connection with employment; or refusing to enter into/violating terms of a last-chance agreement with employer; not disqualified if participating in a recognized rehabilitation program within 10 days of separation
PA	For failure to submit to and/or pass a drug test conducted pursuant to an employer's established substance abuse policy, provided that the drug test is not requested or implemented in violation of the law or of a collective bargaining agreement
SC	For failure or refusal to take a drug test or submitting to a drug test which tests positive for illegal drugs or legal drugs used unlawfully
WV	For reporting to work in an intoxicated condition or under the influence of any controlled substance without a valid prescription; for being intoxicated or under the influence of any controlled substance without a valid prescription while at work; for manipulating a sample or specimen in order to thwart a lawfully required drug or alcohol test; for refusal to submit to random drug testing for employees in safety sensitive positions
VA	For drug use, as evidenced by a positive, confirmed USDOT qualified drug screen conducted in accordance with the employer's bona fide drug policy

Disqualification for discharge for misconduct, as for voluntary leaving, is usually based on the circumstances of separation from the most recent employment. However, as indicated in the following table, a few state laws require consideration of the reasons for separation from employment other than the most recent.

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Federal law permits cancellation of wage credits for only three reasons: misconduct in connection with the work, fraud in connection with a claim, or receipt of disqualifying income. The severity of the cancellation penalty depends mainly on the presence or absence of additional wage credits during the base period. If the wage credits canceled extend beyond the base period for the current benefit year, the individual may not be monetarily eligible in the subsequent benefit year.

**Period of Disqualification**—Some states have a variable disqualification for discharge for misconduct. In some states the range is small, for example, the week of occurrence plus 3 to 7 weeks. In others, the range is large, 5 to 26 weeks. Some states provide a fixed disqualification, and others disqualify for the duration of the unemployment, or longer. Some states reduce or cancel all of the worker's benefit rights. Some states provide for disqualification for disciplinary suspensions.

**Table 5-6: DISCHARGE FOR MISCONDUCT - DISQUALIFICATION**

(Also see Table 5-7)

State	Includes Other Than Last Employer	Benefits Postponed for:		Benefits Reduced or Canceled	Disqualification for Disciplinary Suspension
		Number of Weeks	Duration of Unemployment Until Requalify <sup>1</sup>		
AL	X <sup>2</sup>	W + 3-7	10 x WBA	Equal	W + 1-3
AK		W + 5 <sup>3</sup>		3 x WBA	Same as discharge for misconduct
AZ			5 x WBA		
AR		W + 7 <sup>3</sup>	30 days covered employment <sup>4</sup>		Lesser of duration of suspension or 8 weeks
CA			5 x WBA		
CO		WF + 10		Equal	
CT			10 x WBA		Same as discharge for misconduct
DE			4 weeks of work and 4 x WBA		
DC	X <sup>2</sup>	WF + 7 <sup>3</sup>	8 weeks of work and 8 x WBA	8 x WBA <sup>4</sup>	
FL	X <sup>2</sup>	W + 1-52 <sup>3</sup>	17 x WBA		Duration
GA			10 x WBA	Equal	Same as discharge for misconduct
HI			5 x WBA		
ID	X <sup>2</sup>		14 x WBA		
IL			Wages equal to WBA in each of 4 weeks		
IN			Wages equal to WBA in each of 8 weeks	25%, only one reduction during benefit year	
IA			10 x WBA		Same as discharge for misconduct
KS			3 x WBA		
KY			10 weeks of covered work and wages equal to 10 x WBA		
LA			10 WBA		
ME			4 x WBA		Duration or until earns 4 x WBA

## NONMONETARY ELIGIBILITY

**Table 5-6: DISCHARGE FOR MISCONDUCT - DISQUALIFICATION**

(Also see Table 5-7)

State	Includes Other Than Last Employer	Benefits Postponed for:		Benefits Reduced or Canceled	Disqualification for Disciplinary Suspension
		Number of Weeks	Duration of Unemployment Until Requalify <sup>1</sup>		
MD	X <sup>2</sup>	W + 10-15			Same as discharge for misconduct
MA	X <sup>2</sup>		8 weeks of work and wages of 8 x WBA		
MI			17 x WBA		
MN			8 x WBA		Duration
MS			8 x WBA		
MO	X <sup>2</sup>		6 x WBA for each disqualifying separation		Same as discharge for misconduct
MT			Wages equal to 8 x WBA		
NE	X <sup>2</sup>	12		Equal	
NV			Wages equal to WBA in each of 15 weeks		
NH			5 weeks work in each of which earned 20% more than WBA		Duration
NJ	X <sup>2</sup>	W + 5			Same as discharge for misconduct
NM			5 x WBA in covered work		
NY			3 days work in each of 5 weeks and 5 x WBA		
NC		X <sup>3</sup>	10 x WBA in at least 5 weeks	X <sup>3</sup>	
ND	X <sup>2</sup>		10 x WBA		Duration
OH	X <sup>2</sup>		6 weeks in covered work plus wages equal to 27.5% of state AWW		Duration
OK			10 x WBA		
OR			4 x WBA	8 x WBA	Same as discharge for misconduct
PA			6 x WBA		Same as discharge for misconduct
PR			4 weeks of work and wages equal to 10 x WBA		Same as discharge for misconduct
RI	X <sup>2</sup>		8 weeks of covered work equaling 20 x minimum hourly wage in each week		Same as discharge for misconduct
SC		WF + 5-26		Equal	
SD	X <sup>2</sup>		6 weeks in covered work and wages equal to WBA each week		Same as discharge for misconduct
TN	X <sup>2</sup>		10 x WBA		
TX			6 weeks of work or wages equal to 6 x WBA		
UT	X <sup>2</sup>		6 x WBA in covered work		
VT		WF + 6-15			

## NONMONETARY ELIGIBILITY

**Table 5-6: DISCHARGE FOR MISCONDUCT - DISQUALIFICATION**

(Also see Table 5-7)

State	Includes Other Than Last Employer	Benefits Postponed for:		Benefits Reduced or Canceled	Disqualification for Disciplinary Suspension
		Number of Weeks	Duration of Unemployment Until Requalify <sup>1</sup>		
VA	X <sup>2</sup>		30 days or 240 hours of work		Duration
VI			4 weeks of work and 4 x WBA		Same as discharge for misconduct
WA			10 weeks and earnings in bona fide work 10 x WBA		Same as discharge for misconduct
WV	X <sup>2</sup>	W + 6		Equal <sup>5</sup>	
WI			7 weeks elapsed and 14 x WBA	Benefit rights based on any work involved canceled	
WY			12 x WBA		

KEY: W = Week of discharge or week of suspension, WF = Week of filing

“Equal” indicates a reduction equal to the WBA multiplied by the number of weeks of disqualification.

<sup>1</sup> Minimum employment or wages to requalify for benefits and separated through no fault of his/her own.

<sup>2</sup> Disqualification pertains only to last separation unless indicated. In AL, the preceding separation may be considered if last employment is not considered bona fide work. In FL, ID, MD, MA, MO, OH, RI and UT, a previous employer may be considered if the work with the separating employer does not satisfy a potential disqualification. In VA, disqualification is applicable to last employing unit for which claimant has worked 30 days or 240 hours. In DC, SD, and WV, disqualification is applicable to last 30 day employing unit on new claims and to most recent employer on additional claims. In ND, any employer with whom the individual earned 8 x WBA. In TN, 10 x WBA. In NE, reduction or forfeiture of benefits applicable to separations from any BP employer. In NJ, provided the period of disqualification has not elapsed prior to the date of claim.

<sup>3</sup> In AK, the disqualification is terminated if claimant returns to work and earns 8 x WBA. In DC, disqualification is terminated if either condition is satisfied. In FL, both the term and the duration-of-unemployment disqualifications are imposed. In NC, the agency may reduce permanent disqualification to time certain, but not less than 5 weeks; when permanent disqualification changed to time certain, benefits are reduced by an amount equal to the number of weeks of disqualification x WBA. Also, an individual will be disqualified for substantial fault on the part of the claimant that is connected with work but not rising to the level of misconduct. The disqualification will vary from 4-13 weeks depending on the circumstances.

<sup>4</sup> For discharges that occur during the period of 7/1/2009 through 6/30/2011.

<sup>5</sup> Benefit reduction is restored if individual returns to covered employment for at least 30 days within BY.

**Disqualification for Gross Misconduct**—Some states provide heavier disqualifications for certain types of misconduct. For purposes of this section, all of these heavier disqualifications will be considered “gross misconduct” even if the state’s law does not specifically use this term.

In a few states, the disqualification for gross misconduct runs for 1 year; in other states, for the duration of the worker’s unemployment; and in most of the states, wage credits are canceled in whole or in part, on either a mandatory or optional basis. The definitions of gross misconduct are in such terms as:

- Discharge for dishonesty or an act constituting a crime or a felony in connection with the work, if such a worker is convicted or signs a statement admitting the act (Florida, Illinois, Indiana, New Hampshire, Nevada, New York, Oregon, Utah, and Washington).
- Discharge for a dishonest or criminal act in connection with the work (Alabama).
- Discharge for dishonesty, intoxication (including a controlled substance), or willful violation of safety rules (Arkansas).
- Conduct evincing such willful or wanton disregard of an employer's interests or negligence or harm of such a degree or recurrence as to manifest culpability or wrongful intent, or assault or threatened assault upon supervisors, coworkers, or others at the work site (Colorado).

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- Assault, bodily injury, property loss or damage amounting to at least \$2,000; theft, sabotage, embezzlement, or falsification of employer's records (Georgia).
- Conduct evincing extreme, willful, or wanton misconduct (Kansas).
- Misconduct that has impaired the rights, property, or reputation of a base-period employer (Louisiana).
- Conviction of a felony or misdemeanor in connection with the work (Maine and Utah).
- Deliberate and willful disregard of standards of behavior showing gross indifference to the employer's interests (Maryland).
- Assault, theft, or willful destruction of property (Michigan).
- Any act that would constitute a gross misdemeanor or felony (Minnesota).
- Gross, flagrant, willful, or unlawful misconduct (Nebraska).

*Only Maryland includes a disciplinary suspension in the definition of gross misconduct.*

**Table 5-7: STATES WITH GROSS MISCONDUCT PROVISIONS – DISQUALIFICATION**

(Also See Table 5-6)

State	Includes Other Than Last Employer	Benefits Postponed For:			Benefits Reduced or Canceled
		Fixed Number of Weeks	Variable Number of Weeks	Duration of Unemployment Until Requalify	
AL	X <sup>1</sup>			10 x WBA <sup>1</sup>	Wages earned from employer involved canceled
AK		52		20 x WBA	
AR				10 weeks of work in each of which WBA is earned	
CO		26			Equal
DC				10 weeks of work and wages equal to 10 x WBA	
FL			Up to 52	17 x WBA	
IL					All prior wage credits canceled <sup>2</sup>
IN					All prior wage credits canceled <sup>2</sup>
IA					All prior wage credits canceled
KS				8 x WBA	All prior wage credits canceled
LA	X <sup>1</sup>			10 x WBA <sup>1</sup>	Wages earned from employer involved canceled <sup>1</sup>
ME				Greater of \$600 or 8 x WBA	
MD				25 x WBA <sup>3</sup>	

## NONMONETARY ELIGIBILITY

Table 5-7: STATES WITH GROSS MISCONDUCT PROVISIONS – DISQUALIFICATION					
(Also See Table 5-6)					
State	Includes Other Than Last Employer	Benefits Postponed For:			Benefits Reduced or Canceled
		Fixed Number of Weeks	Variable Number of Weeks	Duration of Unemployment Until Requalify	
MI	X <sup>1</sup>	26 <sup>1</sup>		In each of 13 weeks, earnings at least 1/13 of minimum qualifying high quarter amount <sup>4</sup>	
MN				8 x WBA	Wages earned from employer involved canceled
MO	X <sup>1</sup>			6 x WBA for each disqualifying separation <sup>1,5</sup>	Optional <sup>5</sup>
MT		12 months			Equal
NE					All prior wage credits canceled
NV					Benefit rights based on any work involved canceled <sup>6</sup>
NH			WF + 4-26 <sup>6</sup>		All prior wage credits canceled
NJ	X <sup>1</sup>			4 weeks of covered work and wages = to 6 x WBA	Wages earned from employer involved canceled
NY	X <sup>1</sup>	12 months <sup>1</sup>			Wages earned from employer involved canceled
ND		12 months			
OH	X <sup>1</sup>				Benefit rights based on any work involved canceled <sup>1</sup>
OR					All prior wage credits canceled
SC			WF + 5-26		Optional equal
UT		W + 51			All wage credits from the separating employer are canceled
VT				6 x WBA	Wages earned from employer canceled <sup>7</sup>
WA					Greater of all hourly wage credits from employer involved or 680 hours of wage credits, canceled
WV	X <sup>1</sup>			30 days in covered work	

KEY: W = Week of discharge, WF = Week of filing

<sup>1</sup> In AL, disqualification applies to other than most recent separation from bona fide work only if employer files timely notice alleging disqualifying act. In LA, MI, and MO, disqualification is applicable for all BP employers. In OH, applies if unemployed because of dishonesty or felony in connection with employment. In NY, no days of unemployment deemed to occur for following 12 months if claimant is convicted or signs statement admitting felonious act in connection with employment. In WV, reduction or forfeiture of benefits is applicable to either most recent work or last 30-day employing unit. In NJ, any base period employer.

<sup>2</sup> In IL, wage credits are cancelled if gross misconduct constitutes a felony or theft and is admitted by the individual or has resulted in conviction in a court of competent jurisdiction. In IN, same applies if gross misconduct constitutes a felony or misdemeanor.

<sup>3</sup> Also has provision for aggravated misconduct, which consists of either physical assault or property loss or damage so serious and with malice that the gross misconduct penalty is not sufficient. Disqualification is for duration of unemployment and earnings of at least 30 x WBA.

<sup>4</sup> Or claimant must file a continued claim in each of 13 weeks and certify as to satisfaction of all usual weekly eligibility requirements

<sup>5</sup> Option is taken by the agency to cancel all or part of wages depends on seriousness of misconduct. The only wage credits canceled are those based on work-connected misconduct.

<sup>6</sup> In NH, if discharged for arson, sabotage, felony, dishonesty, or theft greater than \$500, all prior wage credits are canceled. In NV, if worker is discharged and admits in writing or under oath, or is convicted for assault, arson, sabotage, grand larceny, embezzlement, or wanton destruction of property in connection with work, wage credits from that employer are canceled.

<sup>7</sup> Effective July 1, 2011.

## NONMONETARY ELIGIBILITY

### LABOR DISPUTES

Unlike many other eligibility provisions, those related to labor disputes do not question whether the unemployment is incurred through fault on the part of the individual worker. The denial is always a postponement of benefits; there is no reduction or cancellation of benefit rights. In almost all states, the denial period is indefinite and geared to the continuation of the dispute-induced stoppage or to the progress of the dispute.

**Definition of Labor Dispute**—State laws use different terms to describe labor disputes. In addition to labor dispute, these terms include trade dispute, strike, “strike and lockout,” or “strike or other bona fide labor dispute.” Except for Alabama, Arizona, Colorado, and Minnesota, state laws do not define these terms. Some states exclude the following from their denials:

- Employer lockouts, presumably to avoid penalizing workers for the employer’s action.
- Disputes resulting from the employer’s failure to conform to the provisions of a labor contract.
- Disputes caused by the employer’s failure to conform to any state or federal law relating to wages, hours, working conditions, or collective bargaining.
- Disputes where the employees are protesting substandard working conditions.

**Location of the Dispute**—Usually a worker is not denied unless the labor dispute is in the establishment in which the worker was last employed. Exceptions to this are found in the following states:

- Idaho (omits this provision).
- North Carolina, Oregon, Texas, and Virginia – deny workers at any other premises that the employer operates if the dispute makes it impossible for the employer to conduct work normally at such premises.
- Michigan – deny at any establishment within the United States functionally integrated with the striking establishment or owned by the same employing unit.

**Period of Denial**—In most states, the denial period ends when the “stoppage of work because of a labor dispute” ends or the stoppage ceases to be caused by the labor dispute. In other states, the denial period lasts while the labor dispute is in “active progress.” In others, the denial period lasts while the workers’ unemployment is a result of a labor dispute.

A few state laws allow workers to terminate the denial period by showing that the labor dispute (or the stoppage of work) is no longer the cause of their unemployment:

- In Indiana, the denial ends following termination of employment with the employer involved in the dispute.
- In Michigan, the denial ends if a worker works in at least 2 consecutive calendar weeks and earns wages in each week of at least the weekly benefit amount based on employment with the employer involved in the labor dispute.
- In Missouri, the denial ends following the bona fide employment of the worker for at least the major part of each of 2 weeks.



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- In New Hampshire, the denial ends 2 weeks after the dispute is ended even if the stoppage of work continues.
- In Maine, Massachusetts, New Hampshire, and Utah, a worker may receive benefits if, during a stoppage of work resulting from a labor dispute, the worker obtains employment with another employer and earns a specified amount of wages. However, wages earned with the employer involved in the dispute cannot be used to determine eligibility while the stoppage of work continues.
- In contrast, some states' laws extend the denial for the period of time necessary for the employer to resume normal operations (Arkansas, Colorado, North Carolina, and Tennessee). Others extend the denial period to shutdown and start up operations (Michigan and Virginia).
- In New York, a worker is denied for 7 consecutive weeks due to unemployment because of a strike, lockout, or concerted activity not authorized or sanctioned by the collective bargaining unit in the establishment where such individual was employed.

**Exclusion of Individual Workers**—Most states provide that individual workers are not denied under the labor dispute provisions if they and others of the same grade or class are not participating in the dispute, financing it, or directly interested in it.

Table 5-8: LABOR DISPUTES - PERIOD OF DENIAL AND WORKERS EXCLUDED									
State	Duration of Denial			Disputes Excluded if Caused by:			Workers Not Denied if Neither They Nor any of the Same Grade or Class Are:		
				Employer's Failure to Conform to:		Lockout			
	During Stoppage of Work	While Dispute is in Active Progress	Other	Contract	Labor Law		Participating In Dispute	Financing Dispute	Directly Interested in Dispute
AL		X							
AK	X			X	X		X		X
AZ			X <sup>1</sup>	X	X		X	X	X
AR			X <sup>2</sup>			X	X		X
CA		X				X <sup>3</sup>			
CO			X <sup>2</sup>			X <sup>4</sup>	X	X	X
CT			X <sup>1,2</sup>			X	X	X	X
DE	X					X			
DC		X				X	X		X
FL		X				X	X	X	X
GA	X <sup>5</sup>					X	X	X	X
HI	X						X		X
ID			X <sup>1</sup>				X	X <sup>6</sup>	X
IL	X					X <sup>4</sup>	X	X	X

## NONMONETARY ELIGIBILITY

**Table 5-8: LABOR DISPUTES - PERIOD OF DENIAL AND WORKERS EXCLUDED**

State	Duration of Denial			Disputes Excluded if Caused by:			Workers Not Denied if Neither They Nor any of the Same Grade or Class Are:		
				Employer's Failure to Conform to:		Lockout			
	During Stoppage of Work	While Dispute is in Active Progress	Other	Contract	Labor Law		Participating In Dispute	Financing Dispute	Directly Interested in Dispute
IN			X <sup>2,7</sup>				X	X	X
IA	X						X	X	X
KS	X						X <sup>7</sup>	X	X <sup>7</sup>
KY		X				X			
LA		X				X	X <sup>6</sup>		X <sup>6</sup>
ME	X			X	X	X	X	X	X
MD	X					X	X	X	X
MA	X <sup>5</sup>					X	X	X	X
MI			X <sup>2</sup>			X <sup>8</sup>			
MN		X <sup>2</sup>		X	X	X	X <sup>9</sup>		X <sup>9</sup>
MS	X					X	X		X
MO	X <sup>2</sup>						X	X	X
MT			X <sup>1</sup>		X		X	X	X
NE	X						X	X	X
NV		X					X	X	X
NH	X <sup>2</sup>			X	X		X	X	X
NJ	X					X <sup>10</sup>	X	X	X
NM			X <sup>1</sup>				X		X
NY			X			X <sup>11</sup>			
NC			X <sup>2</sup>						
ND			X <sup>1</sup>				X		X
OH			X <sup>1</sup>			X			
OK	X					X	X		X
OR		X <sup>4</sup>		X		X	X	X	X
PA	X					X	X		X
PR	X						X		X
RI			X <sup>1</sup>			X	X <sup>6</sup>	X <sup>6</sup>	X <sup>6</sup>

## NONMONETARY ELIGIBILITY

**Table 5-8: LABOR DISPUTES - PERIOD OF DENIAL AND WORKERS EXCLUDED**

State	Duration of Denial			Disputes Excluded if Caused by:			Workers Not Denied if Neither They Nor any of the Same Grade or Class Are:		
				Employer's Failure to Conform to:		Lockout			
	During Stoppage of Work	While Dispute is in Active Progress	Other	Contract	Labor Law		Participating In Dispute	Financing Dispute	Directly Interested in Dispute
SC		X					X	X <sup>6</sup>	X
SD			X <sup>1</sup>			X	X	X	X
TN		X <sup>4</sup>				X	X		
TX	X <sup>7</sup>					X <sup>3</sup>	X <sup>7</sup>	X <sup>7</sup>	X <sup>7</sup>
UT	X <sup>4</sup>				X	X <sup>3</sup>			X <sup>2</sup>
VT	X					X <sup>4</sup>	X <sup>6</sup>	X <sup>6</sup>	X <sup>6</sup>
VA		X	X <sup>2</sup>				X	X	X
VI		X				X	X		X
WA			X <sup>1</sup>				X	X	X
WV	X <sup>5</sup>			X <sup>12</sup>		X	X	X	X
WI		X				X			
WY	X						X	X	X

<sup>1</sup> As long as unemployment is caused by the existence of a labor dispute.

<sup>2</sup> See text preceding table for details.

<sup>3</sup> By judicial construction of statutory language.

<sup>4</sup> Dispute is not disqualifying: in CO, unless the lockout results from demands of employees, as distinguished from an employer effort to deprive the employees of some advantage they already possess; in OH, if the individual was laid off and not recalled prior to the dispute, if separated prior to the dispute, or if obtained bona fide job with another employer while the dispute was in progress; in IL, if the recognized or certified collective bargaining representative of the locked out employees refuses to meet under reasonable conditions with the employer to discuss the lockout issues, or there is a final adjudication under the NLRA that during the lockout period such representative has refused to bargain in good faith with the employer over the lockout issues, or if the lockout resulted as a direct consequence of a violation by such representative of the provisions of an existing collective bargaining agreement; in OR, if the individual was laid off prior to the dispute and did not work more than 7 days during the 21 calendar days immediately prior to the dispute, or if his/her position was filled and the individual unilaterally abandons the dispute to seek reemployment with the employer; in TN, if the claimant was indefinitely separated prior to the dispute and otherwise eligible; in UT, if the employer was involved in fomenting the strike; in VT, if the employer brought about the lockout in order to gain concessions from the employees.

<sup>5</sup> Disqualification ceases: in GA, when operations have been resumed but individual has not been reemployed; in MA, within 1 week following termination of dispute if individual is not recalled to work; in WV, if the stoppage of work continues longer than 4 weeks after the termination of the labor dispute, there is a rebuttable presumption that the stoppage is not due to the labor dispute and the burden is on the employer to show otherwise.

<sup>6</sup> Applies only to individual, not to others of the same grade or class.

<sup>7</sup> As long as unemployment is caused by claimant's stoppage of work which exists because of labor dispute; failure or refusal to cross picket line or to accept and perform available and customary work in the establishment constitutes participation and interest.

<sup>8</sup> Only if unemployment is caused by lockout in another, functionally integrated U.S. establishment of the same employer.

<sup>9</sup> Disqualification limited to 1 week for individuals neither participating in nor directly interested in dispute.

<sup>10</sup> Individuals locked out of employment by their employer can collect benefits if they were not on strike immediately prior to the lockout and are directed by their union leadership to work under the preexisting terms and conditions of employment.

<sup>11</sup> If not participating and not employed by an employer that is involved in the industrial controversy that caused their unemployment, or not in a bargaining unit involved in the industrial controversy that caused their unemployment.

<sup>12</sup> Denial is not applicable if employees are required to accept wages, hours, or other conditions substantially less favorable than those prevailing in the locality or are denied the right of collective bargaining.

# NONMONETARY ELIGIBILITY

## NONSEPARATIONS

**ABILITY TO WORK**—Only minor variations exist in state laws setting forth the requirements concerning ability to work. A few states specify that a worker must be physically able, or mentally and physically able to work. Evidence of ability to work is the filing of claims and registration for work at a public employment office, required under most state laws. Missouri goes one step further requiring, by law, every individual receiving benefits to report to the nearest office in person at least once every 4 weeks.

Several states have added a proviso that no worker who has filed a claim and has registered for work shall be considered ineligible during an uninterrupted period of unemployment because of illness or disability, so long as no work, which is suitable but for the disability, is offered and refused. These provisions are not to be confused with the special programs in six states for temporary disability benefits.

**AVAILABILITY FOR WORK**—Availability for work is often translated to mean being ready, willing, and able to work. Meeting the requirement of registration for work at a public employment office is considered as some evidence of availability. Nonavailability may be evidenced by substantial restrictions upon the kind or conditions of otherwise suitable work that a worker can or will accept, by his refusal of a referral to suitable work made by the employment service, or of an offer of suitable work made by an employer. A determination that a worker is unable to work or is unavailable for work applies to the time at which notice is given of unemployment or for the period for which benefits are being claimed.

The availability-for-work provisions are more varied than the ability-to-work provisions. Some states provide that a worker must be available for work; some for suitable work; and others for work in the worker's usual occupation or for which the worker is reasonably fitted by training and experience.

The following table indicates claimants who are not ineligible due to illness or disability (occurring after the claim is filed and after registering for work) as long as no refusal of suitable work occurs after the beginning of the illness or disability.

Table 5-9: STATES WITH SPECIAL PROVISION FOR ILLNESS OR DISABILITY			
Alaska <sup>1</sup>	Delaware	Hawaii	Idaho <sup>2</sup>
Maryland	Massachusetts <sup>3</sup>	Nevada	North Dakota <sup>4</sup>
Tennessee	Vermont		

<sup>1</sup> Waiver may not exceed 6 consecutive weeks  
<sup>2</sup> Only if no suitable work was available that would have paid wages greater than one-half of the individual's WBA  
<sup>3</sup> Provision applicable for 3 weeks only in a BY  
<sup>4</sup> Only if illness not covered by workers' compensation

**Vacations**—Georgia and West Virginia specify the conditions under which workers on vacations are deemed unavailable or unemployed. Georgia limits to 2 weeks in any calendar year the period of unavailability of workers who are not paid while on a vacation provided in an employment contract or by employer-established custom or policy. Mississippi considers a worker unavailable for work during a holiday or vacation period. In North Carolina no individual shall be considered available for work for any week, not to exceed two in any calendar year, in which the unemployment is due to a vacation.

In Nebraska and New Jersey, no worker is deemed unavailable for work solely because they are on vacation without pay if the vacation is not the result of the worker's own action as distinguished from any

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collective bargaining or other action beyond the individual's control. Under New York law, an agreement by a worker or the individual's union or representative to a shutdown for vacation purposes is not of itself considered a withdrawal from the labor market or unavailability during the time of such vacation shutdown. Other provisions relating to eligibility during vacation periods, although not specifically stated in terms of availability, are made in Virginia, where a worker is eligible for benefits only if the unemployment is not due to a bona fide vacation is found not to be; and in Washington, where it is specifically provided that a cessation of operations by an employer for the purpose of granting vacations shall not be construed to be a voluntary quit or voluntary unemployment. Tennessee does not deny benefits during unemployment caused by a plant shutdown for vacation, providing the individual does not receive vacation pay. However, workers who receive regular wages for a vacation under terms of a labor-management agreement will have their weekly benefit amount reduced by the amount of the wages received, but only if work will be available for the workers with the employer at the end of the vacation period.

Nebraska provides that a worker is considered employed when wages are received for a specific time in which the vacation is actually taken during a time of temporary layoff or plant shutdown and that vacation pay be prorated in an amount reasonably attributable to each week claimed and considered payable with respect to that week.

**Locality**—Alabama, Michigan, Ohio, and South Carolina require that workers be available for work in a locality where their base-period wages were earned, or in a locality where similar work is available or where suitable work is normally performed. Illinois and Utah consider workers to be unavailable if, after separation from their most recent work, they move to and remain in a locality where opportunities for work are substantially less favorable than those in the locality they left. Arizona and Utah require that, at the time they file a claim, workers be a resident of their state or of another state or foreign country that has entered into reciprocal arrangements with the state. Oregon, Utah and Virginia consider workers unavailable for work if they leave their normal labor market area for the major portion of a week unless the worker can establish that they conducted a bona fide search for work in the labor market area where they spent the major part of the week.

**Availability During Training**—FUTA requires, as a condition for employers in a state to receive credit against the federal tax, that all state laws provide that compensation shall not be denied to an otherwise eligible worker for any week during which the individual is attending a training course with the approval of the state agency. Also, all state laws must provide that trade allowances not be denied to an otherwise eligible individual for any week during which the individual is in training approved under the Trade Act of 1974, because of leaving unsuitable employment to enter such training. In addition, the state law must provide that workers in training not be held ineligible or disqualified for being unavailable for work, for failing to make an active search for work, or for failing to accept an offer of, or for refusal of, suitable work.

Federal law does not specify the criteria that states must use in approving training. Although some state laws have set forth the standards to be used, many do not specify the types of training that are approvable. Generally, approved training is limited to vocational or basic education training, thereby excluding regularly enrolled students from collecting benefits under the approved training provision.

Some states, in addition to providing regular benefits while the worker attends an industrial retraining or other vocational training course, provide for an extended duration of benefits while the worker remains in training/retraining. See Chapter 4 concerning programs for extended duration.

While in almost all states the participation of workers in approved training courses is voluntary, in the District of Columbia, and Washington, a worker may be required to accept such training.

**Availability for Part-Time Work**—Many states require workers to be available for full-time work. Other states allow workers to be available for part-time work under certain conditions. The following table indicates those states paying workers who seek only part-time employment. Please note that considerable differences

## NONMONETARY ELIGIBILITY

may exist between states with entries in the same column. The American Recovery and Reinvestment Act of 2009 (Public Law 111-5) has resulted in changes to some state laws as they seek to modernize their unemployment compensation programs. Please note that the following table does not align with the requirements established by P.L. 111-5.

<b>Table 5-10: STATES WITH AVAILABILITY OF PART-TIME WORKERS PROVISIONS</b>				
<b>States That Pay Benefits To Part-Time Workers Under Certain Conditions</b>				
State	If Otherwise Eligible	Claim Based on Part-Time Work, or has History of Part-Time Work	Medical Restrictions or Restrictions Due to Disabilities	Other
AR	I	L		
CA		L		
CO		L, R		
CT			L, R	
DE		L <sup>1</sup>		Good Cause – I
DC				Good Cause – I
FL		I		
GA		L <sup>1</sup>		
HI		L		
IL			R	Only if part-time work is suitable because of circumstances beyond worker's control - R
ID		L <sup>1</sup>		
IA		L, R		
KS		L <sup>1</sup> , I		
LA		I		
ME		L, R	L, R <sup>2</sup>	L, R <sup>2</sup>
MD		L <sup>1</sup>		
MA		R	R	
MN		L		
MT		L	R	
NE		L <sup>1</sup>		
NV		R	I	I <sup>3</sup>
NH		L	L	R <sup>4</sup>
NJ		L, R		
NM	L, R <sup>3</sup>			L, R <sup>5</sup>
NY		L		
NC		L		
ND		I		

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Table 5-10: STATES WITH AVAILABILITY OF PART-TIME WORKERS PROVISIONS				
States That Pay Benefits To Part-Time Workers Under Certain Conditions				
State	If Otherwise Eligible	Claim Based on Part-Time Work, or has History of Part-Time Work	Medical Restrictions or Restrictions Due to Disabilities	Other
OH		I		
OK		L <sup>1</sup>		
OR			R	
PA	I <sup>6</sup>			
PR		I		
SC		L <sup>1</sup>		
SD		L <sup>1</sup>		
TN		L <sup>1</sup>		
UT			R	
VT		I		
VA			I	
WA		L, R		
WY		R	R	

KEY: L = law , R = regulation, I = interpretation

<sup>1</sup> DE – if individual is willing to work at least 20 hours per week, is available for the number of hours comparable to part-time work in base period, or is available for the hours comparable to his or her work at the time of most recent separation; GA, ID, NM, TN – if individual is willing to work at least 20 hours per week; KS, OK – provided the individual is available for the number of hours per week that are comparable to part-time work experience in base period; MD – provided that the individual worked at least 20 hours per week in part-time work for a majority of the weeks of work in the base period and is in a labor market in which a reasonable demand exists for part-time work (effective March 1, 2011); NE – provided that the majority of weeks of work in the base period included part-time work and that the individual is available for at least 20 hours of work per week (effective July 1, 2011); SC, SD – provided the majority of weeks of work in the base period include part-time work.

<sup>2</sup> When majority of weeks in base period were full-time but claimant is only able, available and seeking part-time work due to own or immediate family member’s illness or disability, or when necessary for safety or protection of claimant or immediate family member, including protection from domestic abuse.

<sup>3</sup> Student provision applies to high school students who can only work part-time while attending school.

<sup>4</sup> In certain circumstances, if claimant is the only adult suitable to care for a child.

<sup>5</sup> Only for workers who attend school full-time and are actively seeking at least part-time work, and for whom school attendance was not a factor in their separation from work.

<sup>6</sup> The Superior Court has stated that the availability requirement is met as long as a claimant is ready, willing, and able to accept some substantial and suitable work.

Michigan and West Virginia require that a worker be available for full-time work. Pennsylvania considers a worker ineligible for benefits for any week in which his unemployment is due to failure to accept an offer of suitable full-time work in order to pursue seasonal or part-time work.

*Note:* Since most state laws do not specify whether the worker must be available for full-time or part-time work, the previous table should be used with caution. The table is based on information provided to the Department.

## NONMONETARY ELIGIBILITY

**ACTIVELY SEEKING WORK**—In addition to registration for work at a local employment office, all states, whether by law or practice (except Pennsylvania), require that a worker be actively seeking work or making a reasonable effort to obtain work. Pennsylvania requires that the claimant be able and available for suitable work and not refuse suitable work when offered. Those states which apply actively seeking work requirements through practice are Alaska, Arizona, Mississippi, Nebraska, Nevada, New York, Puerto Rico, South Dakota, Tennessee, and Texas.

**REFUSAL OF WORK**—All state laws address refusals of work, although they vary concerning the extent of the disqualification imposed. FUTA provides that all state laws must also look at the labor market and certain labor standards. Specifically, benefits will not be denied to any otherwise eligible individual for refusing to accept new work if:

- The position offered is vacant due directly to a strike, lockout, or other labor dispute;
- The wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; or
- As a condition of being employed the individual would be required to join a company union, or to resign from or refrain from joining any bona fide labor organization.

**Criteria for Suitable Work**—All states look at whether the work refused was suitable. When state laws list the criteria for suitability, they usually address the degree of risk to a worker's health, safety, and morals; the worker's physical fitness, prior training, experience, and earnings; the length of unemployment and prospects for securing local work in a customary occupation; and the distance of the available work from the worker's residence. Delaware and New York make no reference to the suitability of work offered but provide for disqualification for refusals of work for which a worker is reasonably fitted. South Carolina specifies that whether work is suitable must be based on a standard of reasonableness as it relates to the particular worker involved.

*Distance*—In Alabama and West Virginia, no work is unsuitable because of distance if it is in substantially the same locality as the last regular employment which the worker left voluntarily without good cause connected with the employment; in Indiana, work under substantially the same terms and conditions under which the worker was employed by a base-period employer, which is within the prior training, experience, and physical capacity to perform, is suitable work unless a bona fide change in residence makes such work unsuitable because of the distance involved. Delaware, New York, and Ohio provide that no refusal to accept employment shall be disqualifying if it is at an unreasonable distance from the worker's residence or the expense of travel to and from work is substantially greater than that in the former employment, unless provision is made for such expense.

*Personal/Family Reasons*—Maine does not disqualify a worker for refusal of suitable work if he refuses a position on a shift, the greater part of which falls between midnight and 5 a.m., and he is prevented from accepting the job because of family obligations. Maine excludes from suitable work a job the worker previously vacated if the reasons for leaving have not been removed or changed; in addition, if a claimant has refused work for a necessitous and compelling reason, the disqualification will be terminated when the claimant is again able and available for work. New Hampshire does not disqualify a worker who is the only available adult to care for an ill, infirm, or physically or mentally disabled family member if the individual is unable or unavailable for suitable, permanent full-time work in a given shift; in addition, New Hampshire does not impose a disqualification for refusing to accept new work if the worker is unable to accept work during the hours of a particular shift because of the family obligations previously described. Wisconsin does not disqualify a worker who accepts work, that could have been refused with good cause, and then terminates with good cause within 10 weeks after starting the job. North Carolina does not deny benefits to a worker for refusing a job resulting from undue family hardship when the individual cannot accept a particular job because the individual is unable to obtain adequate childcare or elder care.



## NONMONETARY ELIGIBILITY

Connecticut does not deem work suitable if, as a condition of being employed, the worker would be required to agree not to leave the position if recalled by his previous employer. In Louisiana, a worker may refuse work if the remuneration from the employer is below 60 percent of the individual's highest rate of pay in the base period. In Wisconsin, a worker has a good cause during the first six weeks of unemployment for refusing work at a lower grade of skill or significantly lower rate of pay than one or more recent jobs.

*Union/Collective Bargaining Issues*—Ohio and New York do not consider suitable any work that a worker is not required to accept pursuant to a labor-management agreement. In Illinois, a worker will not be disqualified if the position offered by an employing unit is a transfer to other work and the acceptance would separate a worker currently performing the work. Iowa does not disqualify a worker for failure to apply for or accept suitable work if the individual left work in lieu of exercising a right to bump or oust an employee with less seniority. In Oregon, a worker will not be disqualified for refusal of suitable work if the employer unilaterally modified the amount of wages agreed upon by the individual's collective bargaining unit and the employer. In Pennsylvania, a worker will not be disqualified for refusal of suitable work when the work is offered by his employer, and the worker is not required to accept the offer pursuant to terms of a union contract or agreement or an established employer plan, program or policy. In New York, a worker not subject to recall or who did not obtain employment through a union hall and is still unemployed after receiving 13 weeks of benefits is required to accept employment that the worker is capable of doing, provided the employment would result in a quarterly wage not less than 80 percent of the high quarter in the base period or the wages prevailing for similar work in the locality, whichever is less.

*Duration of Unemployment*—A few states provide for changing the definition of suitable work as the duration of the individual's unemployment grows. The suitability of the offered wage is the factor states have chosen to alter. For example, Florida requires the agency, in developing rules to determine the suitability of work, to consider the duration of the individual's unemployment and the wage rates available. In addition, Florida law specifies that, after a worker has received 25 weeks of benefits in a single year, suitable work will be a job that pays the minimum wage and is 120 percent or more of the individual's weekly benefit amount.

Idaho law merely requires workers to be willing to expand their job search beyond their normal trade or occupation and to accept work at a lower rate of pay in order to remain eligible for benefits as the length of their unemployment grows. Louisiana will not disqualify a worker for refusing suitable work if the offered work pays less than 60 percent of the individual's highest rate of pay in the base period. Utah considers all earnings in the base year, not just earnings from the most recent employer, in the determination of suitable work and specifies that the agency will be more prone to consider work suitable the longer the worker is unemployed and less likely to secure local work in his or her customary occupation. Wyoming will apply the refusal-of-suitable work disqualification if, after 4 weeks of unemployment, the individual failed to apply for and accept suitable work other than in his customary occupation offering at least 50 percent of the compensation earned in his or her previous occupation.

Georgia specifies that, after a worker has received 10 weeks of benefits, no work will be considered unsuitable if it pays wages equal to at least 66 percent of the individual's highest quarter earnings in the base period and is at least equal to the federal or state minimum wage.

Iowa law specifies that work is suitable if it meets the other criteria in the law and the gross weekly wage of the offered work bears the following relationship to the individual's high-quarter average weekly wage: (1) 100 percent during the first 5 weeks of unemployment; (2) 75 percent from the 6th through the 12th week of unemployment; (3) 70 percent from the 13th through the 18th week of unemployment; and (4) 65 percent after the 18th week of unemployment. No individual, however, is required to accept a job paying below the federal minimum wage.

## NONMONETARY ELIGIBILITY

After 12 weeks of unemployment, Maine no longer considers the individual's prior wage in determining whether work is suitable. In Michigan, an individual will be denied benefits for refusing an offer of suitable work paying at least 70% of the gross pay rate received immediately before becoming unemployed. After 8 weeks of unemployment, Mississippi law specifies that work is suitable if the offered employment pays the minimum wage or higher and the wage is that prevailing for the individual's customary occupation or similar work in the locality. Montana, after 13 weeks of unemployment, specifies that a suitable work offer need only include wages equal to 75 percent of the individual's earnings in his previous customary insured work, but not less than the federal minimum wage. North Dakota law specifies that after a worker has received 18 weeks of benefits, suitable work will be any work that pays wages equal to the maximum weekly benefit amount, providing that consideration is given to the degree of risk involved to the individual's health, safety, morals, and physical fitness, and the distance of the work from his residence.

*Period of Disqualification*—Some states disqualify for a specified number of weeks (3 to 20) any workers who refuse suitable work; others postpone benefits for a variable number of weeks, with the maximum ranging from 1 to 12.

More than half of the states disqualify, for the duration of the unemployment or longer, workers who refuse suitable work. Most of these states specify an amount that the worker must earn or a period of time the worker must work to remove the disqualification.

The relationship between availability for work and refusal of suitable work is explained in the discussion of availability earlier in this chapter. The state of Wisconsin's provisions for suitable work recognize this relationship by stating: "If the commission determines that . . . a failure to accept suitable work has occurred with good cause, but that the employee is unable to work or unavailable for work, he shall be ineligible for the week in which such failure occurred and while such inability or unavailability continues."

Of the states that reduce potential benefits for refusal of suitable work, the majority provide for reduction by an amount equal to the number of weeks of benefits postponed.

**Table 5-11: REFUSAL OF SUITABLE WORK – DISQUALIFICATION**

State	Benefits Postponed for –		Benefits Reduced
	Number of Weeks	Duration of Unemployment Until Requalify <sup>1</sup>	
AL	W + 1-10		
AK	W + 5		3 x WBA
AZ		8 x WBA	
AR	W + 7 <sup>2</sup>		
CA	W + 1-9 <sup>2</sup>		
CO	W + 20		Equal
CT		6 x WBA	
DE		4 weeks of work and 4 x WBA	
DC		10 weeks of work and wages equal to 10 x WBA	
FL	W + 1-5 <sup>3</sup>	17 x WBA <sup>3</sup>	Optional
GA		10 x WBA <sup>4</sup>	

## NONMONETARY ELIGIBILITY

Table 5-11: REFUSAL OF SUITABLE WORK – DISQUALIFICATION			
State	Benefits Postponed for –		Benefits Reduced
	Number of Weeks	Duration of Unemployment Until Requalify <sup>1</sup>	
HI		5 x WBA	
ID		14 x WBA	
IL		Wages equal to WBA in each of 4 weeks	
IN		Wages equal to WBA in each of 8 weeks	1 <sup>st</sup> refusal - 75%; 2 <sup>nd</sup> - 85%; 3 <sup>rd</sup> - 90%
IA		10 x WBA	
KS		3 x WBA	
KY		10 weeks of covered work plus 10 x WBA	
LA		10 x WBA	
ME		8 x WBA	
MD	W + 5-10 <sup>3</sup>	10 x WBA	
MA	W + 7		Up to 8 weeks
MI	W + 13		Equal in current BY <sup>3</sup>
MN	W + 7		
MS	W + 1-12		
MO		10 x WBA	
MT		6 x WBA	Equal
NE	12		Equal
NV		Wages equal to WBA in each week up to 15	
NH		5 weeks of covered work with earnings equal to 20% more than WBA in each week	
NJ	W + 3		
NM		5 x WBA	Equal
NY		5 x WBA	
NC	X <sup>5</sup>	10 x WBA earned in at least 5 weeks	X <sup>5</sup>
ND		10 x WBA	
OH		6 weeks in covered work + wages equal to 27.5% of state AWW <sup>6</sup>	
OK		10 x WBA <sup>7</sup>	
OR		4 x WBA	8 x WBA

## NONMONETARY ELIGIBILITY

**Table 5-11: REFUSAL OF SUITABLE WORK – DISQUALIFICATION**

State	Benefits Postponed for –		Benefits Reduced
	Number of Weeks	Duration of Unemployment Until Requalify <sup>1</sup>	
PA		X <sup>8</sup>	
PR		4 weeks of work and wages equal to 10 x WBA	
RI		8 weeks of covered work equaling 20 x minimum hourly wage in each week	
SC		8 x WBA	
SD		6 weeks of covered work and wages equal to WBA in each week	
TN		10 x WBA in covered work	
TX		6 weeks of work or wages equal to 6 x WBA (applies to any refusal within BY)	
UT		6 x WBA	
VT		6 x WBA	
VA		30 days or 240 hours of work	
VI		4 weeks of work and 4 x WBA	
WA		7 weeks and earnings in bona fide work of 7 x WBA	
WV	W + 4 <sup>9</sup>		Equal
WI		4 weeks elapsed and 4 x WBA	
WY		8 x WBA	

KEY: W = Week of refusal

“Equal” indicates reduction equal to WBA multiplied by number of weeks of disqualification.

<sup>1</sup> Minimum employment or wages required to requalify for benefits.

<sup>2</sup> In AR, weeks of disqualification must be weeks in which claimant is otherwise eligible or earns wages equal to WBA; in CA, it must be weeks in which claimant meets reporting and registration requirements. Also, agency may add 1-8 weeks for successive disqualification.

<sup>3</sup> In FL, both term and duration of unemployment disqualifications are imposed. Aliens who refuse resettlement or relocation employment are disqualified 1-17 weeks, or reduction by not more than 5 weeks. In MI, claimant may be eligible for benefits in subsequent benefit year based on base period wages earned subsequent to refusal. In MD, either disqualification may be imposed at discretion of agency.

<sup>4</sup> Individual must work for a liable employer and become unemployed through no fault of his own.

<sup>5</sup> Disqualification may run into next BY which begins within 12 months after end of current year. Also, a permanent disqualification may be reduced to a time certain disqualification, but not less than 5 weeks, with a corresponding reduction in benefits (weeks of disqualification x WBA).

<sup>6</sup> And wages at 27.5% of state AWW in each week.

<sup>7</sup> An individual who refuses an offer of work due to illness, death of a family member or other circumstances beyond the individual's control will be disqualified for the week of occurrence.

<sup>8</sup> Until a worker obtains work not of a casual or temporary nature; however, if work refused was casual or temporary, then disqualification is for an equal period of time.

<sup>9</sup> Plus such additional weeks as offer remains open.

## NONMONETARY ELIGIBILITY

### SPECIAL GROUPS

All state laws contain provisions addressing special groups of workers. FUTA requires the denial of benefits under certain circumstances to professional athletes, some aliens, and school personnel while it also prohibits states from denying benefits solely on the basis of pregnancy or the termination of pregnancy. Like the FUTA provisions, most of these special provisions restrict benefits more than the usual disqualification provisions.

**STUDENTS**—Most states exclude from coverage service performed by students for educational institutions. In addition, many states have special provisions limiting the benefit rights of students who have had covered employment. In some of these states, the disqualification is for the duration of the unemployment; in others, it is during school attendance or during the school term.

Many states disqualify workers during school attendance and some states extend the disqualification to vacation periods.

**Table 5-12: TREATMENT OF STUDENTS**

State	Disqualified for Leaving Work to Attend School	Disqualified or Ineligible While Attending School	State	Disqualified for Leaving Work to Attend School	Disqualified or Ineligible While Attending School
AL	Yes	Yes, ineligible if school hours overlap normal work hours	AK	Yes, if leaving skilled work or not attending approved training	Yes, unless student pursued an academic education for a school term and worked 30 hours a week, and the academic schedule did not preclude full time work in the student's occupation, and if the student was laid off <sup>1</sup>
AZ	Yes, unless leaving to resume approved training or if work hinders the individual from making satisfactory progress in approved training	Yes, unless there is a pattern of concurrent, full-time work and full-time school attendance for the nine-month period before the filing of an initial claim for UI benefits, and the individual has not left or refused full-time work, or reduced the hours of work to parttime to attend school	AR	Yes	Yes, except while attending a vocational school for a demand occupation and other training as long as the student is making reasonable efforts to obtain employment and doesn't refuse suitable work
CA	Yes, except if attending union apprenticeship school or approved for training benefits	Yes, ineligible unless student has a part-time seek-work plan or is available for full-time work in labor market during school <sup>1</sup>	CO	Yes <sup>1</sup>	No, provided school attendance does not interfere with ability to accept suitable work <sup>1</sup>
CT	Yes <sup>1</sup>	Yes, ineligible except student who becomes unemployed while attending school if work search is restricted to employment that does not conflict with regular class hours and if student was employed on a full-time basis during the 2 years prior to separation while in school <sup>1</sup>	DE	Yes	No, if student determined to be primarily a worker who happens to attend school
DC	Yes	No, provided school is not an undue restriction on availability	FL	Yes	No, provided school attendance does not interfere with availability to accept suitable work
GA	Yes, unless Trade Act training	Yes, unless attending approved courses	HI	Yes	Yes <sup>4</sup>
ID	Yes	Yes, unless attending approved training <sup>1</sup>	IL	Yes, unless Trade Act training	Yes, ineligible when principal occupation is student unless attends approved training <sup>1</sup>

## NONMONETARY ELIGIBILITY

Table 5-12: TREATMENT OF STUDENTS					
State	Disqualified for Leaving Work to Attend School	Disqualified or Ineligible While Attending School	State	Disqualified for Leaving Work to Attend School	Disqualified or Ineligible While Attending School
IN	Yes, unless Trade Act training	No, provided school attendance does not interfere with availability to accept work, and the student is actively seeking work	IA	Yes	No, eligible if school attendance does not interfere with ability to accept suitable work
KS	Yes, unless Trade Act training	Yes, disqualified, including vacation periods, unless full-time work is concurrent with school attendance, or school schedule does not affect availability for work <sup>1</sup>	KY	Yes	No, provided school attendance does not interfere with ability to accept suitable work
LA	No	Yes, ineligible, including vacation periods, unless student loses job while in school and is available for suitable work <sup>1</sup>	ME	Yes	Yes, disqualified unless student is available for full-time work while in school, or would leave school for full-time work, or is in approved training
MD	Yes <sup>1</sup>	INA	MA	Yes	No, provided industrial or vocational training is found to be necessary to obtain suitable work; must be full-time and less than one year in length <sup>2</sup>
MI	Yes <sup>1</sup>	Yes, ineligible unless student agrees to quit school/change class schedule to accept work, or in approved training	MN	Yes, unless entering approved training	Yes, ineligible unless willing to quit school, except for approved training <sup>1</sup>
MS	Yes	No, provided school hours do not interfere with availability for full-time work	MO	Yes	Yes, ineligible if there is a significant restriction on availability. Some part-time students may be eligible. Does not apply to WIA, Trade Act, and mass layoff students.
MT	No	No, provided that student can demonstrate that s/he meets general eligibility requirements	NE	Yes	Yes, disqualified unless major part of BPW were for services performed while attending school <sup>1</sup>
NV	Yes, unless approved training or high school student who must legally attend school	No, if school attendance does not interfere with ability to seek and accept suitable work	NH	Yes	No, provided student is available for and seeking permanent full-time work during all the shifts and all the hours there is a market for his services
NJ	Yes, except for approved training.	Yes, disqualified, including vacation periods, unless student earned wages sufficient to qualify for benefits while attending school <sup>1</sup>	NM	Yes	Yes, ineligible except if school attendance was not a factor in the job separation and as long as the student is available and seeking at least part-time work (even if currently working parttime) <sup>1</sup>
NY	No	Yes, disqualified	NC	No	No, unemployed individual not necessarily unavailable for or unable to work while attending school and not ineligible solely on basis of attending school
ND	No	Yes, disqualified unless major part of BPW were for services performed while attending school <sup>1</sup>	OH	Yes, unless Trade Act training.	No, if becomes unemployed while attending school, BPW were at least partially earned while attending school, meets availability and work search requirements, and if available for suitable employment on any shift <sup>1</sup>

## NONMONETARY ELIGIBILITY

Table 5-12: TREATMENT OF STUDENTS					
State	Disqualified for Leaving Work to Attend School	Disqualified or Ineligible While Attending School	State	Disqualified for Leaving Work to Attend School	Disqualified or Ineligible While Attending School
OK	No	No, provided student offers to quit school, adjust class hours, or change shifts to secure employment <sup>1</sup>	OR	Yes, unless required by law to attend school <sup>2</sup>	No, provided school attendance does not interfere with availability to seek and accept suitable work
PA	Yes, unless Trade Act training and job paid less than 80% of Trade Act job and was at lesser skill level	No, provided able and available for suitable work (does not have to be full-time work)	PR	INA	INA
RI	Yes, unless Trade Act training	Yes, disqualified unless hours of school do not interfere with hours of work in student's occupation	SC	Yes	No, not disqualified if student offers to quit school, adjust class hours or change shifts in order to secure employment. Must make a work search each week.
SD	Yes	Yes, ineligible if determined principally occupied as a student	TN	No	INA
TX	Yes <sup>1</sup>	Yes, eligible if willing to quit school or change class schedule to accommodate full-time work <sup>1</sup>	UT	Yes <sup>2</sup>	No, disqualified when school attendance is a restriction to availability for full-time suitable work, unless in an approved training program <sup>2</sup>
VT	Yes	Yes, if claim is based on part-time employment and student remains available for part-time work while attending school	VA	Yes <sup>3</sup>	Yes, unless attendance would limit availability for only one of multiple shifts in usual occupation
VI	No	No	WA	Yes, unless approved apprentice training or Trade Act training	Yes, disqualified if registered at a school that provides instruction of 12 or more hours per week, unless in approved training or demonstrates evidence of availability for work <sup>1</sup>
WV	Yes, unless previously enrolled in approved training <sup>1</sup>	No, provided student is in approved vocational training or if student is willing to drop or rearrange classes if suitable work were offered	WI	Yes, unless Trade Act training	Yes, unless student is available for full-time first shift work
WY	Yes, unless previously enrolled in approved training	Yes, disqualified unless major part of BPW were for services performed while attending school			

KEY: INA = Information not available  
 NOTE: Unless otherwise indicated, state is applying its voluntary quit or availability provisions

<sup>1</sup> State statutes specifically mention students  
<sup>2</sup> Regulations specifically mention students  
<sup>3</sup> Based upon case law  
<sup>4</sup> Must be available for work and willing to quit school, except for approved training

**SCHOOL PERSONNEL**—FUTA requires states to deny benefits to instructional, research, or principal administrative employees of educational institutions between successive academic years or terms, or, when an agreement so provides, between two regular but not successive terms, if the individual performed such instructional, research, or administrative services in the first year or term and has a contract or a reasonable assurance of performing such services in the second year or term. The denial also applies to vacation or holiday periods within school years or terms.

## NONMONETARY ELIGIBILITY

FUTA permits a state, at its option, to deny benefits between successive academic years or terms to other employees of a school or of an educational service agency who perform services to or on behalf of an educational institution if the individual performed services (other than the three types previously described) during the year or term and has a reasonable assurance or a contract to perform services in the second year or term. The option for denial of benefits also applies to vacation or holiday periods within school years or terms. However, FUTA requires states to pay benefits retroactively to school personnel performing these “other” services if they were given a reasonable assurance of reemployment but were not, in fact, rehired when the new school term or year began.

**PROFESSIONAL ATHLETES**—FUTA requires states to deny benefits to a worker between two successive sport seasons if substantially all of the worker’s services in the first season consist of participating in or preparing to participate in sports or athletic events and the worker has a reasonable assurance of performing similar services in the second season.

**ALIENS**—FUTA requires denial of benefits to certain aliens. Benefits may not be paid based on service performed by an alien unless the alien is one who: (1) was lawfully admitted for permanent residence at the time the services were performed and for which the wages paid are used as wage credits; (2) was lawfully present in the United States to perform the services for which the wages paid are used as wages credits; or (3) was permanently residing in the United States “under color of law,” including one lawfully present in the United States under provisions of the Immigration and Nationality Act. (Note that aliens must also be legally authorized to work to be considered available for work.)

To avoid discriminating against certain groups in the administration of this provision, federal law requires that the information designed to identify ineligible aliens must be requested of all workers. Whether or not the individual is in an acceptable alien status is determined by a preponderance of the evidence.

## DEDUCTIBLE INCOME

Almost all state laws provide that a worker will not receive UI for any week during which the worker is receiving or is seeking benefits under any federal or other state UI law. A few states specifically mention benefits under the Federal Railroad Unemployment Insurance Act. Under most of the laws, no disqualification is imposed if it is finally determined that the worker is ineligible under the other law. The intent is to prevent duplicate payment of benefits for the same week. These disqualifications apply only to the week in which or for which the other payment is received.

Most states have statutory provisions that a worker is ineligible for any week during which such worker receives or has received certain other types of remuneration such as wages in lieu of notice, dismissal wages, worker’s compensation for temporary partial disability, holiday and vacation pay, back pay, and benefits under a supplemental unemployment benefit plan. In many states, if the payment concerned is less than the weekly benefit amount, the worker receives the difference; in other states, no benefits are payable for a week of such payments regardless of the amount of payment. A few states provide for rounding the resultant benefits, like payments for weeks of partial unemployment, to half dollar or dollar amounts.

**Wages in Lieu of Notice and Dismissal Payments**—A considerable number of states consider wages in lieu of notice to be deductible income. Many states have the same provision for receipt of dismissal payments as for receipt of wages in lieu of notice. The state laws use a variety of terms such as dismissal allowance, dismissal payments, dismissal wages, separation allowances, termination allowances, severance payments, or some combination of these terms. In many states, all dismissal payments are included as wages for contribution



## NONMONETARY ELIGIBILITY

purposes, as they are under FUTA. Other states exclude dismissal payments which the employer is not legally required to make. To the extent that dismissal payments are included in taxable wages for contribution purposes, workers receiving such payments may be considered not unemployed, or not totally unemployed, for the weeks concerned. Some states have so ruled in general counsel opinions and benefit decisions. However, under rulings in some states, workers who received dismissal payments have been held to be unemployed because the payments were not made for the period following their separation from work but, instead, with respect to their prior service.

Table 5-13: STATES WITH WAGES IN LIEU OF NOTICE AND DISMISSAL PAYMENTS PROVISIONS								
State	Wages	Dismissal	State	Wages	Dismissal	State	Wages	Dismissal
AK	R	R	AR	R	R	AZ	D (not considered unemployed)	
CA	R: By interpretation		CO	R	L: Benefits postponed for number of weeks equal to total amount of additional remuneration divided by usual weekly wage	CT	D	D: Not applicable to severance or accrued leave pay based on service for the Armed Forces
DE		R	DC		R	FL	R	
GA	D	D	IL	R: By regulation		IN	R: Excludes greater of first \$3 or 1/5 WBA from other than BP employer	
IA	R	R	KY	R		LA	R	R: But not less than 1 week, for each week a BP employer provided severance pay which equaled or exceeded the WBA
ME	R	R	MD	R		MA	D	
MI	R	R	MN	R	R	NE	R	R
NV	D	D	NH	R	R	NJ	D	
NM	R: By regulation		NC	D	D	OH	R	R: Not applicable to severance or accrued leave pay based on service for the Armed Forces
SD	R	R	TX	D		UT	R	R
VT	R/D <sup>1</sup>	R/D <sup>1</sup>	VA	R	R: Only when allocated by the employer to specific pay periods	WA	R	R <sup>2</sup>

## NONMONETARY ELIGIBILITY

Table 5-13: STATES WITH WAGES IN LIEU OF NOTICE AND DISMISSAL PAYMENTS PROVISIONS								
State	Wages	Dismissal	State	Wages	Dismissal	State	Wages	Dismissal
WV	D		WI		R: Only when allocated by close of week, payable at full applicable wage rate and employee had notice of allocation	WY	D	D
R = weekly benefit reduced by weekly prorated amount of the payment    D = all benefits denied for the week of receipt								
<sup>1</sup> Effective July 1, 2011 all benefits denied for the week of receipt (previously weekly benefit amount was reduced by prorated amount of payment). <sup>2</sup> Previously accrued compensation except severance pay, when assigned to a period of time by collective bargaining or trade practices; negotiated settlements or proceeds given for early termination of an employment contract.								

**Worker's Compensation Payments**—Nearly half of the state laws list worker's compensation under any state or federal law as disqualifying income. Some disqualify for the week concerned; the others consider worker's compensation deductible income and reduce unemployment benefits payable by the amount of the worker's compensation payments. A few states reduce the unemployment benefit only if the worker's compensation payment is for temporary partial disability, the type of worker's compensation payment that a worker most likely could receive while certifying ability to work.

Table 5-14: STATES WITH WORKER'S COMPENSATION PROVISIONS									
State		State		State		State		State	
AL	R	CA	R	CO	R	CT	D <sup>1</sup>	DE	R
GA	D	ID	R	IL	R	IA	R	KS	D
LA	R	MA	D	MN	R	MO	R	MT	D
NE	R	NH	R	OH	R	RI	R	SD	R
TN	D	TX	D	VT	R	VA	R <sup>1</sup>	WA	D
WV	D	WI	R						
R = weekly benefit reduced by weekly prorated amount of the payment    D = all benefits denied for the week of receipt									
<sup>1</sup> If worker's compensation received after receipt of UI, worker liable to repay UI in excess of worker's compensation									

**Vacation Pay, Holiday Pay, and Back Pay**—Many states consider workers receiving vacation pay as not eligible for benefits; several other states hold workers eligible for benefits if they are on a vacation without pay through no fault of their own. In practically all states, as under FUTA, vacation pay is considered wages for contribution purposes – in a few states, in the statutory definition of wages; in others, in official explanations, general counsel or attorney general opinions, interpretations, regulations, or other publications of the state agency. Thus, a worker receiving vacation pay equal to his weekly benefit amount would, by definition, not be unemployed and would not be eligible for benefits. Some of the explanations point out that vacation pay is considered wages because the employment relationship is not discontinued, and others emphasize that a worker on vacation is not available for work. Vacation payments made at the time of severance of the employment relationship, rather than during a regular vacation shutdown, are considered disqualifying income in some states only if such payments are required under contract and are allocated to specified weeks; in other states, such payments, made voluntarily or in accordance with a contract, are not considered disqualifying income.

## NONMONETARY ELIGIBILITY

Table 5-15: STATES WITH HOLIDAY PAY, BACK PAY AND VACATION PAY PROVISIONS							
State	Holiday	Back Pay	Vacation	State	Holiday	Back Pay	Vacation
AL		D		AK	R	R: Employer withholds amount of benefits paid and remits to UI agency	R
AR	R: WBA minus holiday pay in excess of 40% of WBA		R: WBA minus vacation pay in excess of 40% of WBA	CA	R	R	
CO	Treated as wages in the week in which the holiday occurred	R: Employer withholds amount of benefits paid and remits to UI agency	D	DE		R	
DC		Employer withholds amount of benefits paid and remits to UI agency		GA		Employer withholds amount of benefits paid and remits to UI agency	D
HI	R	R	R: If continued attachment to employer	ID	R	R/D: Depending on amount	D
IL	R	R: When employee reinstated after suspension/discharge and receives full compensation for period if charges reversed	R	IN	R: Excludes greater of first \$3 or 1/5 WBA from other than BP employer	R: Excludes greater of first \$3 or 1/5 WBA from other than BP employer. Employer withholds amount of benefits paid and remits to UI agency.	R: Excludes greater of first \$3 or 1/5 WBA from other than BP employer
IA			R: If employer designated a specific vacation period, benefits are reduced for that period of time. If not, reduction is limited to 1 week.	KS	R	D: Employer withholds amount of benefits paid and remits to UI agency	R
KY		R: Benefits will be reduced 100% for overpayments caused by back pay award		LA			R

## NONMONETARY ELIGIBILITY

Table 5-15: STATES WITH HOLIDAY PAY, BACK PAY AND VACATION PAY PROVISIONS							
State	Holiday	Back Pay	Vacation	State	Holiday	Back Pay	Vacation
ME	R	X <sup>1</sup>		MD	R: Not applicable to pay attributable to any period outside the terms of an employment agreement, which specifies scheduled vacation or holiday periods		R: Not applicable to pay attributable to any period outside the terms of an employment agreement, which specifies scheduled vacation or holiday periods
MA	D			MI	R	R	R
MN	R: 55% deducted as long as amount is less than WBA	R	R: Only applies if temporary or seasonal layoff, not if permanent separation	MS		D: Employer withholds amount of benefits paid and remits to UI agency	
MO	Reportable during week of holiday	R: Employer withholds amount of benefits paid and remits to UI agency	R	NV	Treated as wages the week in which it is paid	D: Employer withholds amount of benefits paid and remits to UI agency	D
NY	D		D	NM		R: By regulation	
NC		D: Employer withholds amount of benefits paid and remits to UI agency	D	ND	Reportable during week of holiday	Not reportable	Reportable when received unless individual takes vacation prior to lay-off
OH			R	OR	May be deductible depending on circumstances		May be deductible depending on circumstances
PA	R	R	R: Only deductible if claimant has a return to work date	PR			R
RI			R	SD	R		
TN		R		UT	R	R	R
VT		R	R	VA	Reportable during week of holiday	R	R

## NONMONETARY ELIGIBILITY

Table 5-15: STATES WITH HOLIDAY PAY, BACK PAY AND VACATION PAY PROVISIONS							
State	Holiday	Back Pay	Vacation	State	Holiday	Back Pay	Vacation
WA	R: If assigned to the week claimed rather than accrued	Employer withholds amount of benefits paid and remits to UI agency	R: If assigned to the week claimed rather than accrued	WV	D	D	D: Except if worker is totally unemployed and if pay is accumulated prior to unemployment
WI	R: Only when allocated by close of such week, payable at full wage rate, and employee has notice		R: Only when allocated by close of such week, payable at full wage rate, and employee has notice	WY	D: Allocated to week the holiday occurs	R	D

R = weekly benefit reduced by weekly prorated amount of the payment    D = benefits denied for the week of receipt

<sup>1</sup> If a payment, which is awarded or authorized by the National Labor Relations Board, a court, or any other administrative agency of government for any settlement of a dispute, is for, or equivalent to, wages for a specific period of time, then that payment will be considered wages with respect to the week or weeks which are covered by the award, providing the claimant receives the back payment.

**Retirement Payments**—FUTA requires states to reduce the weekly benefit amount of any individual by the amount, allocated weekly, of any “....governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual....” This requirement applies only to payments made under a plan maintained or contributed to by a base-period or chargeable employer which affected eligibility for or increased the amount of the retirement pay. States are permitted to reduce benefits on less than a dollar-for-dollar basis by taking into account the contributions made by the worker to the plan in question. (This effectively means the FUTA requirement is limited to 100% employer-financed pensions.) Also, the requirement applies only to those payments made on a periodic (as opposed to lump-sum) basis. As a result, the states may choose from a variety of options in creating a retirement pay provision. In 2008, FUTA was amended to prohibit reductions for pensions, retirement or retired pay, annuity, or other similar payment which is not includible in the gross income of the individual because it was a part of a rollover distribution.

Table 5-16: EFFECT OF RETIREMENT PAYMENTS							
State	Deductions All Pensions BP Employer (51 States)	Considers Employee Contributions To Pensions	Excludes Pensions Not Affected By BP Work	State	Deductions All Pensions BP Employer (51 States)	Considers Employee Contributions To Pensions	Excludes Pensions Not Affected By BP Work
AL	X		X	AK	X	X	X
AZ	X	X	X	AR	X	X	
CA	X	X	X	CO	X		
CT	X	X	X	DE	X	X	
DC	X	X		FL	X	X	X
GA	X	X	X	HI	X	X	X
ID	X <sup>1</sup>	X		IL	X <sup>2</sup>	X	

## NONMONETARY ELIGIBILITY

Table 5-16: EFFECT OF RETIREMENT PAYMENTS							
State	Deductions All Pensions BP Employer (51 States)	Considers Employee Contributions To Pensions	Excludes Pensions Not Affected By BP Work	State	Deductions All Pensions BP Employer (51 States)	Considers Employee Contributions To Pensions	Excludes Pensions Not Affected By BP Work
IN	X			IA	X	X	X
KS	X	X	X	KY	X	X	X
LA	X			ME	X	X	X
MD	X <sup>3</sup>	X		MA	X	X	X
MI	X	X	X	MN	X		
MS	X			MO	X		X
MT	X	X	X	NE	X	X <sup>4</sup>	
NV	X	X	X	NH	X	X	X
NJ	X	X	X	NM	X	X	
NY	X	X	X	NC	X		
ND	X	X	X	OH			
OK	X		X	OR	X	X	
PA	X	X	X	PR	X	X	X
RI	X	X	X	SC	X	X	
SD	X	X		TN	X	X	X
TX	X	X		UT	X		X
VT		X		VI	X		
VA	X <sup>2</sup>			WA	X	X	X
WV	X		X	WI	X	X	X
WY	X	X					

<sup>1</sup> Only reportable if 100% funded by employer  
<sup>2</sup> Deducted if BP or chargeable employer  
<sup>3</sup> Excludes lump sums paid at time of layoff or shutdown of operations  
<sup>4</sup> By regulation

**Effect of Social Security Payments**—Social Security payments are sometimes treated differently from retirement payments in general. The following table indicates the extent, if any, by which the weekly benefit amount is reduced due to receipt of Social Security payments.

## NONMONETARY ELIGIBILITY

**Table 5-17: EFFECT OF SOCIAL SECURITY PAYMENTS**

AL	Not Reduced	AK	Not Reduced	AZ	Not Reduced	AR	Not Reduced
CA	Not Reduced	CO	Not Reduced	CT	Not Reduced	DE	Not Reduced
DC	Not Reduced	FL	Not Reduced	GA	Not Reduced	HI	Not Reduced
ID	Not Reduced	IL	Reduced by 50%	IN	Not Reduced	IA	Not Reduced
KS	Not Reduced	KY	Not Reduced	LA	Reduced by 50%	ME	Not Reduced
MD	Not Reduced	MA	Not Reduced	MI	Not Reduced	MN	Reduced by 50% <sup>1</sup>
MS	Not Reduced	MO	Not Reduced	MT	Not Reduced	NE	Not Reduced
NV	Not Reduced	NH	Not Reduced	NJ	Not Reduced	NM	Not Reduced
NY	Not Reduced	NC	Not Reduced	ND	Not Reduced	OH	Not Reduced
OK	Not Reduced	OR	Not Reduced	PA	Not Reduced	PR	Not Reduced
RI	Not Reduced	SC	Not Reduced	SD	Reduced by 50% <sup>2</sup>	TN	Not Reduced
TX	Not Reduced	UT	Not Reduced	VT	Not Reduced	VA	Not Reduced <sup>3</sup>
VI	Reduced by 100%	WA	Not Reduced	WV	Not Reduced	WI	Not Reduced
WY	Not Reduced						

<sup>1</sup> Unless base period wages were earned while claimant was already qualified to receive Social Security benefits.  
<sup>2</sup> Reduction will cease once UTF CQ ending balance reaches \$30,000,000.  
<sup>3</sup> Reduced by 50% if fund balance factor is below 50%, repealed effective July 1, 2011.

**Supplemental Unemployment Payments**—A supplemental unemployment payment plan is a system whereby, under a contract, payments are made from an employer-financed trust fund to his workers. The purpose is to provide the worker, while unemployed, with a combined UI and supplemental unemployment benefit payment amounting to a specified proportion of his weekly earnings while employed.

There are two major types of such plans: (1) those of the Ford-General Motors type, under which the worker has no vested interest and is eligible for payments only if he is laid off by the company; and (2) those under which the worker has a vested interest and may collect if he is out of work for other reasons, such as illness or permanent separation.

All states except New Mexico, Puerto Rico, South Carolina, and South Dakota permit supplementation by Ford-General Motors type plans without affecting UI payments.

In 48 states permitting supplementation, an interpretive ruling was made either by the attorney general (27 states) or by the employment security agency (10 states); in Maine, supplementation is permitted as a result of a Superior Court decision and, in the remaining 10 states<sup>1</sup>, by amendment of the UI statutes.

Some supplemental unemployment benefit plans of the Ford-General Motors type provide for alternative payments or substitute private payments in a state in which a ruling not permitting supplementation is issued. These payments may be made in amounts equal to three or four times the regular weekly private benefit

<sup>1</sup> AK, CA, CO, GA, HI, IN, MD, NH, OH and VA.

## NONMONETARY ELIGIBILITY

after two or three weekly payments of state UI benefits without supplementation; in lump sums when the layoff ends or the state benefits are exhausted (whichever is earlier); or through alternative payment arrangements to be worked out, depending on the particular supplemental unemployment benefit plan.

**Relationship with Other Statutory Provisions**—The eleven states<sup>2</sup> which have no provision for any type of disqualifying income except pensions and the larger number which have only two or three types do not necessarily allow benefits to all workers in receipt of the types of payments concerned. When they do not pay benefits to such workers, they rely upon the general able-and-available provisions or the definition of unemployment. Many workers receiving worker's compensation, other than those receiving weekly allowances for dismemberment, are not able to work in terms of the UI law. However, receipt of worker's compensation for injuries in employment does not automatically disqualify an unemployed worker for unemployment benefits. Many states consider that evidence of injury with loss of employment is relevant only as it serves notice that a condition of ineligibility may exist and that a worker may not be able to work and may not be available for work.

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<sup>2</sup> AZ, DC, HI, ID, NM, ND, OK, SC, VI, VA and WA.



## National Conference of State Legislatures

### 2010 & 2011 State Legislation on Drug Testing for Unemployment Benefits

*As of August 30, 2011*

#### ARKANSAS

AR S 157 Unemployment Benefits  
2011 Status: Failed - Adjourned - Senate Public Health, Welfare and Labor Committee  
Last Action: 03/15/2011  
Author: Pritchard (R)  
Topics: Administration| Benefits and eligibility  
Summary: Requires that applicants for and recipients of unemployment benefits test negative for illegal drug use.

History:  
01/27/2011 Introduced.  
01/27/2011 To Senate Committee on Public Health, Welfare and Labor.  
02/21/2011 Withdrawn from Senate Committee on Public Health, Welfare and Labor.  
02/21/2011 Amended on Senate floor.  
02/21/2011 To Senate Committee on Public Health, Welfare and Labor.  
03/02/2011 Withdrawn from Senate Committee on Public Health, Welfare and Labor.  
03/02/2011 Amended on Senate floor.  
03/02/2011 To Senate Committee on Public Health, Welfare and Labor.  
03/15/2011 Withdrawn from Senate Committee on Public Health, Welfare and Labor.  
03/15/2011 Amended on Senate floor.  
03/15/2011 To Senate Committee on Public Health, Welfare and Labor.

#### FLORIDA

FL S 302 Drug Testing and Unemployment Compensation  
2011 Status: Failed - Died  
Last Action: 03/08/2011  
Author: Bennett (R) Additional Authors: Dockery (R);Bennett (R);Garcia Re (R);Gaetz D (R)  
Topics: Administration| Benefits and eligibility  
Associated Bills: FL H 653 Similar  
Summary: Relates to drug testing as regards unemployment compensation, creates the Drug Deterrence Pilot Program within the Agency for Workforce Innovation, provides for the screening of individuals to determine which individuals must be tested, provides terms of disqualification of benefits, provides for authentication and the admissibility of drug tests in unemployment compensation hearings, provides for preservation of test samples, provides for retesting.

History:  
12/21/2010 Prefiled.  
01/05/2011 To Senate Committee on Commerce and Tourism.  
01/05/2011 Referred to Senate Committee on Governmental Oversight and Accountability.  
01/05/2011 Referred to Senate Committee on Budget.  
03/08/2011 Introduced.  
03/08/2011 To Senate Committee on Commerce and Tourism.  
03/08/2011 Referred to Senate Committee on Governmental Oversight and Accountability.  
03/08/2011 Referred to Senate Committee on Budget.  
05/07/2011 In Senate. Indefinitely postponed and withdrawn from consideration.  
05/07/2011 In Senate. Died in committee.

FL H 575 Drug Testing and Unemployment Compensation  
2010 Status: Failed - Died  
Last Action: 03/02/2010  
Author: Williams T (R) Additional Authors: Drake (R)  
Topics: Benefits and eligibility  
Associated Bills: FL S 258 Similar  
Summary: Relates to drug testing and unemployment compensation, creates Drug Deterrence Pilot Program within the Agency for Workforce Innovation, provides legislative intent, provides scope of eligibility for benefits, defines terms, provides for screening of individuals to determine which individuals must be tested, provides for notice, provides terms of disqualification for benefits, requires agency to supply information concerning drug treatment programs.

History:  
01/06/2010 Prefiled.  
01/20/2010 To House Council on Economic Development and Community Affairs Policy.  
01/20/2010 Referred to House Policy Council.  
01/20/2010 Referred to House Committee on Transportation and Economic Development Appropriations.  
01/20/2010 Referred to House Council on Economic Development and Community Affairs Policy.  
03/02/2010 Introduced.  
03/02/2010 To House Committee on Economic Development Policy.  
03/02/2010 Referred to House Policy Council.  
03/02/2010 Referred to House Committee on Transportation and Economic Development Appropriations.  
03/02/2010 Referred to House Council on Economic Development and Community Affairs Policy.  
04/30/2010 In House. Died in committee.

FL H 653 Drug Deterrence Program  
2011 Status: Failed - Died  
Last Action: 03/08/2011  
Author: Gaetz M (R)  
Topics: Administration| Benefits and eligibility  
Associated Bills: FL S 302 Similar  
Summary: Creates Drug Deterrence Program within Agency for Workforce Innovation, provides scope of eligibility for benefits, defines terms, provides for screening of individuals to determine which individuals must be tested, provides for notice, provides terms of disqualification for benefits, requires agency to supply information concerning drug treatment programs, provides for authentication & admissibility of drug tests in unemployment compensation hearings, provides for retesting, provides an appeal process.

History:  
02/08/2011 Prefiled.  
02/22/2011 To House Council on Economic Development and Tourism Subcommittee.  
02/22/2011 Referred to House Committee on Rulemaking and Regulation Subcommittee.  
02/22/2011 Referred to House Committee on Transportation and Economic Development Appropriations Subcommittee.  
02/22/2011 Referred to House Committee on Economic Affairs.  
03/08/2011 Introduced.  
03/08/2011 To House Committee on Economic Development and Tourism Subcommittee.  
03/08/2011 Referred to House Committee on Rulemaking and Regulation Subcommittee.  
03/08/2011 Referred to House Committee on Transportation and Economic Development Appropriations Subcommittee.  
03/08/2011 Referred to House Committee on Economic Affairs.  
05/07/2011 In House. Indefinitely postponed and withdrawn from consideration.  
05/07/2011 In House. Died in committee.

## GEORGIA

GA H 1163 Employment Security Law

2010 Status: Failed - Adjourned - House Industrial Relations Committee  
Last Action: 02/10/2010  
Author: Harbin (R)  
Topics: Benefits and eligibility  
Summary: Relates to the administration of the Employment Security Law, provides that the Department of Labor shall develop a program of random drug testing of applicants for unemployment benefits, amends Article 1 of Chapter 4 of Title 49 of the Official Code of Georgia Annotated, the Public Assistance Act of 1965, provides that the Department of Human Services shall develop a program of random drug testing of applicants for public assistance.

History:  
02/10/2010 Introduced.  
02/11/2010 To House Committee on Industrial Relations.

GA H 1389 Public Assistance  
2010 Status: Failed - Adjourned - House Industrial Relations Committee  
Last Action: 03/11/2010  
Author: Harden M (R)  
Topics: Benefits and eligibility  
Summary: Relates to general provisions relating to public assistance, requires random drug testing for recipients of certain public assistance, amends Article 7 of Chapter 8 of Title 34 of the Official Code of Georgia Annotated, relates to unemployment compensation benefits, requires random drug testing for recipients of unemployment compensation benefits, provides for related matters, provides for an effective date and applicability, repeals conflicting Laws.

History:  
03/11/2010 Introduced.  
03/16/2010 To House Committee on Industrial Relations.

## INDIANA

IN S 86 Unemployment Benefits Qualifications  
2011 Status: Enacted - Public Law No. 12-2011  
Last Action: 04/15/2011 - Enacted  
Author: Leising (R)  
Topics: Administration| Benefits and eligibility  
Summary: Relates to conditions for extended unemployment benefits, requires that an unemployment benefits drug test shall be performed at a certified laboratory, with specimen collection performed by a certified collector and that the cost of the drug test be paid by the employer, provides that a person is considered to have refused an offer of suitable work by testing positive for drugs or by refusing without good cause to submit an employment drug test, prohibits use of drug test results in a criminal hearing.

History:  
12/29/2010 Prefiled.  
01/05/2011 Introduced.  
01/05/2011 To Senate Committee on Pensions and Labor.  
01/12/2011 From Senate Committee on Pensions and Labor: Do pass.  
01/24/2011 Amended on Senate floor.  
01/25/2011 Passed Senate. To House.  
03/28/2011 To House Committee on Employment, Labor and Pensions.  
04/07/2011 From House Committee on Employment, Labor and Pensions: Do pass as amended.  
04/07/2011 Committee amendment adopted on House floor.  
04/11/2011 Amended on House floor.  
04/12/2011 In House. Third Reading: recommitted to Committee of One, amendment adopted.  
04/12/2011 Passed House. To Senate for concurrence.  
04/14/2011 Senate concurred in House amendments.  
04/14/2011 Eligible for Governor's desk.

04/14/2011 To Governor.  
04/15/2011 Signed by Governor.  
04/15/2011 Public Law No. 12-2011

IN H 1207 Unemployment Compensation and Drug Testing  
2011 Status: Failed - Adjourned - House Employment, Labor and Pensions Committee  
Last Action: 01/10/2011  
Author: Ubelhor (R)  
Topics: Administration| Benefits and eligibility  
Summary: Relates to unemployment compensation and drug testing, provides that an individual who is otherwise qualified for unemployment compensation benefits is disqualified for benefits upon a report to the department of workforce development by a prospective employer that the individual was found to have had a positive post offer or preemployment drug test, requires the department to adopt rules concerning positive preemployment drug tests reported to the department, repeals an outdated reference.

History:  
01/10/2011 Introduced.  
01/10/2011 To House Committee on Employment, Labor and Pensions.

IN H 1267 Drug Testing and Unemployment Benefits  
2011 Status: Failed - Adjourned - Conference Committee  
Last Action: 03/14/2011  
Author: Kubacki (R)  
Topics: Administration| Benefits and eligibility  
Summary: Relates to drug testing and unemployment benefits, provides that an individual, who is required to undergo drug testing as a condition of an offer of employment and who files an initial claim for unemployment benefits, must be advised that the individual is disqualified for benefits if the person is found to have a positive drug test or refuses to submit to a drug test, provides for resumption of eligibility upon submission of a negative drug test.

History:  
01/12/2011 Introduced.  
01/12/2011 To House Committee on Employment, Labor and Pensions.  
02/08/2011 From House Committee on Employment, Labor and Pensions: Do pass as amended.  
02/08/2011 Committee amendment adopted on House floor.  
02/10/2011 Ordered Engrossed.  
02/14/2011 Passed House. To Senate.  
02/17/2011 To Senate Committee on Pensions and Labor.  
03/03/2011 From Senate Committee on Pensions and Labor: Do pass as amended.  
03/03/2011 Committee amendment adopted on Senate floor.  
03/14/2011 Amended on Senate floor.  
03/15/2011 Passed Senate. To House for concurrence.  
04/20/2011 House refused to concur in Senate amendments.  
04/20/2011 To Conference Committee.

## IOWA

IA S 90 State Aid  
2011 Status: Pending - Carryover - Senate State Government Committee  
Last Action: 01/25/2011  
Author: Zaun (R)  
Topics: Administration| Benefits and eligibility  
Summary: Establishes a requirement that individuals applying and receiving state aid participate in drug testing if such drug testing is not otherwise prohibited by law, defines the term "drug" as having the same meaning as the definition in Code section 730.5.

History:

01/25/2011 Introduced.  
 01/25/2011 To Senate Committee on State Government.  
 01/27/2011 In Senate Committee on State Government

IA H 2250 Requirement for Participation in Drug Testing  
 2010 Status: Failed - Adjourned - House Human Resources Committee  
 Last Action: 02/02/2010  
 Author: Schueller (D)  
 Topics: Benefits and eligibility  
 Summary: Establishes a requirement for participation in drug testing for individuals receiving unemployment compensation benefits and for persons seeking eligibility for the family investment program.

History:  
 02/02/2010 Introduced.  
 02/02/2010 To House Committee on Human Resources.  
 02/04/2010 In House Committee on Human Resources.

### NEW MEXICO

NM S 263 Unemployment Compensation and Drug Tests  
 2011 Status: Failed - Adjourned - Senate Judiciary Committee  
 Last Action: 01/25/2011  
 Author: Jennings (D)  
 Topics: Administration| Benefits and eligibility  
 Summary: Relates to unemployment compensation, denies benefits to individuals who fail to pass a drug test.

History:  
 01/25/2011 Introduced.  
 01/25/2011 To Senate Committee on Corporations and Transportation.  
 01/25/2011 To Senate Committee on Judiciary.  
 01/25/2011 To Senate Committee on Finance.  
 03/03/2011 From Senate Committee on Corporations and Transportation: Do pass.

### NORTH CAROLINA

NC H 735 Unemployment Benefit and Drug Testing  
 2011 Status: Pending - House Commerce and Job Development Committee  
 Last Action: 04/07/2011  
 Author: Warren H (R)  
 Topics: Administration| Benefits and eligibility  
 Summary: Includes periodic drug testing among the conditions required for eligibility to receive unemployment insurance benefits in order to ensure that recipients are able and available to work.

History:  
 04/06/2011 Filed.  
 04/07/2011 Introduced.  
 04/07/2011 To House Committee on Commerce and Job Development.

### OREGON

OR H 2995 Claimants of Unemployment Insurance Benefits  
 2011 Status: Failed - Adjourned - House Business and Labor Committee  
 Last Action: 01/11/2011  
 Author: Richardson (R)

Topics: Administration| Benefits and eligibility  
Summary: Requires Employment Department to adopt rules requiring drug testing of applicants for and recipients of unemployment insurance benefits, applies to applicants for and recipients of unemployment insurance benefits on or after July 1, 2012.  
History:  
01/11/2011 Introduced.  
01/21/2011 To House Committee on Business and Labor.

## **SOUTH CAROLINA**

SC S 920 Drug Screening for Unemployment Benefits  
2010 Status: Failed - Adjourned - Senate Judiciary Committee  
Last Action: 01/12/2010  
Author: Thomas (R)  
Topics: Benefits and eligibility  
Summary: Requires a person receiving an unemployment benefit to submit to drug screening and provides penalties if he fails this drug test, and require a person receiving certain public aid or assistance shall submit to drug screening and to provide penalties if he fails this drug test.  
History:  
12/09/2009 Prefiled.  
12/09/2009 To Senate Committee on Judiciary.  
01/12/2010 Introduced.  
01/12/2010 To Senate Committee on Judiciary.

SC H 4043 Unemployment Benefits Drug Test Results  
2011 Status: Pending - House Judiciary Committee  
Last Action: 04/06/2011  
Author: Tallon (R)  
Topics: Administration| Benefits and eligibility  
Summary: Provides that an employer may confidentially notify the Department of Employment and Workforce when a prospective employee fails a drug test required by the employer as a condition of employment if the prospective employee is receiving unemployment benefits, provides the department shall suspend the benefits of a person who, while receiving benefits, fails a drug test taken as a condition of an application for employment.  
History:  
04/06/2011 Introduced.  
04/06/2011 To House Committee on Judiciary.

## **TENNESSEE**

TN H 1289 Welfare  
2011 Status: Pending - Carryover - House Health & Human Resources Committee  
Last Action: 02/16/2011  
Author: Butt (R)  
Topics: Administration| Benefits and eligibility  
Associated Bills: TN S 1677 Same as  
Summary: Relates to Welfare, requires individuals applying for food stamp program benefits, unemployment benefits, and families first assistance to submit to drug testing, prohibits felons of certain drug crimes from receiving certain benefits.  
History:  
02/16/2011 Introduced.  
02/23/2011 To House Committee on Health and Human Resources.  
03/01/2011 In House Committee on Health and Human Resources: Referred to General Subcommittee.

TN S 1677 Welfare  
2011 Status: Pending - Carryover - Senate General Welfare, Health and Human Resources Committee  
Last Action: 02/17/2011  
Author: Tracy (R)  
Topics: Administration| Benefits and eligibility  
Associated Bills: TN H 1289 Same as  
Summary: Relates to Welfare, requires individuals applying for food stamp program benefits, unemployment benefits, and families first assistance to submit to drug testing, prohibits felons of certain drug crimes from receiving certain benefits.  
History:  
02/17/2011 Introduced.  
02/24/2011 To Senate Committee on General Welfare, Health and Human Resources.

### TEXAS

TX H 126 Drug Testing for Unemployment Compensation Applicants  
2011 Status: Failed - Adjourned - House Economic & Small Business Development Committee  
Last Action: 01/11/2011  
Author: Legler (R)  
Topics: Administration| Benefits and eligibility  
Summary: Relates to required drug testing for applicants and recipients of unemployment compensation benefits.  
History:  
11/08/2010 Prefiled.  
01/11/2011 Introduced.  
02/11/2011 To House Committee on Economic and Small Business Development.

### WEST VIRGINIA

WV H 3007 Implementing Random Drug Testing  
2010 Status: Failed - Adjourned - House Judiciary Committee  
Last Action: 01/13/2010  
Author: Blair (R)  
Topics: Benefits and eligibility  
Summary: Implements random drug testing for recipients of federal-state assistance, state assistance and unemployment compensation.  
History:  
01/06/2010 Prefiled.  
01/13/2010 Introduced.  
01/13/2010 To House Committee on Judiciary.

Source: NCSL/StateNet Legislative Bill Tracking Database, August 30, 2011  
<http://www.ncsl.org/?tabid=20237>

section 1(a)(2) of this chapter must not be included in the calculation of the ~~minimum net worth~~ **positive working capital** described in section 1(a)(1) of this chapter.

SECTION 46. THE FOLLOWING ARE REPEALED [EFFECTIVE JULY 1, 2011]: IC 27-1-25-7.5; IC 27-8-15-2.

SECTION 47. [EFFECTIVE JULY 1, 2011] **(a) IC 27-1-15.7-2(a) and IC 27-1-15.7-2(e), both as amended by this act, apply to an insurance producer license renewal occurring after December 31, 2011.**

**(b) IC 27-1-15.7-5, as amended by this act, applies to insurance producer preclicensing self-study or instruction provided after December 31, 2011.**

**(c) This SECTION expires on December 31, 2013. SECTION 48. An emergency is declared for this act.**

P.L.12-2011

[S.86. Approved April 15, 2011.]

AN ACT to amend the Indiana Code concerning labor and safety.

*Be it enacted by the General Assembly of the State of Indiana:*

SECTION 1. IC 22-4-2-34, AS AMENDED BY P.L.175-2009, SECTION 3, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE MARCH 1, 2011 (RETROACTIVE)]: Sec. 34. (a) With respect to benefits for weeks of unemployment beginning after August 13, 1981, "extended benefit period" means a period which begins with the third week after a week for which there is a state "on" indicator and ends with the later of the following:

- (1) The third week after the first week for which there is a state "off" indicator.
- (2) The thirteenth consecutive week of such period.



(b) However, no extended benefit period may begin by reason of a state "on" indicator before the fourteenth week following the end of a prior extended benefit period which was in effect with respect to this state.

(c) There is a state "on" indicator for this state for a week if the commissioner determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediately preceding twelve (12) weeks, the rate of insured unemployment (not seasonally adjusted) under this article:

(1) equaled or exceeded one hundred twenty percent (120%) of the average of such rates for the corresponding 13-week period ending in each of the preceding two (2) calendar years; and

(2) equaled or exceeded five percent (5%). However, the determination of whether there has been a state "on" or "off" indicator beginning or ending any extended benefit period shall be made under this subsection as if it did not contain subdivision (1) if the insured unemployment rate is at least six percent (6%). Any week for which there would otherwise be a state "on" indicator shall continue to be such a week and may not be determined to be a week for which there is a state "off" indicator.

(d) In addition to the test for a state "on" indicator under subsection (c), there is a state "on" indicator for this state for a week if:

(1) the average rate of total unemployment in Indiana, seasonally adjusted, as determined by the United States Secretary of Labor, for the period consisting of the most recent three (3) months for which data for all states are published before the close of the week, equals or exceeds six and five-tenths percent (6.5%); and

(2) the average rate of total unemployment in Indiana, seasonally adjusted, as determined by the United States Secretary of Labor, for the three (3) month period referred to in subdivision (1) equals or exceeds one hundred ten percent (110%) of the average for either or both of the corresponding three (3) month periods ending in the two (2) preceding calendar years.

There is a state "off" indicator for a week if either of the requirements in subdivisions (1) and (2) are not satisfied. However, any week for which there would otherwise be a state "on" indicator under this section continues to be subject to the "on" indicator and shall not be considered a week for which there is a state "off" indicator. This subsection expires on the later of December 5, 2009, or the week ending four (4) weeks before the last week for which federal sharing is authorized by Section 2005(a) of Division B, Title II (the federal Assistance to Unemployed Workers and Struggling Families Act) of the federal American Recovery and Reinvestment Act of 2009 (P.L. 111-5).

(e) There is a state "off" indicator for this state for a week if the commissioner determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediately preceding twelve (12) weeks, the requirements of subsection (c) have not been met.

(f) With respect to benefits for weeks of unemployment beginning after August 13, 1981, "rate of insured unemployment," for purposes of subsection (c), means the percentage derived by dividing:

(1) the average weekly number of individuals filing claims for regular compensation in this state for weeks of unemployment with respect to the most recent 13 consecutive week period (as determined by the board on the basis of this state's reports to the United States Secretary of Labor); by

(2) the average monthly employment covered under this article for the first four (4) of the most recent six (6) completed calendar quarters ending before the end of such 13-week period.

(g) "Regular benefits" means benefits payable to an individual under this article or under the law of any other state (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. 8501 through 8525) other than extended benefits. "Additional benefits" means benefits other than extended benefits and which are totally financed by a state payable to exhaustees by reason of conditions of high unemployment or by reason of other special factors under the provisions of any state law. If extended compensation is payable to an individual by this state and additional compensation is payable to the individual for the same week by any state, the individual may elect which of the two (2) types of compensation to claim.

(h) "Extended benefits" means benefits (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5

U.S.C. 8501 through 8525) payable to an individual under the provisions of this article for weeks of unemployment in the individual's "eligibility period". Pursuant to Section 3304 of the Internal Revenue Code extended benefits are not payable to interstate claimants filing claims in an agent state which is not in an extended benefit period, against the liable state of Indiana when the state of Indiana is in an extended benefit period. This prohibition does not apply to the first two

(2) weeks claimed that would, but for this prohibition, otherwise be payable. However, only one (1) such two (2) week period will be granted on an extended claim. Notwithstanding any other provisions of this chapter, with respect to benefits for weeks of unemployment beginning after October 31, 1981, if the benefit year of any individual ends within an extended benefit period, the remaining balance of extended benefits that the individual would, but for this clause, be entitled to receive in that extended benefit period, with respect to weeks of unemployment beginning after the end of the benefit year, shall be reduced (but not below zero (0)) by the product of the number of weeks for which the individual received any amounts as trade readjustment allowances within that benefit year, multiplied by the individual's weekly benefit amount for extended benefits.

(i) "Eligibility period" of an individual means the period consisting of the weeks in the individual's benefit period which begin in an extended benefit period and, if the individual's benefit period ends within such extended benefit period, any weeks thereafter which begin in such extended benefit period. For any weeks of unemployment beginning after February 17, 2009, and before January 1, 2010, ~~2010, 2012~~, an individual's eligibility period (as described in Section 203(c) of the Federal-State Unemployment Compensation Act of 1970) is, for purposes of any determination of eligibility for extended compensation under state law, considered to include any week that begins:

- (1) after the date as of which the individual exhausts all rights to emergency unemployment compensation; and
- (2) during an extended benefit period that began on or before the date described in subdivision (1).

(j) "Exhaustee" means an individual who, with respect to any week of unemployment in the individual's eligibility period:

- (1) has received, prior to such week, all of the regular benefits including dependent's allowances that were available to the individual under this article or under the law of any other state (including benefits payable to federal civilian employees and ex-servicemen under 5 U.S.C. 8501 through 8525) in the individual's current benefit period that includes such week. However, for the purposes of this subsection, an individual shall be deemed to have received all of the regular benefits that were available to the individual although as a result of a pending appeal with respect to wages that were not considered in the original monetary determination in the individual's benefit period or although a nonmonetary decision denying benefits is pending, the individual may subsequently be determined to be entitled to added regular benefits;
- (2) may be entitled to regular benefits with respect to future weeks of unemployment but such benefits are not payable with respect to such week of unemployment by reason of seasonal limitations in any state unemployment insurance law; or
- (3) having had the individual's benefit period expire prior to such week, has no, or insufficient, wages on the basis of which the individual could establish a new benefit period that would include such week;

and has no right to unemployment benefits or allowances, as the case may be, under the Railroad Unemployment Insurance Act, the Trade Act of 1974, the Automotive Products Trade Act of 1965 and such other federal laws as are specified in regulations issued by the United States Secretary of Labor, and has not received and is not seeking unemployment benefits under the unemployment compensation law of Canada; but if the individual is seeking such benefits and the appropriate agency finally determines that the individual is not entitled to benefits under such law, the individual is considered an exhaustee.

(k) "State law" means the unemployment insurance law of any state, approved by the United States Secretary of Labor under Section 3304 of the Internal Revenue Code.

**(l) With respect to compensation for weeks of unemployment beginning after March 1, 2011, and ending on the later of December 10, 2011, or the week ending four (4) weeks before the last week for which federal sharing is authorized by Section 2005(a) of Division B, Title II (the federal Assistance to Unemployed and Struggling Families Act) of the federal American Recovery and Reinvestment Act of 2009 (P.L. 111-5), in addition to the tests for a state "on" indicator under subsections (c) and (d), there is a state "on" indicator for a week if:**

**(1) the average rate of insured unemployment for the period consisting of the week and the immediately preceding twelve (12) weeks equals or exceeds five percent (5%); and**  
**(2) the average rate of insured unemployment for the period consisting of the week and the immediately preceding twelve (12) weeks equals or exceeds one hundred twenty percent (120%) of the average rates of insured unemployment for the corresponding thirteen (13) week period ending in each of the preceding three (3) calendar years.**

**(m) There is a state "off" indicator for a week based on the rate of insured unemployment only if the rate of insured unemployment for the period consisting of the week and the immediately preceding twelve (12) weeks does not result in an "on" indicator under subsection (c)(1).**

**(n) With respect to compensation for weeks of unemployment beginning after March 1, 2011, and ending on the later of December 10, 2011, or the week ending four (4) weeks before the last week for which federal sharing is authorized by Section 2005(a) of Division B, Title II (the federal Assistance to Unemployed and Struggling Families Act) of the federal American Recovery and Reinvestment Act of 2009 (P.L. 111-5), in addition to the tests for a state "on" indicator under subsections (c), (d), and (l) there is a state "on" indicator for a week if:**

**(1) the average rate of total unemployment (seasonally adjusted), as determined by the United States Secretary of Labor, for the period consisting of the most recent three (3) months for which data for all states are published before the close of the week equals or exceeds six and one-half percent (6.5%); and**  
**(2) the average rate of total unemployment in Indiana (seasonally adjusted), as determined by the United States Secretary of Labor, for the three (3) month period referred to in subdivision (1) equals or exceeds one hundred ten percent (110%) of the average for any or all of the corresponding three (3) month periods ending in the three (3) preceding calendar years.**

**(o) There is a state "off" indicator for a week based on the rate of total unemployment only if the rate of total unemployment for the period consisting of the most recent three (3) months for which data for all states**

are published before the close of the week does

**not result in an "on" indicator under subsection (d)(1).**

SECTION 2. IC 22-4-2-40 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2011]: **Sec. 40. As used in this article, "drug test" means a test that contains at least a five (5) drug panel that tests for the following:**

- (1) Amphetamines.**
- (2) Cocaine.**
- (3) Opiates (2,000 ng/ml).**
- (4) PCP.**

**(5) THC. A drug test described in this section must be performed at a United States Department of Health and Human Services certified laboratory, with specimen collection performed by a collector certified by the United States Department of Transportation and the cost of the drug test paid by the employer.**

SECTION 3. IC 22-4-12-4, AS AMENDED BY P.L.175-2009, SECTION 17, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE MARCH 1, 2011 (RETROACTIVE)]: Sec. 4. (a) Benefits shall be computed upon the basis of wage credits of an individual in the individual's base period. Wage credits shall be reported by the employer and credited to the individual in the manner prescribed by the board. With respect to initial claims filed for any week beginning on and after July 7, 1991, the maximum total amount of benefits payable to any eligible individual during any benefit period shall not exceed twenty-six (26) times the individual's weekly benefit, or twenty-eight percent (28%) of the individual's wage credits with respect to the individual's base period, whichever is less. If such maximum total amount of benefits is not a multiple of one dollar (\$1), it shall be computed to the next lower multiple of one dollar (\$1).

(b) Except as provided in subsection (d), the total extended benefit amount payable to any eligible individual with respect to the individual's applicable benefit period shall be fifty percent (50%) of the total amount of regular benefits (including dependents' allowances) which were payable to the individual under this article in the applicable benefit year, or thirteen (13) times the weekly benefit amount (including dependents' allowances) which was payable to the individual under this article for a week of total unemployment in the applicable benefit year, whichever is the lesser amount.

(c) This subsection applies to individuals who file a disaster unemployment claim or a state unemployment insurance claim after June 1, 1990, and before June 2, 1991, or during another time specified in another state statute. An individual is entitled to thirteen (13) weeks of additional benefits, as originally determined, if:

- (1) the individual has established:
    - (A) a disaster unemployment claim under the Stafford Disaster Relief and Emergency Assistance Act; or
    - (B) a state unemployment insurance claim as a direct result of a major disaster;
  - (2) all regular benefits and all disaster unemployment assistance benefits:
    - (A) have been exhausted by the individual; or
    - (B) are no longer payable to the individual due to the expiration of the disaster assistance period; and
  - (3) the individual remains unemployed as a direct result of the disaster.
- (d) For purposes of this subsection, "high unemployment period" means a

period during which an extended benefit period would be in effect if IC 22-4-2-34(d)(1) were applied by substituting "eight percent (8%)" for "six and five-tenths percent (6.5%)". Effective with respect to weeks beginning in a high unemployment period, the total extended benefit amount payable to an eligible individual with respect to the applicable benefit year is equal to the least of the following amounts:

- (1) Eighty percent (80%) of the total amount of regular benefits that were payable to the eligible individual under this article in the applicable benefit year.
- (2) Twenty (20) times the weekly benefit amount that was payable to the eligible individual under this article for a week of total unemployment in the applicable benefit year.
- (3) Forty-six (46) times the weekly benefit amount that was payable to the eligible individual under this article for a week of total unemployment in the applicable benefit year, reduced by the regular unemployment compensation benefits paid (or deemed paid) during the benefit year.

This subsection expires on the later of December 5, 2009, or the week ending four (4) weeks before the last week for which federal sharing is authorized by Section 2005(a) of Division B, Title II (the federal Assistance to Unemployed Workers and Struggling Families Act) of the federal American Recovery and Reinvestment Act of 2009 (P.L. 111-5).



(e) For purposes of this subsection, "high unemployment period" means a period during which an extended benefit period would be in effect if IC 22-4-2-34(n)(1) were applied by substituting "eight percent (8%)" for "six and one-half percent (6.5%)". Effective with respect to weeks of unemployment beginning after March 1, 2011, and ending on the later of December 10, 2011, or the week ending four (4) weeks before the last week for which federal sharing is authorized by Section 2005(a) of Division B, Title II (the federal Assistance to Unemployed and Struggling Families Act) of the federal American Recovery and Reinvestment Act of 2009 (P.L. 111-5), in a high unemployment period, the total extended benefit amount payable to an eligible individual with respect to the applicable benefit year is equal to the lesser of the following amounts:

**(1) Eighty percent (80%) of the total amount of regular benefits that were payable to the eligible individual under this article in the applicable benefit year.**

**(2) Twenty (20) times the weekly benefit amount that was payable to the eligible individual under this article for a week of total unemployment in the applicable benefit year.**

SECTION 4. IC 22-4-15-2, AS AMENDED BY P.L.175-2009, SECTION 24, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2011]:

Sec. 2. (a) With respect to benefit periods established on and after July 3, 1977, an individual is ineligible for waiting period or benefit rights, or extended benefit rights, if the department finds that, being totally, partially, or part-totally unemployed at the time when the work offer is effective or when the individual is directed to apply for work, the individual fails without good cause:

(1) to apply for available, suitable work when directed by the commissioner, the deputy, or an authorized representative of the department of workforce development or the United States training and employment service;

(2) to accept, at any time after the individual is notified of a separation, suitable work when found for and offered to the individual by the commissioner, the deputy, or an authorized representative of the department of workforce development or the United States training and employment service, or an employment unit; or

(3) to return to the individual's customary self-employment when directed by the commissioner or the deputy.

(b) With respect to benefit periods established on and after July 6, 1980, the ineligibility shall continue for the week in which the failure occurs and until the individual earns remuneration in employment equal to or exceeding the weekly benefit amount of the individual's claim in each of eight (8) weeks. If the qualification amount has not been earned at the expiration of an individual's benefit period, the unearned amount shall be carried forward to an extended benefit period or to the benefit period of a subsequent claim.

(c) With respect to extended benefit periods established on and after July 5, 1981, the ineligibility shall continue for the week in which the failure occurs and until the individual earns remuneration in employment equal to or exceeding the weekly benefit amount of the individual's claim in each of four (4) weeks.

(d) If an individual failed to apply for or accept suitable work as outlined in this section, the maximum benefit amount of the individual's current claim, as initially determined, shall be reduced by an amount determined as follows:

(1) For the first failure to apply for or accept suitable work, the maximum benefit amount of the individual's current claim is equal to the result of:

(A) the maximum benefit amount of the individual's current claim, as initially determined; multiplied by

(B) seventy-five percent (75%); rounded (if not already a multiple of one dollar (\$1)) to the next higher dollar.

(2) For the second failure to apply for or accept suitable work, the maximum benefit amount of the individual's current claim is equal to the result of:

(A) the maximum benefit amount of the individual's current claim determined under subdivision (1); multiplied by

(B) eighty-five percent (85%); rounded (if not already a multiple of one dollar (\$1)) to the next higher dollar.

(3) For the third and any subsequent failure to apply for or accept suitable work, the maximum benefit amount of the individual's current claim is equal to the result of:

(A) the maximum benefit amount of the individual's current claim determined under subdivision (2); multiplied by

(B) ninety percent (90%); rounded (if not already a multiple of one dollar (\$1)) to the next higher dollar.

(e) In determining whether or not any such work is suitable for an individual, the department shall consider:

(1) the degree of risk involved to such individual's health, safety, and morals;

(2) the individual's physical fitness and prior training and experience;

(3) the individual's length of unemployment and prospects for securing local work in the individual's customary occupation; and

(4) the distance of the available work from the individual's

residence. However, work under substantially the same terms and conditions under which the individual was employed by a base-period employer, which is within the individual's prior training and experience and physical capacity to perform, shall be considered to be suitable work unless the claimant has made a bona fide change in residence which makes such offered work unsuitable to the individual because of the distance involved. During the fifth through the eighth consecutive week of claiming benefits, work is not considered unsuitable solely because the work pays not less than ninety percent (90%) of the individual's prior weekly wage. After eight (8) consecutive weeks of claiming benefits, work is not considered unsuitable solely because the work pays not less than eighty percent (80%) of the individual's prior weekly wage. However, work is not considered suitable under this section if the work pays less than Indiana's minimum wage as determined under IC 22-2-2. For an individual who is subject to section 1(c)(8) of this chapter, the determination of suitable work for the individual must reasonably accommodate the individual's need to address the physical, psychological, legal, and other effects of domestic or family violence.

(f) Notwithstanding any other provisions of this article, no work shall be considered suitable and benefits shall not be denied under this article to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

- (1) If the position offered is vacant due directly to a strike, lockout, or other labor dispute.
- (2) If the remuneration, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality.
- (3) If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining a bona fide labor organization.
- (4) If as a condition of being employed the individual would be required to discontinue training into which the individual had entered with the approval of the department.

(g) Notwithstanding subsection (e), with respect to extended benefit periods established on and after July 5, 1981, "suitable work" means any work which is within an individual's capabilities. However, if the individual furnishes evidence satisfactory to the department that the individual's prospects for obtaining work in the individual's customary occupation within a reasonably short period are good, the determination of whether any work is suitable work shall be made as provided in subsection (e).

(h) With respect to extended benefit periods established on and after July 5, 1981, no work shall be considered suitable and extended benefits shall not be denied under this article to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(1) If the gross average weekly remuneration payable to the individual for the position would not exceed the sum of:

(A) the individual's average weekly benefit amount for the individual's benefit year; plus

(B) the amount (if any) of supplemental unemployment compensation benefits (as defined in Section 501(c)(17)(D) of the Internal Revenue Code) payable to the individual for such week.

(2) If the position was not offered to the individual in writing or was not listed with the department of workforce development.

(3) If such failure would not result in a denial of compensation under the provisions of this article to the extent that such provisions are not inconsistent with the applicable federal law.

(4) If the position pays wages less than the higher of:

(A) the minimum wage provided by 29 U.S.C. 206(a)(1) (the Fair Labor Standards Act of 1938), without regard to any exemption; or

(B) the state minimum wage (IC 22-2-2).

(i) The department of workforce development shall refer individuals eligible for extended benefits to any suitable work (as defined in subsection (g)) to which subsection (h) would not apply.

**(j) An individual is considered to have refused an offer of suitable work under subsection (a) if an offer of work is withdrawn by an employer after an individual:**

**(1) tests positive for drugs after a drug test given on behalf of the prospective employer as a condition of an offer of employment; or**

**(2) refuses, without good cause, to submit to a drug test required by the prospective employer as a condition of an offer of employment.**

**(k) For purposes of this article, a drug test is not found to be positive unless:**

**(1) a second confirmation test:**

**(A) renders a positive result that has been performed by a SAMHSA (as**

defined in IC 22-10-15-3) certified laboratory on the same sample used for the first screen test using gas chromatography mass spectrometry for the purposes of confirming or refuting the screen test results; and

(B) has been reviewed by a licensed physician and:

(i) the laboratory results described in clause (A);

(ii) the individual's medical history; and

(iii) other relevant biomedical information; confirm a positive result of the drug tests; or

(2) the individual who has submitted to the drug test has no valid medical reason for testing positive for the substance found in the drug test.

(l) The department's records concerning the results of a drug test described in subsection (j) may not be admitted against a defendant in a criminal proceeding.

**SECTION 5. An emergency is declared for this act.**

**400.571 Assistance eligibility; substance abuse testing as condition; pilot program; statewide implementation; positive test; retest; noncompliance; penalty; exemption; notice of test implementation; report; applicability to individual 65 years or older.**

Sec. 571.

(1) Subject to subsection (2), the family independence agency may require substance abuse testing as a condition for family independence assistance eligibility under this act.

(2) The family independence agency shall implement a pilot program of substance abuse testing as a condition for family independence assistance eligibility in at least 3 counties, including random substance abuse testing. It is the intent of the legislature that a statewide program of substance abuse testing of family independence assistance recipients, including random substance abuse testing, be implemented before April 1, 2003. However, statewide implementation of the substance abuse testing program shall not begin until all of the following have been completed:

(a) The pilot programs have first been evaluated by the department and the evaluation has been submitted to the legislature.

(b) The evaluation under subdivision (a) includes at least the factors enumerated in subsection (5)(a) through (d) as well as an analysis of the pilot program.

(c) Six months have passed since the evaluation required in subdivision (a) has been submitted to the legislature.

(3) An individual described in section 57b shall not be considered to have tested positive for substance abuse until the sample has been retested to rule out a false positive by gas chromatography with mass spectrometry, gas chromatography, high performance liquid chromatography, or an equally, or more, specific test using the same sample obtained for the original test. An individual described in section 57b who tests positive for substance abuse under this section shall agree to and participate in substance abuse assessment and comply with a required substance abuse treatment plan. Failure to comply with a substance abuse assessment or treatment plan shall be penalized in the same manner as a work first program violation imposed under section 57d or 57g. An individual is exempt from substance abuse testing authorized by this section if the individual is participating in a substance abuse rehabilitation program that the individual was ordered to participate in by a circuit court that has established procedures to expedite the closing of criminal cases involving a crime established under part 74 of the public health code, 1978 PA 368, MCL 333.7401 to 333.7461.

(4) Before implementing substance abuse testing under this section, the family independence agency shall notify the senate and house of representatives standing committees having jurisdiction over this act and the senate and house of representatives appropriations subcommittees having jurisdiction over the family independence agency budget of the planned implementation.



(5) If the family independence agency implements substance abuse testing as authorized and required by this section, the family independence agency shall submit an annual report on the testing program to the senate and house of representatives standing committees having jurisdiction over this act and the senate and house of representatives appropriations subcommittees having jurisdiction over the family independence agency budget. The annual report shall include at least all of the following information for the preceding year:

(a) The number of individuals tested, the substances tested for, the results of the testing, and the number of referrals for treatment.

(b) The costs of the testing and the resulting treatment.

(c) Sanctions, if any, that have been imposed on recipients as a result of the testing program.

(d) The percentage and number of households receiving family independence assistance that include an individual who has tested positive for substance abuse under the program and that also include an individual who has been named as a perpetrator in a case classified as a central registry case under the child protection law, 1975 PA 238, MCL 722.621 to 722.638.

(6) The substance abuse testing authorized and required by this section does not apply to an individual 65 years old or older.

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
NORTHERN DIVISION**

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**TANYA L. MARCHWINSKI, TERRI J. KONIECZNY, and WESTSIDE MOTHERS, on behalf of all similarly situated persons,**

**CASE NUMBER: 99-10393**

**HONORABLE VICTORIA A. ROBERTS**

**Plaintiff(s),**

**v.**

**DOUGLAS E. HOWARD, in his official capacity as Director of THE FAMILY INDEPENDENCE AGENCY of Michigan, a Governmental Department of the State of Michigan,**

**Defendant(s).**

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**OPINION AND ORDER GRANTING PLAINTIFFS' MOTION  
FOR PRELIMINARY INJUNCTION**

**I. Introduction**

This case concerns the constitutionality of M.C.L § 400.57 (the "Act"), a Michigan law which authorizes suspicionless drug testing of welfare recipients.

Plaintiffs Tanya Marchwinski, Terry Konieczny and Westside Mothers filed their Complaint on September 30, 1999, alleging that the Family Independence Program ("FIP") drug testing requirement violates the Fourth Amendment of the

United States Constitution. Plaintiffs bring this action on their own behalf and on behalf of a class of all adult residents of Michigan whose ability to receive FIP benefits is or will be conditioned on their willingness to submit to drug testing.<sup>1</sup>

This Court entered a Temporary Restraining Order on November 10, 1999, and, since then, the parties have engaged in discovery and have filed additional papers and pleadings for this Court's consideration. After a review of the additional filings, the Court will now enter a Preliminary Injunction. The Court finds that Plaintiffs are likely to succeed on the merits of their claim, inasmuch as Michigan's requirement that welfare recipients be drug tested does not fit within the closely guarded category of constitutionally permissible suspicionless testing. Drug testing under these circumstances must satisfy a special need, and that need must concern public safety. In this instance, there is no indication of a concrete danger to public safety which demands departure from the Fourth Amendment's main rule and normal requirement of individualized suspicion.

## **II. Background**

On August 22, 1996, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA") was signed into law. Replacing Aid to Families with Dependent Children, ("AFDC"), the PRWORA created a program

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<sup>1</sup>Plaintiffs' Motion for Class Certification was granted on April 14, 2000.

called Temporary Assistance for Needy Families (“TANF”). Whereas AFDC was an entitlement program that provided cash assistance, TANF’s emphasis is on moving recipients into work. Of critical importance is that no “public safety” issues are implicated in the stated goals and principles of TANF.<sup>2</sup>

Towards its stated goal of moving welfare recipients to work, PRWORA requires TANF recipients to return to work either when deemed ready to do so by their State or within twenty-four months after receiving benefits, whichever comes earlier. 42 U.S.C. § 602(a)(1)(A). Additionally, each TANF family has a sixty month lifetime limit for receiving benefits under the program. 42 U.S.C.

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<sup>2</sup>As explained by the Department of Health and Human Services, Administration for Children and Families (“ACF”),  
The new law reflects widespread, bipartisan agreement on a number of key principles:

- Welfare reform should help move people from welfare to work.
- Welfare should be a short-term, transitional experience, not a way of life.
- Parents should receive the child care and the health care they need to protect their children as they move from welfare to work.
- Child support programs should become tougher and more effective in securing support from absent parents.
- Because many factors contribute to poverty and dependency, solutions to these problems should not be ‘one size fits all.’ The system should allow States, Indian tribes, and localities to develop diverse and creative responses to their own problems.
- The Federal government should focus less attention on eligibility determinations and place more emphasis on program results.
- States should continue to make substantial investments of State funds in addressing the needs of low-income families.

64 Fed. Reg. 17720, 17721-17722 (1999).

§ 608(a)(7). PRWORA furthermore gives the States both the flexibility and the duty to design programs and services to move families from welfare to work. ACF, *Summary of Final Rule, Temporary Assistance for Needy Families (TANF) Program* at 3.<sup>3</sup>

Of particular relevance to this case, PRWORA authorizes but does not mandate States to test TANF recipients for use of controlled substances and to sanction those recipients who test positive. 21 U.S.C. § 862b. Thus far, Michigan is the only State to implement such testing.<sup>4</sup>

Michigan's Family Independence Agency ("FIA") provides TANF assistance through the FIP. Beginning October 1, 1999, until enjoined by this Court in November last year, the FIA operated a pilot program which required drug-testing and treatment for FIP applicants in certain regions of the State.<sup>5</sup> The program is mandated by M.C.L. § 400.571, which provides, in relevant part, as

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<sup>3</sup>This document is found at Defendant's Exhibit 1 and at [www.acf.dhhs.gov/programs/ofa/exsumcl.htm](http://www.acf.dhhs.gov/programs/ofa/exsumcl.htm). The final rules described in this document are found at 45 C.F.R. Parts 260 through 265.

<sup>4</sup>The Lindesmith Center, *Drug Testing Welfare Applicants: A Nationwide Survey of Policies, Practices and Rationales*, Interim Report, 2 (1999)(Plt's Exh. X). The majority of States responding to the survey "expressed the opinion that drug testing of TANF applicants may be unlawful and cited legal obstacles as a reason why they did not engage in suspicionless testing." *Id.*

<sup>5</sup> The FIA pilot program was implemented in Alpena and Presque Isle Counties, Berrien County, and the Joy/Greenfield district of Wayne County.

follows:

(2) The family independence agency shall implement a pilot program of substance abuse testing as a condition for family independence assistance eligibility in at least 3 counties, including random substance abuse testing. It is the intent of the legislature that a statewide program of substance abuse testing of family independence assistance recipients, including random substance abuse testing, be implemented before April 1, 2003.

Section 571(2).

The statute further provides that individuals who test positive for substance abuse “shall agree to and participate in substance abuse assessment and comply with a required substance abuse treatment plan.” Section 571(3).

The specific provisions of the FIA pilot program are detailed in the Program Eligibility Manual<sup>6</sup> (“PEM”). The PEM describes the FIA’s goal of helping families to become self-sufficient and states: “Because having strong family relationships may be more difficult if there are substance abuse issues in the home, and because substance abuse is a barrier to employment, drug testing is being piloted in Michigan.” PEM at 1. According to the PEM, all new FIP applicants must be tested prior to a case opening. Additionally, after six months, twenty percent of adults and minor parent grantees with active cases up for

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<sup>6</sup>See Plaintiffs’ Exhibit U.

redetermination will be randomly selected to be tested.<sup>7</sup>

For those who test positive, cooperation in a substance abuse assessment, including an interview with a treatment agency, is mandatory. If the assessment results in a referral for treatment, the client must also comply with the treatment plan.<sup>8</sup> If a client does not comply with the testing/treatment requirements, s/he is given the opportunity to show good cause, which includes demonstrating that s/he: (1) has become exempt; (2) has a debilitating illness or injury; and/or (3) gives credible information that an unplanned event or factor interfered with compliance.

The PEM details different penalties for non-compliance. Where an applicant “fails or refuses, without good cause, to submit a specimen for testing by the end of the first business day following the application interview,” the FIP application will be denied. *Id.* at 6. Similarly, where an applicant fails to complete the assessment process and/or fails to comply with a treatment plan within the first two months without good cause, his/her case will be closed.

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<sup>7</sup> The only exemptions include applicants who are participating in a court ordered substance abuse treatment program, eighteen/nineteen year-olds who are treated as children due to school attendance requirements, and applicants who are at least sixty-five years old.

<sup>8</sup> Although the client must comply with treatment, “relapse does not constitute noncompliance.” Deposition of Ann Marie Sims, Plaintiffs’ Exhibit Y at 84. “In other words, the existence of a subsequent dirty urine would not mean sanction, denial, closure in and of itself.” *Id.*

Where an active FIP client chosen randomly fails to complete a drug test without good cause, his/her FIP benefit amount will be reduced twenty-five percent for the first month of non-compliance, and twenty-five percent for each subsequent month of non-compliance. If the client remains non-compliant at the end of the fourth month, his/her case will be closed.

The instant question before the Court is whether it should continue to enjoin the State from conducting such suspicionless testing of FIP applicants and recipients. The Court concludes that it should.

### **III. Analysis**

#### **A.**

In the Sixth Circuit, when determining whether to issue a preliminary injunction, the court must consider four factors:

(1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction.

*Washington v. Reno*, 35 F.3d 1093, 1099 (6<sup>th</sup> Cir. 1994).

With respect to the first factor, some opinions have expressed a need for the court to find a “strong” likelihood of success on the merits. *See United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit*



*Authority*, 163 F.3d 341, 347 (6<sup>th</sup> Cir. 1998). Other opinions have stated that it is enough for the movant to show “serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued.” See *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6<sup>th</sup> Cir. 1982). Still others emphasize that the four considerations are factors to be balanced rather than prerequisites that must be met. See *Mascio v. Public Employees Retirement System of Ohio*, 160 F.3d 310, 313 (6<sup>th</sup> Cir. 1998). “A district court is required to make specific findings concerning each of the four factors, unless fewer factors are dispositive of the issue.” *Six Clinics Holding Corp., II v. Cafcomp Systems, Inc.*, 119 F.3d 393, 399 (6<sup>th</sup> Cir. 1997).

In this case, the Court finds that Plaintiffs will likely succeed on the merits of their claim that the FIP suspicionless drug testing violates the Fourth Amendment. Further, the other factors also weigh in Plaintiffs’ favor.

## B.

The Fourth Amendment of the United States Constitution reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Historically, the Supreme Court has generally viewed the Fourth Amendment as requiring “some quantum of individualized suspicion” for a search or seizure to be constitutional. *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976). Furthermore, it is universally agreed that the collection and testing of urine is a search within the meaning of the Fourth Amendment. *See, e.g., Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 617 (1989).

Nevertheless, in *Skinner*, an opinion described by a dissenter as “unprincipled and dangerous,” *Id.* at 641, (Marshall, J. dissenting), the Supreme Court upheld suspicionless drug testing of railroad employees involved in train accidents. The Court reasoned:

[T]he permissibility of a particular practice is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.

In most criminal cases, we strike this balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment. Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause. **We have recognized exceptions to this rule, however,**

**when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.** When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.

*Skinner* at 619, (citations and quotation marks omitted; emphasis added).

The Court thus ruled:

In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.

*Id.* at 624.

Since *Skinner*, the Supreme Court has sanctioned suspicionless drug testing of United States Customs agents whose positions caused them to be directly involved with drug interdiction. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). It further upheld random, suspicionless testing of high school athletes. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995). But, in *Chandler v. Miller*, 520 U.S. 305 (1997), the Supreme Court's most recent pronouncement on suspicionless drug testing, the Court found that the State of Georgia had gone too far in requiring that all candidates for State office pass a drug test.

**C.**

The *Chandler* Court reiterated that suspicionless searches are allowed only under “certain limited circumstances.” *Id.* at 308, *citing Von Raab* at 668. The Court further emphasized that the “core issue” it needed to address was whether the drug testing was warranted by a special need. It stated that not only must there be a special need, but if there is one, “it must be substantial -- important enough to override the individual’s acknowledged privacy interest [and] sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.” *Id.* at 318.

After reviewing the “special needs” that had justified departure from the usual requirement of individualized suspicion in its preceding cases, the *Chandler* Court held that the Georgia requirement did “not fit within the closely guarded category of constitutionally permissible suspicionless searches.” *Id.* at 309. “Georgia has failed to show, in justification of the [drug testing statute], a special need of that kind.” *Id.* at 318.

As described by the *Chandler* Court, the special need articulated in *Skinner* was that of ensuring safety; railroad employees are in a position to “cause great human loss before any signs of impairment become noticeable to supervisors.” *Id.* at 315, *quoting Skinner* at 634. And, the government had shown a special need in *Von Raab* because the customs agents were the first line of defense against drug smuggling.

Work directly involving drug interdiction and posts that require the employee to carry a firearm pose grave safety threats to employees who hold those positions, and also expose them to large amounts of illegal narcotics and to persons engaged in crime; illicit drug users in such high-risk positions might be unsympathetic to the Service's mission, tempted by bribes, or even threatened with blackmail.

*Id.* at 316.

Finally, the *Chandler* Court described the special need in *Vernonia* as deriving from the fact that there was an "immediate crisis" and that student athletes were "leaders of the drug culture." *Id.* at 316. The drug testing served the purpose of "detering drug use by schoolchildren" and addressed "the risk of injury a drug-using student athlete cast on himself and those engaged with him on the playing field." *Id.* at 317.

In finding the statute at issue to be unconstitutional, the *Chandler* Court found that Georgia had not shown a special need. "Notably lacking in respondents' presentation is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule." *Id.* at 318-319. Thus, in light of *Chandler*, when suspicionless drug testing is being challenged, the initial inquiry must be whether a special need has been shown.

Prior to conducting the balancing, in surveying the public interests at issue, the Court said that we must specifically inquire into whether the drug-testing program at issue is warranted by a 'special need.' *See Chandler*, 520 U.S. at ----, 117 S.Ct. at 1303. Only if we can say that the government has made that special need showing do we then inquire into the relative strengths of the competing private

and public interests to settle whether the testing requirement is reasonable under the Fourth Amendment. If the government has not made its special need showing, then the inquiry is complete, and the testing program must be struck down as unconstitutional.

*19 Solid Waste Dept. Mechanics v. City of Albuquerque*, 156 F.3d 1068, 1072 (10<sup>th</sup> Cir. 1998).

And, the State's alleged special need must concern public safety.

We reiterate, too, that where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'--for example, searches now routine at airports and at entrances to courts and other official buildings. See *Von Raab*, 489 U.S., at 674-676, and n. 3, 109 S.Ct., at 1395-1396, and n. 3. But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.

*Chander* at 323.

#### **D.**

As in *Chandler*, the State in this case has not demonstrated a special need that justifies departure from the ordinary Fourth Amendment requirement of individualized suspicion. The State has not shown that public safety is genuinely placed in jeopardy in the absence of drug testing of all FIP applicants and of random, suspicionless testing of FIP recipients.

The primary justification advanced by the State for instituting mandatory drug testing is to move more families from welfare to work. In House Legislative Analyses of House Bill 4090, the "Apparent Problem" was described as follows:

Michigan reformed its welfare system in 1995. . . . While the new program has been largely successful, none of the reforms have been able to overcome one persistent problem: for some people, the major barrier to employment is rooted in substance abuse.

(Plt's Exhs. E at 1, F at 1 & G at 1).

The State's desire to address substance abuse as a barrier to employment is laudable and understandable in view of the Federal mandate to move welfare recipients to work. Yet, it does not constitute a special need sufficient to warrant a departure from the Fourth Amendment's main rule. "[W]here, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged." *Id.* at 323. The State does not even attempt to argue that its goal of moving welfare recipients to work is a public safety issue, nor could it. Consequently, the State's FIP drug testing does "not fit within the closely guarded category of constitutionally permissible suspicionless searches." *Chandler* at 309.

Despite *Chandler's* clear language to the contrary, the State argues that it does not have to show that its special need involves public safety in order to justify blanket drug testing. The State claims that that language in the *Chandler* opinion was simply a response to Georgia's argument that public safety justified its requirement of mandatory drug testing of candidates for State office. To the

contrary, Georgia did not cite public safety as justifying its drug testing requirement.

[Georgia's] defense of the statute rests primarily on the incompatibility of unlawful drug use with holding high state office. The statute is justified, respondents contend, because the use of illegal drugs draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials. Brief for Respondents 11-18. The statute, according to [Georgia], serves to deter unlawful drug users from becoming candidates and thus stops them from attaining high state office.

*Chandler* at 318. Since the *Chandler* Court's ruling that public safety must be in jeopardy was not in response to Georgia's defense, there is no genuine question that the *Chandler* Court meant what it said.

Public safety has been the primary justification for each case in which suspicionless drug testing has been upheld. In *Skinner*, the Court held that the Government's interest in such testing was compelling because "[e]mployees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Skinner* at 628. In *Von Raab*, the Court emphasized "the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances . . . ." *Von Raab* at 674. Likewise, in *Knox County Educ. Ass'n v.*



*Knox County Bd. of Educ.*, 158 F.3d 361, 374-378 (6<sup>th</sup> Cir. 1998), the court upheld drug testing of individuals applying for teaching and other positions only after it found that those positions were “safety sensitive.”

Asserting that public safety need not be in jeopardy, the State cites a portion of *Vernonia* in which the Court indicated that deterring drug use by schoolchildren is an important governmental concern. *Vernonia* at 661. However, despite the fact that deterring drug use by schoolchildren in general was cited as important, it was the more narrowly tailored drug testing of student athletes that was sanctioned by the Court:

[I]t must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high. Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District’s Policy have been demonstrated to pose substantial physical risks to athletes.

*Id.* at 662. Public safety was, thus, an important component of both the school’s drug testing program and its approval by the Supreme Court.

**E.**

The State argues that it has shown a special need even if jeopardy to public safety is required. It states that there is overwhelming evidence that substance abuse and child neglect are highly correlated and that the children are the primary beneficiaries of FIP benefits. “Given the State’s *parens patriae* interest in minor FIP recipients, the State has a strong interest in identifying substance abusers not only for the negative impact such behavior may have on fulfilling employment goals but also because of the potential danger posed to the children of abusers, whose interests are paramount.” (Dft’s Br. at 27-28).

The State’s argument in this regard is misplaced. While the State has asserted that the drug testing program is designed in part to encourage “strong family relationships,” PEM at 1, TANF is not aimed at addressing child abuse or neglect. Rather, the TANF program was designed to:

- (1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;
- (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;
- (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and
- (4) encourage the formation and maintenance of two-parent families.

42 U.S.C. § 601.

Additionally, in Michigan, the FIP is not designed to address child abuse or neglect. Instead, the FIP was created to:

(a) Provide financial support to eligible families while they pursue self-improvement activities and engage in efforts to become financially independent.

(b) Ensure that recipients who are minor parents live in adult-supervised households in order to reduce long-term dependency on financial assistance.

(c) Assist families in determining and overcoming the barriers preventing them from achieving financial independence.

(d) Ensure that families pursue other sources of support available to them.

M.C.L. § 400.57a(2).<sup>9</sup>

Since TANF generally, and Michigan's FIP specifically, are not designed to ameliorate child abuse or neglect, the State cannot legitimately advance such abuse or neglect as supporting a special need sufficient to single out FIP recipients for suspicionless drug testing. In other words, the State's financial assistance to parents for the care of their minor children through the FIP cannot be used to regulate the parents in a manner that erodes their privacy rights in

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<sup>9</sup>The FIA's Children's Protective Services is the entity charged with addressing child abuse and neglect. "Children's Protective Services (CPS) has responsibility to investigate allegations that a child under the age of 18 is suspected of being abused or neglected by a parent, legal guardian or adult who lives in the same home as the child." FIA's Client Services & Programs website, [www.mfia.state.mi.us/CFSAdmin/cps/cps.html](http://www.mfia.state.mi.us/CFSAdmin/cps/cps.html).

order to further goals that are unrelated to the FIP.<sup>10</sup>

If the State is allowed to drug test FIP recipients in order to ameliorate child abuse and neglect by virtue of its financial assistance on behalf of minor children, that excuse could be used for testing the parents of all children who receive Medicaid, State Emergency Relief, educational grants or loans, public education or any other benefit from the State. In all cases in which the State offers a benefit on behalf of minor children, the State could claim that it has a broad interest in the care of those children which overcomes the privacy rights of the parents. Indeed, the query posed by Justice Marshall in his dissent in *Wyman v James*, 400 U.S. 309 (1971), is a pertinent inquiry to make here:

Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse? Or is this court prepared to hold as a matter of constitutional law that a mother, merely because she is poor, is substantially more likely to injure or exploit her children? Such a categorical approach to an entire class of citizens would be dangerously at odds with the tenets of our democracy.

*Id.* at 342.

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<sup>10</sup>It should be noted that the State does not claim to have *in loco parentis* authority over the minor children of FIP recipients. This case, therefore, contrasts with *Vernonia*, where the Supreme Court upheld the drug testing of high school athletes over whom the school was found to stand *in loco parentis*, “permitting a degree of supervision and control that could not be exercised over free adults.” *Vernonia* at 655. This case is further distinguishable from *Knox County*, where the drug testing of school personnel in safety sensitive positions was justified in part by the “*in loco parentis* obligations imposed upon them.” *Knox County* at 375.

Upholding this FIP suspicionless drug testing would set a dangerous precedent.

**F.**

The lack of connection between the FIP program and Michigan's efforts toward reducing child abuse or neglect contrasts this case with *Wyman*. The State cites *Wyman* as supporting its claim that it has *parens patriae* interest in minor FIP recipients. In *Wyman*, the Court held that home visits by case workers did not constitute a search within the meaning of the Fourth Amendment. *Id.* at 317-318. It further stated that, even if the visit was a search, it would not be proscribed by the Fourth Amendment. The Court described home visits as "the heart of welfare administration" and noted that "[t]he home visit is an established routine in States besides New York." *Id.* At 320. In contrast, child abuse and neglect are not within the FIP's mandate. Moreover, drug testing of welfare recipients as a means of preventing such abuse and neglect is not practiced anywhere else in the country. Blanket drug testing of welfare recipients has, in fact, been rejected by most States primarily because it is viewed as unconstitutional.<sup>11</sup>

While *Wyman* did hold that home visits, which were found to not even

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<sup>11</sup>See note 4, *supra*.

constitute searches, did not offend the Fourth Amendment, it would be quite a stretch for this Court to hold that *Wyman* supports drug testing which (1) clearly constitutes a search within the meaning of the Fourth Amendment and (2) is not justified by an interest that is germane to the FIP. Even if *Wyman* did support such a holding, it would not be sustainable in light of the more recent *Chandler*.

### G.

*Chandler* undermines the State's reliance on *Wyman* in two respects. First, the State cites *Wyman* as stressing that the voluntary nature of applying for welfare benefits diminishes the applicants expectation of privacy. The *Wyman* Court stated, "So here Mrs. James has the 'right' to refuse the home visit, but a consequence in the form of cessation of aid . . . . The choice is entirely hers, and nothing of constitutional magnitude is involved." *Wyman* at 324.

Yet, in *Chandler*, the drug testing involved an even more voluntary activity. No one is compelled to run for public office, and the applicants for public office are not in the desperate straits that the State concedes FIP applicants are in when they apply for assistance (Dft's Br. at 26). Notwithstanding the voluntary nature of applying for public office, the *Chandler* Court held that mandatory, suspicionless drug testing of candidates violated the Fourth Amendment.

In addition, the *Chandler* Court made clear that suspicionless drug testing is unconstitutional if there is no showing of a special need, and that the special need must be grounded in public safety. *Chandler* at 318, 323; *19 Solid Waste Dept. Mechanics* at 1072. To the extent that *Wyman* could be construed as allowing otherwise, its holding is no longer viable.

Since the State has failed to show, in justification of the Act, a special need grounded in public safety which would warrant the suspicionless drug testing of FIP recipients, this Court's Fourth Amendment inquiry is complete, and it need not inquire into the relative strengths of the competing private and public interests to settle whether the testing requirements is reasonable under the Fourth Amendment. *19 Solid Waste Dept. Mechanics* at 1072. "[T]he testing program must be struck down as unconstitutional." *Id.* Thus, the Court finds that Plaintiffs have established a strong likelihood of succeeding on the merits of their Fourth Amendment claim.

## **H.**

The questions now before the Court are whether the Plaintiffs would suffer irreparable harm if their request for an injunction is denied, whether an injunction would harm others, and whether the public interest is advanced by the issuance of the injunction. These factors unquestionably weigh in Plaintiffs' favor.

### **1. Irreparable harm to Plaintiffs**

Violations of the Fourth Amendment constitute the type of irreparable injury for which injunctive relief is appropriate. *See Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1500-1501 (9<sup>th</sup> Cir. 1996). The right to be free from unreasonable searches is a fundamental right, and, accordingly, the possible violation of that right is alone sufficient to demonstrate irreparable harm. *Covino v. Patrissi*, 967 F.2d 73, 76 (2<sup>nd</sup> Cir. 1992).

### **2. Harm to Others**

The State "cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations." *Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 727 (9<sup>th</sup> Cir. 1983). It should further be noted that an injunction will not preclude the State from taking other measures to address substance abuse as a barrier to employment. The State may screen its applicants and recipients for substance abuse and drug test those that it



reasonably suspects are using illegal substances.

The State points out that some mechanisms for screening welfare applicants for substance abuse have proven to be ineffective, such as Maryland's and New York's methods of asking applicants a set of questions.<sup>12</sup> However, the Substance Abuse Subtle Screening Inventory ("SASSI") has received positive reviews. Oregon's use of the SASSI, administered by trained substance abuse counselors, "has been shown to identify a substantial fraction of recipients who are in need of substance abuse treatment . . . ."<sup>13</sup> In a Report of the Virginia Department of Social Services to the Governor and General Assembly, the Department likewise stated, "The SASSI is especially effective in identifying early stage chemically dependent individuals who are either in denial or deliberately trying to conceal their chemical dependency pattern."<sup>14</sup> It found the SASSI to be effective even without the use of trained substance abuse counselors

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<sup>12</sup>In Maryland, the applicants are asked four questions. Greg Garland, *Drug Abuser care Program Reaches Few*, The Baltimore Sun, November 28, 1999 at 1B, (Dft's Exh. 40). In New York, the case manager hands the applicants a nine-question paper test. Nina Bernstein, *City Searches Medical Files in Effort to Force Welfare Applicants Into Drug Treatment*, N.Y. Times, September 25, 1999, at A14, (Dft's Exh. 42).

<sup>13</sup>LaDonna Pavetti, et. al., American Institutes for Research, *Welfare-to-Work Options for Families Facing Personal and Family Challenges: Rationale and Program Strategies* 23 (1987). This article is Plaintiffs' Exhibit O.

<sup>14</sup>*Recipient Drug Testing Study* 4 (1998). This report is within Plaintiffs' Exhibit X.

to administer it.<sup>15</sup> In light of the availability of effective screening mechanisms, such as the SASSI, the State cannot show that it will be harmed by the issuance of a preliminary injunction.

### **3. Public Interest**

The last factor that must be evaluated is that of the public interest. “[P]erhaps no greater public interest exists than protecting a citizen’s rights under the constitution.” *Legal Aid Soc. of Hawaii v. Legal Services Corp.*, 961 F.Supp. 1402, 1419 (D.Hawaii 1997). The Court, therefore, finds that this factor, too, weighs heavily in Plaintiffs’ favor. Despite all of the good intentions of the State of Michigan in enacting the Act,

‘Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.’

*Chandler* at 322, citing *Olmstead v United States*, 277 U.S. 438, 485, 48 S. Ct. 564, 575, 72 L. Ed. 944 (1928).

### **IV. Conclusion**

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<sup>15</sup>Also see Letter from Linda G. Dilworth, Assistant Secretary for Economic Self-Sufficiency Services of Florida Department of Children & Families, to District Economic Self-Sufficiency Services Program Administrators 4 (Dec. 24, 1998)(“The [SASSI] establishes a scientific objective decision of ‘reasonable cause’ and may result in the applicant’s being required to have a drug test.”). This letter is within Plaintiffs’ Exhibit X.



## MARCHWINSKI v. HOWARD

**Tanya L. MARCHWINSKI; Terri J. Konieczny; Westside Mothers, on behalf of all similarly situated persons, Plaintiffs-Appellees, v. Douglas E. HOWARD, in his official capacity as Director of the Family Independence Agency of Michigan, a governmental department of the State of Michigan, Defendant-Appellant.**

**No. 00-2115.**

**Argued: Jan. 30, 2002. -- October 18, 2002**

Before SUHRHEINRICH, SILER, and BATCHELDER, Circuit Judges.

Robert A. Sedler (argued and briefed), Detroit, MI, Graham A. Boyd (briefed), ACLU Drug Policy Litigation Project, New Haven, CT, for Appellees. Morris J. Klau (argued and briefed), Office of the Attorney General, Detroit, MI, for Appellant. Paul D. Kamenar (briefed), Washington Legal Foundation, Washington, DC, for Amicus Curiae. Daniel N. Abrahamson, The Lindesmith Center, Office of Legal Affairs, Oakland, CA, for Amicus Curiae American Public Health Association.

### OPINION

Defendant-appellant Douglas Howard, the director of the Michigan Family Independence Assistance program (“FIA”), appeals the district court’s grant of a preliminary injunction based on Michigan’s failure to identify a “special need” related to public safety that would allow the state—without a requirement of individualized suspicion—to drug test the plaintiff-appellees, a class of persons eligible for or receiving welfare assistance and subject to drug testing under Mich. Comp. Laws Ann. § 400.571. Because we find that safety need only be a factor in the state’s special need; that section 400.571 is supported by a public safety special need; and that under *Wyman v. James*, 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971), the condition attached by section 400.571 to the receipt of welfare benefits is constitutional, we reverse.

### I.

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) that replaced the previous welfare entitlement program with the Temporary Assistance for Needy Families program (“TANF”). Pub. L. 104-193, § 103, 110 Stat. 2113 (1996) (codified at 42 U.S.C. § 601 et seq.). Among the general purposes for the PRWORA is the goal of increasing the flexibility of the states in providing assistance to needy families “so that children may be cared for in their own homes or in the homes of relatives.” 42 U.S.C. § 601(a)(1). A state participating in the TANF program must submit to the Secretary of Health and Human Services a written document that includes, among other things, the state’s plan for a program that will “provide[] assistance to needy families with (or expecting) children and provide[] parents with job preparation, work, and support services to enable them to leave the program and become self-sufficient.” 42 U.S.C. § 602(A)(1). Only needy families who have or are expecting children are eligible for benefits under this program. 42 U.S.C. § 602(1)(A)(i).

PRWORA explicitly provides that the Act “shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.” 42 U.S.C. § 601(b). TANF permits states to drug test applicants for and recipients of these benefits and to impose sanctions where use of controlled substances is found. 21 U.S.C. § 862b.

In Michigan, the Family Independence Agency provides TANF block-grant moneys through the Family Independence Program (“FIP”) to eligible families needing assistance. Section 400.571(1) of Mich. Comp. Laws Ann. expressly permits the FIA to condition eligibility for FIP assistance on the recipient's being tested for substance abuse. Section 400.571(2) requires the FIA “to implement a pilot program of substance abuse testing as a condition for family independence assistance eligibility in at least 3 counties, including random substance abuse testing.”

The FIP's Program Eligibility Manual (“PEM”), which sets out the program's goals, notes that “[b]ecause having strong family relationships may be more difficult if there is substance abuse and because substance abuse is a barrier to employment” the state of Michigan has piloted drug testing. Under the pilot program, applicants for benefits are tested prior to receiving benefits; every six months twenty percent of recipients are randomly selected for drug screening. Testing is done by urinalysis (not in a direct line of sight, for greater privacy) and samples are tested only for illegal drugs. No individual will lose benefits or eligibility for benefits on the basis of one failed urinalysis. An individual who tests positive must go to a treatment agency for a determination of whether that person is a substance abuser; if appropriate, the agency will recommend and the individual must comply with a treatment plan. However, applicants who refuse to take the drug test without good cause and applicants who fail to complete the assessment process or do not comply with a required treatment plan within two months will be refused benefits. Aid recipients who refuse to submit to the random drug testing will lose a percentage of their benefits each month; after four months of failure to cooperate in the testing, such recipients will have all benefits withheld.

On September 30, 1999, the plaintiffs sued in the Eastern District of Michigan to preliminarily enjoin enforcement of section 400.571, arguing that the challenged Michigan law violated their Fourth Amendment rights because the required testing was done without particularized suspicion. The district court granted the injunction.

Howard appeals, arguing that the district court erred when it held that a public safety “special need” was the only interest that would justify a suspicionless search. Alternatively, Howard contends that Michigan's interest in the prevention of child abuse and neglect is a sufficient public safety concern.

## II.

We review the district court's grant of a preliminary injunction for an abuse of discretion. *Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass'n.*, 110 F.3d 318, 322 (6th Cir.1997). “A district court abuses its discretion when it relies on clearly erroneous findings of fact or when it improperly applies the law or uses an erroneous legal standard. Under this standard, this court must review the district court's legal conclusions de novo and its

factual findings for clear error.” *Owner-Operator Indep. Drivers Ass'n v. Bissell*, 210 F.3d 595, 597 (6th Cir.2000) (internal citations and quotation marks omitted).

When determining whether to issue a preliminary injunction, a district court must consider four factors: “(1) whether the movant has a ‘strong’ likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction.” *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir.2000) (citation omitted). When considering these factors the district court should balance each factor against the others to arrive at its ultimate determination. *Id.*

Whether the plaintiffs have a strong likelihood of success on the merits is heavily dependent upon whether Michigan has a “special need” for its drug-testing program, and whether the government's interests outweigh the plaintiffs' reasonable expectation of privacy. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654-65, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). Special needs are those government interests that go “beyond the normal need for law enforcement.” *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987). The Supreme Court has ruled that government has a special need to conduct drug testing in several different circumstances where no particularized suspicion is present: testing of employees of the Customs Service who apply for positions directly involving interdiction of illegal drugs or positions requiring the agent to carry firearms, *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989); testing of railroad employees involved in train accidents, *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); testing of student athletes in an effort to prevent the spread of drugs among the student population, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995); and testing of students who participate in competitive extracurricular activities, *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, ---U.S. ---, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002). This circuit has held that a school district has a special need to test applicants for all safety-sensitive positions in a school district, *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361 (6th Cir.1998); that a city has a special need to test its municipal bus drivers, *Tanks v. Greater Cleveland Reg'l Transit Auth.*, 930 F.2d 475 (6th Cir.1991); and that a city has a special need to test its firemen and policemen, *Penny v. Kennedy*, 915 F.2d 1065 (6th Cir.1990).

In *Earls*, the most recent case decided by the Supreme Court pertaining to suspicionless drug testing, the Court found that the school district's interest in preventing drug abuse was sufficient to justify the testing program in light of the nationwide drug epidemic, the evidence provided by the district that drug abuse was a problem among its students and the “special responsibility” undertaken by the district to care for the children in its charge. *Earls*, 122 S.Ct. at 2567-68. The Court said that the students had diminished privacy interests because of the “public school environment where the State is responsible for maintaining discipline, health, and safety [and because s]choolchildren are routinely required to submit to physical examinations and vaccinations against disease.” *Id.* at 2565. Examining the character of the students' privacy interests, the Court found that, in light of the method for collecting the test samples-unobserved urination-and the fact that the test determined only the presence of illicit drugs and the test results were available only to school personnel and only on a “need to know” basis, any intrusion

into a student's privacy was “minimal[.]” Id. at 2566. Also important was the fact that a failed drug test had no criminal consequences, but resulted, at most, in a limitation of the student's privileges to participate in extracurricular activities. Id. at 2567. Lastly, the district's “pressing concern” with drug abuse among its students, supported with evidence, was sufficient to justify the intrusion into student privacy. Id. at 2568. In reaching this result, the Court rejected the respondents' argument that a special need must be based on a “surpassing safety interest[.]” and stated that safety merely “factors into the special needs analysis” and that “drug use carries a variety of health risks for children.” Id.

The plaintiffs—who did not have the benefit of the Court's *Earls* decision either in the district court proceedings or in preparing their brief—rely on language at the end of *Chandler v. Miller*, 520 U.S. 305, 323, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997), to support their assertion that only a very strong public safety rationale can qualify as a special need. *Chandler* involved a challenge by candidates for high office in the state of Georgia to a Georgia statute requiring candidates for state office to pass drug tests. The Court looked carefully at the interest the state sought to protect by the suspicionless drug testing requirement and concluded that the interest was nothing more than the image the state sought to project of being committed to the struggle against drug abuse. Summing up its finding that this interest fell well short of a special need, the Court concluded: “[W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as ‘reasonable’. But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search.” Id.

We do not agree with the plaintiffs that this language stands for the broad proposition that special needs are limited to urgent public safety concerns. In our view, the Court in *Chandler* was merely contrasting the state's public image concerns to a situation in which, unlike that in *Chandler*, public safety would genuinely be in issue. Our reading of *Chandler* is clearly supported by the Court's statement in *Earls*:

Respondents also argue that the testing of nonathletes does not implicate any safety concerns, and that safety is a “crucial factor” in applying the special needs framework. They contend that there must be “surpassing safety interests” or “extraordinary safety and national security hazards,” in order to override the usual protections of the Fourth Amendment. Respondents are correct that safety factors into the special needs analysis, but the safety interest furthered by drug testing is undoubtedly substantial for all children, athletes and nonathletes alike. We know all too well that drug use carries a variety of health risks for children, including death from overdose.

*Earls*, 122 S.Ct. at 2568 (internal citations and quotations omitted).

Of further support is *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), in which the Court upheld drug testing of high school athletes, not primarily because of safety issues, but instead on the basis of deterring drug use among the children entrusted to the school's care. The Court in *Von Raab* characterized the governmental interest which it found sufficient to justify suspicionless searches as “ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment.” *Von Raab*, 489 U.S. at 670, 109 S.Ct. 1384. The government's interest in *Von Raab*, while certainly related to

safety, was not justified on that basis, but was rather justified because the government had the authority to guard against “bribery and blackmail.” *Id.* at 674, 109 S.Ct. 1384. See also *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) (ruling that a search of a doctor's office (at a state hospital) was reasonable, citing the efficiency interests of the governmental employer as sufficient to dispense with the warrant and probable cause requirements); *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) (creating the special needs exception to the probable cause and warrant requirements and upholding as reasonable a search of a student's purse). As these cases demonstrate, although public safety must be a component of a state's special need, it need not predominate.

We are persuaded that the district court erred in holding that only a public safety concern can qualify as a “special need” that may justify suspicionless drug testing. We conclude, therefore, that the district court applied an erroneous legal standard in granting the preliminary injunction. The proper standard is whether Michigan has shown a special need, of which public safety is but one consideration. As we will explain, the evidence in the case at hand establishes that Michigan's special need does encompass public safety concerns, as well as other needs “beyond the normal need for law enforcement.” *Earls*, 122 S.Ct. at 2564 (internal quotes omitted).

Primary concerns of PRWORA and TANF are that children of needy families may be cared for in their own or in their relatives' homes, and that the parents of these children may be assisted in overcoming dependence on government programs and in becoming economically self-sufficient. Howard presented to the district court numerous studies supporting the FIA's contentions that controlled substance abuse negatively affects the ability of an individual to obtain and retain employment and to be a responsible and effective parent; that the incidence of controlled substance abuse is higher among recipients of welfare benefits than in the population as a whole; that substance abuse by parents contributes substantially to child abuse and neglect; and that controlled substance abuse is a significant barrier to economic self-sufficiency. We have no doubt that the safety of the children of families in Michigan's Family Independence Program is a substantial public safety concern that must be factored into the determination of whether Michigan has shown a special need to this drug testing program. An additional public safety concern is the risk to the public from the crime associated with illicit drug use and trafficking. And we think it is beyond cavil that the state has a special need to insure that public moneys expended in the FIP are used by the recipients for their intended purposes and not for procuring controlled substances—a criminal activity that not only undermines the objectives of the program but directly endangers both the public and the children the program is designed to assist. For all of these reasons, we conclude that the district court erred in holding that Howard could not establish that the state has a special need sufficient to justify the drug testing program.

In determining whether the plaintiffs have demonstrated a strong likelihood of success on the merits we must also consider whether the evidence supports their contention that the means chosen by Michigan are not “effective” to vindicate the interest Michigan has asserted. *Earls*, 122 S.Ct. at 2569. Here again, we think that the plaintiffs have fallen short. Under Michigan's program, every applicant is tested, and twenty percent of recipients are randomly tested every six months. The objections that counseled against finding constitutional the testing program in *Chandler*—that the tests called for by the statute were predictable and infrequent and therefore ineffective—counsel in favor of the use of random and suspicionless testing here. And here,



Howard has provided evidence that the tests so far conducted have resulted in approximately ten percent positive results, demonstrating that the means utilized by Michigan are effective in detecting drug abuse among aid recipients. See also *Von Raab*, 489 U.S. at 676, 109 S.Ct. 1384 (rejecting the argument that persons subject to testing will be able to manipulate the test results by abstaining from drug use prior to the test).

Finally, we must examine the extent of the intrusion into the plaintiffs' privacy worked by the drug testing, in order to balance the privacy interests of the plaintiffs against Michigan's special need. We evaluate the asserted privacy interest of the plaintiffs by looking at the character and invasiveness of the privacy intrusion and the nature of the privacy interest. *Acton*, 515 U.S. at 654, 658, 115 S.Ct. 2386. Important to the determination of the reasonableness of the expectation of privacy is the extent of regulation of the welfare "industry," *Skinner*, 489 U.S. at 627, 109 S.Ct. 1402, the pervasiveness of the testing practice in other areas of life, *id.* at 626, 109 S.Ct. 1402, and the voluntary or involuntary nature of the procedure, *Acton*, 515 U.S. at 657, 115 S.Ct. 2386; *Wyman*, 400 U.S. at 325, 91 S.Ct. 381.

We turn first to the character of the privacy intrusion. The program at issue here requires applicants and randomly selected recipients of the FIP benefits to provide a urine sample. Like the procedures at issue in *Earls*, 122 S.Ct. at 2566, and *Skinner*, 489 U.S. at 626, 109 S.Ct. 1402, the system here allows for unobserved sample collection, and like the tests approved by the Court in *Earls*, 122 S.Ct. at 2566-67, and *Acton*, 515 U.S. at 658, 115 S.Ct. 2386, the system utilized by Michigan tests only for illicit drugs and does not seek any other information. Finally, the test results are released only to "a limited class of . . . personnel who have a need to know" and are not used for criminal proceedings. *Acton*, 515 U.S. at 658, 115 S.Ct. 2386. See also *Earls*, 122 S.Ct. at 2566-67, 122 S.Ct. 2559. All of these factors point to a conclusion that the intrusion is limited.

Turning to the nature of the privacy interest, it is clear that the plaintiffs have a somewhat diminished expectation of privacy. First, welfare assistance is a very heavily regulated area of public life with a correspondingly diminished expectation of privacy. *Skinner*, 489 U.S. at 627-28, 109 S.Ct. 1402; *Knox County Educ. Ass'n*, 158 F.3d at 379. The federal government provides the parameters within which the states may attempt to meet their goals. The states themselves heavily regulate the provision of welfare assistance. Applicants for welfare benefits are required by these regulations to relinquish important and often private information, and are aware that their receipt of these benefits is accompanied by a diminished expectation of privacy with regard to that information.

Given Michigan's strong interest in ensuring that the public moneys it expends through the FIP are used to foster the purposes of the FIP and to provide for the welfare of the children of the FIP recipients, and the plaintiffs' diminished expectation of privacy, the plaintiffs have not demonstrated that their privacy interests are outweighed by the interests of the state.

Accordingly, we conclude that the plaintiffs have not shown a strong likelihood of success on the merits of their claim.

We turn next to the other factors the district court was required to weigh in determining whether to issue the preliminary injunction, beginning with whether the plaintiffs have demonstrated that they will suffer irreparable injury if the injunction is denied. We conclude that they have not.

The plaintiffs' claimed injury is the violation of their Fourth Amendment right to be free from unreasonable searches. Even were we to conclude that the state could not show a special need sufficient to justify the drug testing, we would nonetheless find that the plaintiffs have not shown that the drug testing is an unreasonable search. Rather, we think that the evidence suggests that the Michigan program imposes a condition on the plaintiffs' receiving the program benefits, and that there has been no showing that the condition is unreasonable. Our conclusion is premised on the language of 42 U.S.C. § 601(b), which explicitly negates any claim of entitlement to any state program funded under the PRWORA, and the reasoning of the Court in *Wyman v. James*, 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971), an action brought by a welfare recipient who claimed that requiring her to submit to home visits by caseworkers as a condition of receiving benefits constituted an unreasonable search and violated her Fourth Amendment rights. *Id.* at 314, 91 S.Ct. 381. The Court assumed that the home visit was a search and held that the search was reasonable, *id.* at 318, 91 S.Ct. 381. The Court considered the public interest in aiding the dependent children of recipients; the public interest in insuring that welfare benefits are spent on their proper objects; the nonintrusive, limited, means of the search; the civil and noncriminal nature of the objects of the information gained from the search; the impracticability of obtaining a warrant; and the consensual nature of the home visit, *id.* at 318-24, 91 S.Ct. 381, and concluded that the condition itself was reasonable, and the plaintiff was free to refuse to permit the visits but could not then complain about the benefits' being withheld.

Whether we view the condition imposed by the state in this case as the requirement that the recipient of the benefits submit to the random and suspicionless drug tests, or the requirement that the recipient not use controlled substances-in which event, the drug test is the mechanism by which the state ensures compliance with the condition-we think that the state has made a strong showing that Michigan's program satisfies the *Wyman* factors. The state is attempting to insure that children are adequately cared for through the Family Independence Program, and ascertaining whether the adult recipients of the programs funds are abusing controlled substances is directly related to that end. Further, the public has a strong interest in ensuring that the money it gives to recipients is used for its intended purposes. The state is not using the information it gathers to institute criminal proceedings. As in *Wyman*, application of the warrant and probable cause requirements would be extremely impracticable. And like the search in *Wyman*, it is consensual in the sense that the recipient may refuse to submit to the test, but may not then continue to participate fully in the program. Accordingly, we do not conclude that the plaintiffs have shown irreparable harm if the preliminary injunction does not issue.

In this particular case, the third and fourth factors that comprise the preliminary injunction analysis are substantially identical: whether issuance of the injunction would cause substantial harm to others, and whether the public interest would be served by issuance of a preliminary injunction. Here, the public interest lies insuring both that the public moneys are expended for their intended purposes and that those moneys not be spent in ways that will actually endanger the public. Issuance of the injunction would work to thwart that interest, and to make it much

more difficult for the state to ensure that the public at large is not harmed by FIP recipients' use of those moneys for illegal, and indeed criminal, purposes.

For all of these reasons, we conclude that the district court erred in issuing the preliminary injunction. Accordingly, we REVERSE the judgment of the district court.

BATCHELDER, Circuit Judge.

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

**LUIS W. LEBRON, individually  
and as class representative,**

**Plaintiff,**

**v.**

**Case No.: 6:11-cv-01473-Orl-35DAB**

**DAVID E. WILKINS, in his official  
capacity as Secretary of the Florida  
Department of Children & Families,**

**Defendant.**

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**ORDER**

**THIS CAUSE** comes before the Court upon Plaintiff's Motion for Preliminary Injunction (Dkt. 2), Motion for Class Certification (Dkt. 16) and Reply to Defendant's opposition to preliminary injunctive relief (Dkt. 22), along with the State's responses (Dkt. 19; Dkt. 16) in opposition to Plaintiff's motions.

**I. INTRODUCTION**

The question presented is whether Section 414.0652, Florida Statutes, which requires all applicants for a class of federal welfare benefits to submit to suspicionless drug testing, is constitutional under the Fourth and Fourteenth Amendments. Based on the evidence submitted by the parties on their written submissions and at a hearing on Plaintiff's Motion for Preliminary Injunction, the Court **GRANTS** Plaintiff's Motion for Preliminary Injunction against the enforcement of Section 414.0652 against him until

this matter is fully adjudicated by the Court. On stipulation of the State that it will not seek to enforce the statute against others similarly situated to Plaintiff until the matter is fully resolved, the Court **DENIES** the Plaintiff's Motion for Class Certification (Dkt. 16) without prejudice.

## II. BACKGROUND

Plaintiff in this case, Luis Lebron, applied to the Florida Department of Children and Families ("DCF") for benefits under the federal Temporary Assistance for Needy Families ("TANF") program in July 2011 to support himself and his minor child. Lebron Aff. ¶¶ 5, 14 (Dkt. 2-1 at 1, 2.) Plaintiff has sole custody of his four-year old son and is an undergraduate student at the University of Central Florida with prior military service. Lebron Aff. ¶ 5 (Dkt. 2-1 at 1.) Though Plaintiff attests that he has never used illegal drugs, Section 414.0652 requires him to submit to drug testing as a condition of eligibility for TANF benefits. Lebron Aff. ¶ 19 (Dkt. 2-1 at 3.)

Plaintiff refuses to take a drug test because he believes that requiring him to pay for and submit to such a test is unreasonable when there is no reason to believe that he uses drugs. Lebron Aff. ¶ 19 (Dkt. 2-1 at 3.) DCF has stipulated that, as of the date of the initiation of this action, Plaintiff is eligible for TANF benefits, aside from his failure to provide proof that he has tested negative for controlled substances. Berner Aff. ¶ 10 (Dkt. 19-1 at 5; Dkt. 19 at 5.) Plaintiff contends that Section 414.0652 violates his Fourth Amendment right to be free from unreasonable searches, and he seeks a preliminary injunction on behalf of himself and a class of persons similarly situated to enjoin the State from enforcing this statute as a condition for receipt of TANF benefits.

The TANF block grant program was created by Congress on August 22, 1996, as part of the Personal Responsibility and Work Opportunity Act, 42 U.S.C. §§ 601 *et seq.* The Act was intended to provide states with resources and flexibility to operate programs designed meet the following goals:

- (1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;
- (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;
- (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and
- (4) encourage the formation and maintenance of two-parent families.

42 U.S.C. § 601(a).

To become eligible to receive TANF funds, a state must submit a plan that outlines how it intends to administer its program and set eligibility requirements for families that apply for assistance. 42 U.S.C. § 602(a). States may generally use federal funds “in any manner that is reasonably calculated to accomplish” the purposes of TANF. 42 U.S.C. § 604(a)(1). As a complement to this provision, 21 U.S.C. § 862b provides: “Notwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances.” 21 U.S.C. § 862b. Thus, Congress authorizes states to test welfare recipients for controlled substances and to sanction those who test positive, but it does

not provide guidance on the manner in which states are permitted to do so consistent with constitutional mandates.

Florida began disbursing TANF funds in 1996 pursuant to Chapter 414, Florida Statutes. See FLA. STAT. § 414.015 *et seq.* (1996). After holding hearings on welfare reform, the Florida Legislature enacted legislation in 1998 that required DCF<sup>1</sup> to develop and implement a “Demonstration Project” to study and evaluate the “impact of the drug-screening and drug-testing program on employability, job placement, job retention, and salary levels of program participants” and to make “recommendations, based in part on a cost benefit analysis, as to the feasibility of expanding the program,” including specific recommendations for implementing such an expansion. FLA. STAT. § 414.70(1)-(5) (1998) (repealed 2004).

In order to carry out this mandate, DCF designed the Demonstration Project to test empirically (1) whether “individuals who apply for temporary cash assistance or services under the state’s welfare program are likely to abuse drugs,” and (2) whether “such abuse affects employment and earnings and use of social service benefits.” Robert E. Crew, Jr. and Belinda Creel Davis, Assessing the Effects of Substance Abuse Among Applicants for TANF Benefits, 17(1) JOURNAL OF HEALTH & SOCIAL POLICY 39 at 41 (2003) (Dkt. 22-2 at 2). The Legislature instructed DCF to drug test only those individuals whom the department had “reasonable cause to believe” engaged in illegal use of controlled substances. FLA. STAT. § 414.70(1) (1998) (repealed 2004). Thus, to

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<sup>1</sup> At that time, this agency was known as the Florida Department of Children and Family Services. See FLA. STAT. § 414.70(5)(2) (1998) (repealed 2004).

gather data on the likelihood of TANF applicants to use drugs, DCF, working in conjunction with private contractors, screened over eight thousand applicants for welfare benefits between 1999 and 2001 using a written test designed to differentiate between substance abusers and non abusers, regardless of denial or deliberate deception on the part of the test subject. Robert E. Crew, Jr. and Belinda Creel Davis, Assessing the Effects of Substance Abuse Among Applicants for TANF Benefits, 17(1) JOURNAL OF HEALTH & SOCIAL POLICY 39 at 41-42, 44 (2003) (Dkt. 22-2 at 2-3, 5). Of those individuals who were screened, 6,462 continued to receive TANF benefits during the relevant timeframe and were determined to be proper subjects of the study. Id. at 44. Based on the results of the screening, 1,447 of the 6,462 TANF applicants were flagged as potential substance abusers and were required to undergo urinalysis. Id. at 45. Only 335 of those individuals subjected to drug testing—5.1% of the total population who were screened—tested positive. Id. at 45.

The results of the Demonstration Project confounded the expectations of the researchers, who observed that “evidence of drug abuse in Florida is substantially lower than the percentages reported in other research on this topic.” Id. In fact, the percentage of positive drug tests was so low in comparison to previous studies that the researchers opined that the results “raise some questions about the procedures employed by the State to identify drug use among welfare recipients.” Id. 46. To explain the surprisingly low rate of drug use, the researchers speculated that, as news of the drug testing spread, applicants for TANF benefits took the “opportunity to ‘clean’ their urine” by abstaining from illegal substances for a period prior to application. Id.



Notwithstanding the concerns surrounding the methods employed, the concrete scientific evidence gathered clearly undermined the underlying assumption regarding the prevalence of substance abuse among TANF applicants: drug use among the tested TANF population was found to be significantly lower than drug use among welfare recipients in other national studies. See id. at 45-46. The results also showed significantly lower rates of drug use among this population than the rate of drug use among the population of Florida at large, which was recently estimated at 8.13 percent. (Dkt. 2 at 16 n.4.)

With respect to the second area of inquiry, whether drug abuse affects employment and earnings and use of social service benefits, the researchers found that (1) there is very little difference between the employment rates and earning capacities of Food Stamps, cash assistance, and Medicaid recipients who screened positive for substance abuse and those who did not; and (2) there is also very little difference on these same variables between those who tested positive on a urinalysis and those who did not. Robert E. Crew, Jr. and Belinda Creel Davis, Assessing the Effects of Substance Abuse Among Applicants for TANF Benefits, 17(1) JOURNAL OF HEALTH & SOCIAL POLICY 39 at 47-48 (2003) (Dkt. 22-2 at 8-9). That is to say, those welfare recipients who screened and tested positive for the use of illicit substances were found to be just as likely to work and just as likely to use social service benefits as those who screened and tested negative.

Overall, the researchers concluded that the findings of the project raised two implications for social welfare policy:

First, [the findings] emphasize the difficulty of determining the extent of drug use among welfare beneficiaries. *Any* test utilized for this purpose is likely to provide, at best, an estimate of these numbers. ***Such estimates are suitable only for planning purposes and not for sanctioning.***

Secondly, the findings suggest that states may not need to test for drug use among welfare beneficiaries. Evidence from the Florida demonstration project showed very little difference between drug users and non-users on a variety of dimensions. ***Users were employed at about the same rate as were non-users, earned approximately the same amount of money as those who were drug free and did not require substantially different levels of governmental assistance.*** If there are no behavioral differences between drug users and non-users and if drug users do not require the expenditure of additional public funds, then policymakers are free to concentrate on other elements of welfare policy and to avoid divisive, philosophy-laden debates.

Id. at 52 (emphasis added).

The preliminary results of the Demonstration Project were reported to the Legislature in an Evaluation Report that recommended that the project not be expanded because of the high costs of drug testing “compared with the benefits derived” and because of the “minimal differences in employment and earnings between those who showed evidence of current substance abuse and those who did not.” ROBERT E. CREW, EVALUATION REPORT,<sup>2</sup> at ii-iii (Dkt. 32-1 at 2-3). The Legislature apparently did not undertake further testing or expanded testing, and the Demonstration Project expired on June 30, 2001, pursuant to a statutory sunset provision. See FLA. STAT. § 414.70(1) (1998) (repealed 2004).

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<sup>2</sup> There are two reports on the record that set forth the results of the Demonstration Project: the Evaluation Report (Dkt. 32-1), which was prepared by Robert E. Crew, Jr. for presentation to the legislature pursuant to Section 414.70, and the subsequent published version of the evaluation report, Robert E. Crew, Jr. and Belinda Creel Davis, Assessing the Effects of Substance Abuse Among Applicants for TANF Benefits, 17(1) JOURNAL OF HEALTH & SOCIAL POLICY 39 (2003) (Dkt. 22-2). Plaintiff filed both studies without objection by the State.

In 2011, the Florida Legislature resurrected the concept of drug testing TANF applicants. No new studies were conducted, and no new data specific to the Florida welfare population was offered. Instead, legislative staff officials turned again to the Demonstration Project, evaluated its data and considered other issues implicated by the proposed suspicionless drug testing program. See FINAL B. ANALYSIS, FLA. H. B. 353 (2011) (Dkt. 22-4); PROFESSIONAL STAFF OF THE BUDGET COMMITTEE, FLA. S. B. ANALYSIS AND FISCAL IMPACT STATEMENT, S. B. 556 (2011) (Dkt. 22-5). Staff analyses provided to the Florida House of Representatives and the Florida Senate considered the legal ramifications of drug testing, citing a number of cases raised by the parties in the filings before this Court. The House analysis cited the line of United States Supreme Court cases dealing with suspicionless drug testing of individuals and noted that the issue had been successfully challenged as unconstitutional in Michigan in the precise context of welfare recipients. FINAL B. ANALYSIS, FLA. H. B. 353 (2011) (Dkt. 22-4 at 4-5.) The staff analysis provided to the Florida Senate inexplicably cited Marchwinski v. Howard, 309 F.3d 330 (6th Cir. 2002) (holding that district court erred in granting preliminary injunction). PROFESSIONAL STAFF OF THE BUDGET COMMITTEE, FLA. S. B. ANALYSIS AND FISCAL IMPACT STATEMENT, S. B. 556 (2011) (Dkt. 22-5 at 6). On the record presented to this Court, it appears that the analysis failed to advise the Senate that the Sixth Circuit Court of Appeals vacated that decision and subsequently affirmed the district court decision by a vote of an evenly divided *en banc* court, thereby reinstating the district court's preliminary injunction enjoining the Michigan statute on constitutional grounds.

See Marchwinski v. Howard, 319 F.3d 258 (6th Cir. 2003), and Marchwinski v. Howard, 60 F. App'x 601 (6th Cir. 2003).

The staff analyses did both summarize the Demonstration Project's findings and conclusions, however. PROFESSIONAL STAFF OF THE BUDGET COMMITTEE, FLA. S. B. ANALYSIS AND FISCAL IMPACT STATEMENT, S. B. 556 (2011) (Dkt. 22-5 at 3, 7); FINAL B. ANALYSIS, H. B. 353 (2011) (Dkt. 22-4 at 3.) The legislative staff specifically advised the legislature that the researcher charged with evaluating the project "did not recommend continuation or statewide expansion" of the Demonstration Project, noting: "Overall research and findings concluded that there is very little difference in employment and earnings between those who test positive versus those who test negative. Researchers concluded that the cost of the pilot project was not warranted." PROFESSIONAL STAFF OF THE BUDGET COMMITTEE, FLA. S. B. ANALYSIS AND FISCAL IMPACT STATEMENT, S. B. 556 (2011) (Dkt. 22-5 at 3); FINAL B. ANALYSIS, H. B. 353 (2011) (Dkt. 22-4 at 3.) Despite the failure of the Demonstration Project to uncover evidence of rampant drug abuse among TANF applicants; despite the conclusion of researchers that drug use did not adversely impact any of the goals of the TANF program, including employability, earning capacity or independence from social assistance; despite the fact that the study revealed no financial efficacy; despite the legal ramifications; and, despite the express recommendation that the project not be continued or expanded, Florida enacted Section 414.0652 on May 31, 2011.

Section 414.0652 requires each individual who applies for TANF funding to take a drug test. FLA. STAT. § 414.0652(1). The applicant must initially bear the expense of

the drug testing, which costs between \$24 and \$45. FLA. STAT. § 414.0652(1); Duchene Aff. ¶ 4 (Dkt. 19-2 at 2.) Drug testing is not conducted at the office of an individual's physician but instead must take place at an "approved laboratory" authorized by DCF to administer drug testing. Berner Aff. ¶ 6 (Dkt. 19-1 at 3.) If the applicant tests negative, TANF funds will be used to reimburse the applicant for the cost of the drug test. FLA. STAT. § 414.0652(2)(a). A medical review officer reviews all test results and evaluates positive tests, as various prescription medications being taken at the direction of a physician can trigger a positive result. Duchene Aff. ¶ 6 (Dkt. 19-2 at 2.) To avoid being denied benefits due to legitimate prescription drug use, applicants must inform the agent administering the drug test that they are taking prescription or over-the-counter medications and must legitimize their use. Although this requirement is presented as optional, if the applicant does not so disclose, the applicant may be denied benefits due to a positive screening. See FLA. STAT. § 414.0652(2)(d)-(j). Ultimately, a medical review officer verifies the validity of any prescriptions provided by the applicant and may override positive results if appropriate. Duchene Aff. ¶ 6 (Dkt. 19-2 at 2-3.) All test results are provided to DCF. Duchene Aff. ¶ 6 (Dkt. 19-2 at 3.)

Any applicants who test positive for controlled substances and have no medically approved excuse for the positive result are immediately sanctioned; they are rendered ineligible to receive TANF benefits for one year. FLA. STAT. § 414.0652(1)(b). However, an applicant may reapply after 6 months and may receive benefits if the individual successfully completes a substance abuse treatment program and passes a drug test, the costs of which are to be borne by the applicant. FLA. STAT. §

414.0652(2)(j). If an adult tests positive for illicit drug use, children in the family may still receive benefits if another approved adult, referred to as a “protective payee,” provides a negative drug test for controlled substances. FLA. STAT. § 414.0652(3)(b)-(c).

DCF shares all positive drug tests for controlled substances with the Florida Abuse Hotline. Berner Aff. ¶ 9 (Dkt. 19-1 at 4.) After receiving a positive drug test, a hotline counselor enters a Parent Needs Assistance referral into a child welfare database known as the Florida Safe Families Network. Berner Aff. ¶ 9 (Dkt. 19-1 at 4.) A referral is then prepared so that the adult who tested positive may receive a list of substance abuse treatment programs and so that “other appropriate response to the referral in the particular county of residence of the applicant” may be taken. Berner Aff. ¶ 9 (Dkt. 19-1 at 4.) The statute governing the Florida Abuse Hotline authorizes the disclosure of records from the abuse hotline to “[c]riminal justice agencies of appropriate jurisdiction,” as well as “[t]he state attorney of the judicial circuit in which the child resides or in which the alleged abuse or neglect occurred.” FLA. STAT. § 39.202(2)(b)-(c). Law enforcement officials may access the Florida Safe Families Network and make such use of the data as they see fit. Preliminary Injunction Hearing at 10:58 A.M. (Drew Parker, attorney for DCF); see also FLA. STAT. § 39.202(2)(b)-(c). However, the Parent Needs Assistance referral does not trigger formal reports of child abuse or neglect, which are governed under Chapter 39, Florida Statutes.

Section 414.0652 became effective July 1, 2011, and drug testing began in earnest during the month of July. FINAL B. ANALYSIS, H. B. 353 (2011) (Dkt. 22-4 at 1); Berner Aff. ¶ 6 (Dkt. 19-1 at 3.) The preliminary results from the drug testing conducted

pursuant to Section 414.065 reveal even lower drug use among TANF applicants than demonstrated by the results of the Demonstration Project. Evidence adduced on this record suggests that preliminary tests show that only about 2 percent<sup>3</sup> of TANF applicants tested positive in the first month of drug testing. (Dkt. 19 at 8; Dkt. 2 at 16.)

The State argues that all denials of benefits to TANF applicants who refuse to take the drug test after being determined otherwise eligible should be considered “drug related denials.”<sup>4</sup> Yet, it is difficult to draw any conclusions concerning the extent of drug use or the deterrent effect of the statute from this fact because declining to take the drug test can be attributed to a number of factors in addition to drug use, including an inability to pay for the testing, a lack of laboratories near the residence of an applicant, inability to secure transportation to a laboratory or, as in the case at bar, a refusal to accede to what an applicant considers to be an unreasonable condition for receiving benefits. No evidence on the distribution of these other factors among those who have declined to be tested has been adduced. Whatever the reason for the failure or refusal to test, the empirical data to date has only demonstrated that 2 percent to 5.1

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<sup>3</sup> The State suggested initially at the Hearing that there might be a discrepancy in this low number but later stated on the record that “we know that about two percent are testing positive.” In any case, the State has not sought to introduce evidence of a higher percentage of actual positive drug tests among TANF applicants based on the initial results of the drug testing. The pamphlet the State introduces on this point states that **only 9 people** of the 574 denials through the end of July actually tested positive for drug use. Tarren Bragdon, The Impact of Florida’s New Drug Test Requirement for Welfare Cash Assistance, FOUNDATION FOR GOVERNMENT ACCOUNTABILITY, September 2011 at 4 (Dkt. 19-8 at 2.) Although this would equate to approximately 2 percent of those who were denied, it is far less than 2 percent of the overall total number tested. For purposes of its analysis, the Court considers the overall 2 percent positive test results figure cited by the parties. Perhaps the parties can more fully address these numbers as the case progresses.

<sup>4</sup> The State uses a 9.8 percent number to quantify drug related denials based a refusal to take a test, but this number appears to conflate the 7.6 percent of those who are denied based on because they have not submitted any test results and the 2 percent of those who have tested positive.

percent of Florida's TANF applicants are drug users. Conversely, the data suggests that 94.9 to 98 percent are not drug users. Yet, all must submit to suspicionless drug testing or forego receipt of TANF benefits.

## I. DISCUSSION

Plaintiff argues that requiring all applicants for TANF benefits to submit to a suspicionless drug test violates the Fourth Amendment's prohibition against unreasonable searches and that preliminary injunctive relief is required to avoid the irreparable harm that will befall him and others similarly situated without the issuance of an injunction. (Dkt. 2 at 1.) The State offers four rejoinders: (1) the Section 414.0652 requirement for acquiescence to a drug test is not a search within the meaning of the Fourth Amendment; (2) Section 414.0652 is justified by the "special needs" of the State to conduct drug testing within the ambit of its administration of TANF funds; (3) Plaintiff will suffer no irreparable harm in the absence of an injunction because he is free to refuse the drug test; and (4) the public interest lies in ensuring that public funds are expended for their intended purposes and not in ways that will endanger the public. (Dkt. 19 at 9-27.)

A district court may grant a preliminary injunction only upon the movant's showing that (1) it has a substantial likelihood of success on the merits, (2) the movant will suffer irreparable injury unless the injunction is issued, (3) the threatened injury to the movant outweighs the possible injury that the injunction may cause the opposing party, and (4) if issued, the injunction would not disserve the public interest. Horton v. City of St. Augustine, Fla., 272 F.3d 1318, 1326 (11th Cir. 2001); Scott v. Roberts, 612



F.3d 1279, 1290 (11th Cir. 2010). The Court will address each of these considerations in turn.

**a. Likelihood of Success on the Merits**

The Court finds that Plaintiff has demonstrated that, on the current record, there is a substantial likelihood that his challenge to the constitutionality of Section 414.0652 under the Fourth Amendment will succeed.

1. Urinalysis Testing for the Presence of Drugs Constitutes a Search under the Fourth Amendment

It is well established that a drug test is considered a search under the Fourth Amendment. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 617 (1989); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989); Chandler v. Miller, 520 U.S. 305, 313 (1997); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822 (2002). In Skinner, the seminal case on this issue, the Supreme Court held that the “collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable”<sup>5</sup> and that “these intrusions must be deemed searches under

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<sup>5</sup> Against this controlling authority, the Court declines the State’s invitation (Dkt. 24) to review current private organizations’ practices or public opinion polls to conclude that there no longer exists a reasonable expectation of privacy against state intrusion via urinalysis drug testing. Private employers are not constrained by the limits of the Fourth and Fourteenth Amendment in this regard.

the Fourth Amendment.” Skinner, 489 U.S. at 617; Vernonia, 515 U.S. at 658 (“collecting the samples for urinalysis intrudes upon ‘an excretory function traditionally shielded by great privacy’”) (quoting Skinner, 489 U.S. at 626); Nat’l Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987) aff’d in part, vacated in part and remanded, 489 U.S. 656 (1989) (“There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.”) (quoted in Skinner, 489 U.S. at 617); see also Schmerber v. California, 384 U.S. 757, 768 (1966) (“compelled intrusion into the body for blood to be analyzed for alcohol” is a search under the Fourth Amendment).

Notwithstanding the overwhelming body of case law to the contrary, the State contends that the drug testing of welfare recipients is not a search. (Dkt. 19 at 9.) According to the State, the drug test is not forced or compelled, and, if there is no consent to the testing, there is no drug test and, thus, no search. (Dkt. 19 at 11.) For support, the State relies upon Wyman v. James, 400 U.S. 309 (1971). In Wyman, the Supreme Court concluded that requiring a welfare recipient to consent to a home visit in order to be deemed eligible for welfare benefits did not constitute a search. In so holding, the Court observed that the home visit “in itself is not forced or compelled. . . . If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search.” Wyman, 400 U.S. at 317-18. Defendant contends that the principles

announced in Wyman control the outcome of this case and compel the conclusion that Section 414.0652 does not implicate a search. (Dkt. 19 at 11.)

The Court finds this argument unpersuasive. The principal and dispositive difference between this case and Wyman is the nature of the intrusion demanded. In Wyman, the Court characterized the home visit to be primarily “rehabilitative” in nature and cautioned against placing too much emphasis on its investigatory character. Wyman, 400 U.S. at 317. The Court reasoned that the caseworker was “not a sleuth but rather . . . a friend to one in need,” and, although the caseworker might have observed matters in the home that revealed fraud or issues requiring further review, the parameters of the visit did not permit snooping or intrusion beyond sitting in the living room having a conversation. Id. at 321, 323. It also recognized that the home visit had become “an established routine in States besides New York” and that the home visit formed the “heart of the welfare administration.” Wyman, 400 U.S. at 320 (quoting Note, Rehabilitation, Investigation and the Welfare Home Visit, 79 YALE L.J. 746, 748 (1970)). The Supreme Court has never extended the holding of Wyman outside the context of the home visit in the manner urged by the State.<sup>6</sup>

The post-Wyman cases dealing with suspicionless drug testing further confirm that the urinalysis at issue here is a search and negate the State’s contrary contention. The Supreme Court has “routinely treated urine screens taken by state agents as searches within the meaning of the Fourth Amendment,” Ferguson v. City of Charleston,

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<sup>6</sup> See, Sanchez v. County of San Diego, 464 F.3d 916, 922, n. 8 (9th Cir. 2006), cert. denied, 552 U.S. 1038 (2007) (applying Wyman in a home visit context with slightly more intrusive aspects but noting that Wyman’s holding that home visits are not searches had been “called into question by the Supreme Court’s subsequent Fourth Amendment jurisprudence”).

532 U.S. 67, 77 n.9, regardless of whether the person subjected to the test has the opportunity to refuse it. See Chandler, 520 U.S. at 313 (drug testing of prospective political candidates considered to be a search); Vernonia, 515 U.S. 646 (policy requiring high school students to sign a form consenting to testing in order to play sports considered a search); Earls, 536 U.S. 822 (policy requiring middle school and high school students to consent to drug testing as a condition for participation in extracurricular activities held a search); Von Raab, 489 U.S. at 665 (drug testing as a condition for employment in certain U.S. Customs Service positions held to be a search).

In short, this case does not concern home visits; it concerns the collection of an individual's urine, an act that necessarily entails intrusion into a highly personal and private bodily function, and the subsequent urinalysis, which can reveal a host of private medical facts about that individual. Skinner, 489 U.S. at 617. The intrusion here also extends well beyond the initial passing of urine. Positive drug tests are not kept confidential in the same manner as medical records; they are shared with third-parties, including DCF, medical reviewers and counselors for the Florida Abuse Hotline. More troubling, positive test results are memorialized, perhaps indefinitely, in a database that the State admits can be accessed by law enforcement. This potential interception of positive drug tests by law enforcement implicates a "far more substantial" invasion of privacy than in ordinary civil drug testing cases. See Ferguson, 532 U.S. at 78. In light of the inherently investigative character of the drug test and binding legal authority, the

Court rejects the argument that a drug test taken pursuant to Section 414.0652 is not a search within the meaning of the Fourth Amendment.

2. Plaintiff's Initial Consent, Now Revoked, Does not Bar His Claim

The State is correct that a search conducted with consent does not give rise to a constitutional violation. Schneekloth v. Bustamonte, 412 U.S. 218, 219 (1973). It is uncontested that Plaintiff electronically signed a "Drug Testing Information and Consent Form," which is clear evidence of his consent to be drug tested. However, completion of that form was required in order for DCF to process Plaintiff's application. Berner Aff. ¶ 7 (Dkt. 19-1 at 3.) Without DCF's initial approval of his application, Plaintiff's claim would have likely been barred by the ripeness doctrine, which serves to protect federal courts from "engaging in speculation or wasting their resources through the review of potential or abstract disputes." Digital Props., Inc. v. City of Plantation, 121 F.3d 586, 590 (11th Cir. 1997) (First Amendment claim not sufficiently mature for judicial review). Plaintiff has since unequivocally revoked his consent to be searched by refusing to take the drug test and by filing this action. Lebron Aff. ¶ 21 (Dkt. 2-1 at 3.) Under these facts, the Court finds that Plaintiff's initial consent does not bar the invocation of his rights under the Fourth Amendment to be free from suspicionless drug testing under Section 414.0652.

Even if Plaintiff's consent were not revoked, the State's exaction of consent to an otherwise unconstitutional search in exchange for TANF benefits would violate the doctrine of unconstitutional conditions. See Perry v. Sindermann, 408 U.S. 593, 597

(1972) (collecting cases and observing that “even though a person has no ‘right’ to a valuable governmental benefit,” the government may not “deny a benefit to a person on a basis that infringes his constitutionally protected interests”); see also Bourgeois v. Peters, 387 F.3d 1303, 1324 (11th Cir. 2004) (“The doctrine of unconstitutional conditions prohibits terminating benefits, although not classified as entitlements, if the termination is based on motivations that other constitutional provisions proscribe.”) (quotations omitted); United States v. Scott, 450 F.3d 863, 866 (9th Cir. 2006) (waiver of Fourth Amendment rights is limited by unconstitutional conditions doctrine).

3. The State has not Demonstrated Any “Special Need” for Drug Testing All TANF Applicants

Because Florida’s drug testing program authorizes suspicionless searches, Florida must establish that the interests it advances to demand such searches without probable cause or reasonable suspicion meet the “Special Needs” exception to the Fourth Amendment. The Fourth Amendment, as applicable to the states through the Fourteenth Amendment, does not prohibit all searches; only unreasonable searches are unconstitutional. Skinner, 489 U.S. at 619. “To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing.” Chandler, 520 U.S. at 313.

One exception to this rule arises when the government can demonstrate “exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.” New

Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring); see also Skinner, 489 U.S. at 619. As the Supreme Court has noted, “Our precedents establish that the proffered special need for drug testing must be substantial—important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.” Chandler, 520 U.S. at 318. When special needs are alleged in justification of a Fourth Amendment intrusion, “courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.” Id. at 314.

The special needs exception arises out of circumstances in the administrative context in which the practice of obtaining a warrant would simply not be feasible. In Skinner, for instance, the Federal Railroad Administration found that alcohol and drug abuse by railroad employees posed a serious threat to safety, and in response it promulgated regulations that required employees involved in train accidents to take blood and urine tests. Skinner, 489 U.S. at 606. The Supreme Court recognized that the delay required to procure a warrant could result in the destruction of valuable evidence of drug and alcohol use, and that adherence to normal probable cause and warrant requirements would frustrate the compelling government interest in railway safety. Id. at 623. Thus, the administrative necessity of investigating the cause of an accident justified resort to the special needs doctrine. Id. at 623.

Similarly, in the context of public schools, the Supreme Court has determined that "strict adherence to the requirement that searches be based upon probable cause" would “unduly interfere with the maintenance of swift and informal disciplinary

procedures” and would detract from “the substantial need of teachers and administrators for freedom to maintain order in the schools.” Vernonia, 515 U.S. at 653 (quoting New Jersey v. T.L.O., 469 U.S. 325, 340 (1985)). In contrast, the Tenth Circuit has found that the special needs doctrine could not justify an intrusive, nonconsensual physical examination of preschoolers because parental notice and consent to the searches were not impracticable. Dubbs v. Head Start, Inc., 336 F.3d 1194, 1215 (10th Cir. 2003).

The viability of alleged special needs also depends upon the substantiality of the governmental interest asserted. Chandler, 520 U.S. at 318. In drug testing cases, an interest will be considered substantial if the government shows that the drug testing is warranted by “surpassing safety interests.” Skinner, 489 U.S. at 634. Likewise, suspicionless drug testing has been deemed justified where the individuals who are to be tested are employed in a particularly sensitive capacity implicating peculiar affairs or missions of the government, such as law enforcement agents involved in drug interdiction. See, e.g., Von Raab, 489 U.S. at 669. Finally, the Supreme Court has approved of suspicionless drug testing in public schools because of “the need to prevent and deter the substantial harm of childhood drug use,” Earls, 536 U.S. at 835, and because the schools have taken on a “custodial and tutelary responsibility for children” in the special confines of the school setting. Vernonia, 515 U.S. at 656.

But the special needs exception is reserved for “exceptional circumstances,” T.L.O., 469 U.S. at 351, and not every alleged governmental interest will fit within the “closely guarded category of constitutionally permissible suspicionless searches.”



Chandler, 520 U.S. at 309. In Chandler, the Supreme Court considered the constitutionality of a statute that required candidates for certain elected offices to submit to drug testing as a condition of qualification for candidacy. Id. at 309. The State of Georgia cited as a special need the “incompatibility of unlawful drug use with holding high state office” and argued that the “use of illegal drugs draws into question an official’s judgment and integrity; jeopardizes the discharge of public functions; . . . and undermines public confidence and trust in elected officials.” Id. at 318. The State of Georgia also argued that the statute “serves to deter unlawful drug users from becoming candidates and thus stops them from attaining high state office.” Id.

Rejecting this rationale, the Supreme Court found that Georgia failed to demonstrate a sufficiently substantial special need. The Court noted that Georgia conceded that the statute was “not enacted in response to any fear or suspicion of drug use by state officials” and that the cited reasons did not present “any indication of a concrete danger demanding departure from the Fourth Amendment’s main rule.” Id. at 319. The Court also opined that the drug testing regime was “not well designed” to identify drug users because all of those drug users “save for those prohibitively addicted, could abstain for a pretest period sufficient to avoid detection.” Id. at 320-21. In the absence of any showing that the statute responded to anything more than a “symbolic” need, the Court held that the need asserted did not justify the suspicionless drug testing. Id. at 309, 322.

Applying this analysis to the facts of this case and considering the evidence adduced to date, the Court finds the State has not demonstrated a substantial special

need to justify the wholesale, suspicionless drug testing of all applicants for TANF benefits. The State maintains that the following interests qualify as special needs: (1) ensuring that TANF funds are used for their dedicated purpose, and not diverted to drug use; (2) protecting children by “ensuring that its funds are not used to visit an ‘evil’ upon the children’s homes and families;” (3) ensuring that funds are not used in a manner that detracts from the goal of getting beneficiaries back to employment; (4) ensuring that the government does not fund the “public health risk” posed by the crime associated with the “drug epidemic.” (Dkt. 19 at 18-22.)

These goals are undeniably laudable objectives. However, these stated goals can be found nowhere in the legislation, and with good reason: the State’s commissioned study undercuts each of these rationales as a likely feature of the proposed legislation. As noted, researchers found a lower rate of drug usage among TANF applicants than among current estimates of the population of Florida as a whole. This would suggest that TANF funds are no more likely to be diverted to drug use or used in a manner that would expose children to drugs or fund the “drug epidemic” than funds provided to any other recipient of government benefits. The researchers also found no evidence that TANF recipients who screened and tested positive for the use of illicit substances were any less likely to find work than those who screened and tested negative. The Florida Legislature, in fact, enacted the Section 414.0652 over the express recommendation of its own researchers *not* to expand the Demonstration Project statewide because it was not shown to meet these goals.

In this litigation, the State provides scant evidence that rampant drug abuse exists among this class of individuals. It relies on three studies in support of its position. The first is a policy brief prepared by the National Poverty Center, which the State cites for its data estimating that twenty one percent of welfare recipients self-reported using drugs in the previous year, mostly marijuana. Jayakody et al., Substance Abuse and Welfare Reform, NATIONAL POVERTY CENTER POLICY BRIEF # 2 (National Poverty Center) April 2004 at 2-3; (Dkt. 19-5 at 2). The Court finds this study lacks any probative value on the issue presented. The State concedes that the study relies on data from 1994 and 1995; the study is not specific to Florida; and the study is not of the same population being considered here, but a much larger recipient, demographic and geographic population than the TANF recipients being tested here. Moreover, the study posits that, although illicit drug use is more prevalent among women receiving welfare benefits, “only a small minority of recipients (about 4 percent) satisfied the diagnostic screening for illicit drug dependence (i.e. drug use impacted their functioning in significant ways.” Id. at 2.

Even less probative of the State’s position is the second cited study, which relies upon data dating back nearly 20 years to 1992 and concludes that “contrary to common characterizations” only “small percentages”—3.8 percent to 9.8 percent—of national recipients of AFDC, WIC and food stamps use drugs. Bridget F. Grant and Deborah A. Dawson, Alcohol and Drug Use, Abuse, and Dependency among Welfare Recipients, 86 AM. J. PUB. HEALTH 1450, 1453 (1996) (Dkt. 19-6 at 3). This study also considers evidence of a broader population than TANF applicants.

Similarly, the third study offered by the State, which uses data from Women's Employment Surveys taken between 1997 and 1999 and a 1997 National Household Survey of Drug Abuse, estimates drug dependency among respondents to be between 3.2 and 4.4 percent. Harold Pollack et al., Drug Testing Welfare Recipients – False Positives, False Negatives, Unanticipated Opportunities (2001) (Dkt. 19-7 at 5, 11.) The only more significant numbers are based on self-reports of TANF recipients of any drug use within the previous year. Id. at 6. Again, this study considers data that is outdated and is not specific to Florida TANF beneficiaries. Its authors also conclude that psychiatric disorders are a more prevalent problem than drug dependence and suggest that drug testing should be "focused only on recipients who experience tangible drug-related economic barriers or threats to family functioning." Id. at 11, 13. These studies do not support the conclusion that drug abuse is a "concrete danger" among the class of citizens the State seeks to drug test. See Chandler, 520 U.S. at 319. Moreover, there is no evidence that any of these studies were considered by the legislature when it promulgated the statute.

Perhaps more damaging than its failure to provide evidence in support of its alleged special needs is the State's failure to address the only competent evidence before the Court on this issue: (1) the results from the Demonstration Project commissioned by the Florida Legislature to study the scope of the perceived problem of drug abuse among Florida's TANF applicants and the concomitant benefits of drug testing; and, (2) the preliminary results from the drug testing conducted thus far pursuant to Section 414.0652. This evidence suggests that TANF applicants can be

expected to test positive between 2 and 5.1 percent of the time. This percentage range falls well below current estimates of the rate of drug use among the general population of Florida. More importantly, the researchers have concluded that the benefits ostensibly to be served by this legislation will not be reaped—and no evidence has been offered yet to discredit those findings.

Faced with this evidence, the State argues that it can, nevertheless, establish special needs without a showing of an overwhelming drug problem in the tested population. (Dkt. 19 at 22 n.15.) In this regard, the State invokes the concern for the wellbeing of children that served as a special need in Earls and the concerns for public safety and crime risks that justified the special needs in Von Raab. (Dkt. 19 at 19-20, 21.) It is true that the Supreme Court did not require overwhelming evidence of a drug problem among the specific populations to be tested in those cases. See Von Raab, 489 U.S. at 673-75; Earls, 536 U.S. at 835. However, the Chandler Court made clear that the Von Raab decision is “[h]ardly a decision opening broad vistas for suspicionless searches;” instead, it is a decision that “must be read in its unique context.” Chandler, 520 U.S. at 321. The Chandler Court explained that the preventative drug testing in Von Raab was warranted because the customs employees who served as the “first line of defense” against the smuggling of illicit narcotics were “routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use.” See id. at 316, 321 (quotation to Von Raab omitted).

Unlike Von Raab, where the Supreme Court excused the absence of evidence because smuggling posed a threat to national border security, there is no “veritable

crisis” demonstrated on this record that demands preventative measures. See Von Raab, 489 U.S. at 668. Though the State speaks in generalities about the “public health risk, as well as the crime risk, associated with drugs” being “beyond dispute,” it provides no concrete evidence that those risks are any more present in TANF applicants than in the greater population. (Dkt. 19 at 21.) Rather, the evidence suggests that those risks are less prevalent among TANF applicants. The Court, therefore, rejects the suggestion that the inchoate public health or crime risks assertions incanted by the State justify the Fourth Amendment intrusions mandated by Section 414.0652.

Nor is the drug testing analogous to the preventative drug testing program approved of in Earls. In Earls, as in prior and subsequent public school drug testing cases, the subjects of the drug tests were vulnerable students, and the school district’s custodial or tutelary responsibility towards those students justified early, preventative intervention through drug testing. Earls, 536 U.S. at 835, 830. The Supreme Court also considered evidence of a “nationwide drug epidemic” that had “grown worse” since its decision in Vernonia in 1995 upholding the constitutionality of drug testing of student athletes. Id. at 834. Specifically, the Court pointed out that “the number of 12th graders using any illicit drug increased from 48.4 percent in 1995 to 53.9 percent in 2001. The number of 12th graders reporting they had used marijuana jumped from 41.7 percent to 49.0 percent during that same period.” Id. at 834 n.5. This evidence on the “nationwide drug epidemic ma[de] the war against drugs a pressing concern in every school.” Id. at 834.

The Court also considered “specific evidence of drug use at Tecumseh schools,” including the testimony of teachers that they had observed students under the influence of drugs and had heard students speaking openly about the use of drugs. Id. at 834-35. The school board also provided other anecdotal evidence, including the discovery of “marijuana cigarettes near the school parking lot” and “drugs or drug paraphernalia in a car driven by a Future Farmers of America member.” Id. at 835. The Supreme Court concluded that the school board had “provided sufficient evidence to shore up the need for its drug testing program.” Id. Importantly, Earls was decided on summary judgment after an opportunity to offer up competent evidence. Considering, as the Court must, this record as it is currently presented, there is no evidence at this stage of the litigation comparable to the evidence presented in Earls regarding drug use by TANF applicants, and there is no evidence that the children of these applicants are at any heightened risk from the dangers of drug abuse.

On this point, the State contends that by being the conduit for a maximum of \$241 per month in federal cash assistance for a finite period of time to TANF applicants, it somehow “steps into the role of the parent” in the same manner as the school board in Earls. (Dkt 19 at 20.) This contention is without merit. At the point at which the drug test is demanded, the State has not made a TANF contribution for the benefit of the children. Moreover, the children affected by Section 414.0652 remain in the custody of their caretakers, not the State, regardless of whether the caretaker tests positive for drugs and regardless of whether Florida withholds TANF benefits as a consequence. Even if the State did assume some authority over the children, it does not follow that the

State would be justified in drug testing their parents, whose role the State suggests it supplants, and Earls does not so hold.

This untenable suggestion also implicates the concerns raised in Marchwinski v. Howard, 113 F. Supp. 2d 1134 (E.D. Mich. 2000), regarding the danger of unquestioned deference to the assertion of this interest:

If the State is allowed to drug test [TANF] recipients in order to ameliorate child abuse and neglect by virtue of its financial assistance on behalf of minor children, that excuse could be used for testing the parents of all children who receive Medicaid, State Emergency Relief, educational grants or loans, public education or any other benefit from the State. In all cases in which the State offers a benefit on behalf of minor children, the State could claim that it has a broad interest in the care of those children which overcomes the privacy rights of the parents.

Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1142 (E.D. Mich. 2000) aff'd, 60 F. App'x 601 (6th Cir. 2003) (affirmed on rehearing by evenly divided *en banc* panel).<sup>7</sup> In light of this concern and in the absence of a showing that Section 414.0652 was promulgated in response to any concrete danger to the children of Florida's TANF recipients, the Court declines to extend the special need for drug testing public school students to the facts of this case.

The State's asserted interest in ensuring that drug use does not frustrate TANF's statutory goal of getting beneficiaries back to employment is, likewise, unsupported on

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<sup>7</sup> The State repeatedly quotes and cites to Marchwinski v. Howard, 309 F.3d 330 (6th Cir. 2002) (holding that district court erred in granting preliminary injunction) vacated by 319 F.3d 258 (6th Cir. 2003), despite the fact that this decision has been vacated and therefore has no precedential value. See, e.g., Whole Health Chiropractic & Wellness, Inc. v. Humana Med. Plan, Inc., 254 F.3d 1317, 1320 n.3 (11th Cir. 2001) (noting that In re First Nat'l Bank of Boston, 70 F.3d 1184 (11th Cir. 1995) "lacks precedential value, as it was vacated"); Iranian Students Ass'n v. Edwards, 604 F.2d 352, 354 n.4 (5th Cir., 1979) (reliance on Henderson v. Fort Worth Indep. Sch. Dist., 574 F.2d 1210 (5th Cir. 1978) was "totally inapposite" because the "vacating of that decision deprives it of precedential value").



the evidence of record. Even if this interest qualified as a special need, see contra Marchwinski, 113 F. Supp. 2d at 1140,<sup>8</sup> the evidence does not support its application here. The special needs exception rests on the assumption that the drug testing will actually redress the problem that gives rise to the special need, and the justification for the special needs exception loses force when the drug testing and its attendant consequences would prove ineffective. See Chandler, 520 U.S. at 319-320.

The asserted benefit of getting TANF beneficiaries back to work is not supported by any tangible evidence, however. The only evidence on this point soundly refutes it. The State's Demonstration Project study emphatically concluded that "whether or not a person tested positively for drug abuse on the urinalysis affected very little their likelihood of working." Robert E. Crew, Jr. and Belinda Creel Davis, Assessing the Effects of Substance Abuse Among Applicants for TANF Benefits, 17(1) JOURNAL OF HEALTH & SOCIAL POLICY 39 at 42, 48 (2003) (Dkt. 22-2 at 9). Thus, the interest of getting TANF applicants back to work is not a demonstrated or concrete special need, and, even if it were, the evidence of record does not suggest it would be furthered by the drug testing program in any event.

When the asserted concerns regarding public safety, the wellbeing of children and the employment of TANF applicants are stripped away, the State is left with only one alleged special need: the interest in preserving public funds by ensuring that money that is intended for one purpose is not used instead to purchase illegal drugs.

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<sup>8</sup> The Marchwinski Court found that the goal of moving welfare recipients to work does not fit into any "closely guarded category of constitutionally permissible suspicionless searches" such that it would qualify as a special need. Marchwinski, 113 F. Supp. 2d at 1140 (quoting Chandler, 520 U.S. at 309).

(Dkt. 19 at 18.) Again, this is a commendable governmental purpose, and one that courts have found relevant to the special needs analysis. See, e.g., Sanchez, at 928 (home visits for the purpose of verifying eligibility of welfare benefits and reducing welfare fraud held to be justified by a special need).

Chandler teaches, however, that it is not enough to simply recite a governmental interest without any evidence of a concrete threat that would be mitigated through drug testing. Chandler, 520 U.S. at 322; see also Ferguson, 532 U.S. at 81 (observing that the Court does “not simply accept the State’s invocation of a ‘special need’” but instead must carry out “‘close review’ of the scheme at issue” before determining whether the need is special as that term has been defined through Supreme Court precedent) (quoting Chandler, 522 U.S. at 322).

The State has not shown by competent evidence that any TANF funds would be saved by instituting a drug testing program. The State, of course, concedes the substantial cost of administering the program: everyone who tests negative must be reimbursed for the cost of the drug test. FLA. STAT. § 414.0652(2)(a). Thus, millions of TANF dollars will be spent funding drug tests.

Though the State offers, as evidence of the cost savings, a pamphlet from the Foundation for Government Accountability<sup>9</sup> entitled, The Impact of Florida’s New Drug Test Requirement for Welfare Cash Assistance, the data contained in the pamphlet is

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<sup>9</sup> The Foundation for Government Accountability, a non-profit organization that “believes personal liberty and private enterprise are key to Florida’s economic future,” “develops and promotes free market public policies that achieve limited, constitutional government and a robust economy that will be an engine for job creation across the state.” Tarren Bragdon, The Impact of Florida’s New Drug Test Requirement for Welfare Cash Assistance, FOUNDATION FOR GOVERNMENT ACCOUNTABILITY, September 2011 at 4 (Dkt. 19-8 at 4.)

not competent expert opinion, nor is it offered as such, nor could it be reasonably construed as such. Tarren Bragdon, The Impact of Florida's New Drug Test Requirement for Welfare Cash Assistance, FOUNDATION FOR GOVERNMENT ACCOUNTABILITY, September 2011 at 1 (Dkt. 19-8 at 1.) Even a cursory review of certain assumptions in the pamphlet undermines its conclusions. Just by way of example, the pamphlet suggests that the State will save millions in the first year; but it arrives at this number by extrapolating from the 9.6 percent of TANF applications that are denied for "drug-related" reasons, including those who tested positive and those who declined to be tested. Id. at 1. It extends these hypothetical savings for the full year that a TANF applicant who tested positive for drugs would be subject to losing benefits. Id. at 2-3.

However, the results show that 7.6 percent of this 9.6 percent figure is comprised of applicants who have declined to be tested. These "non-testers" cannot be reasonably counted as providing twelve months of savings, or so-called "annualized savings," because they are otherwise eligible and can begin receiving benefits at any point during the year by submitting a new application and a negative drug test. Even as to those 2 percent of applicants who are known drug users, "annualized savings" calculations inflate the claimed savings because those applicants do not have to forego an entire year of TANF assistance but may reapply after 6 months. FLA. STAT. § 414.0652(2)(j). Additionally, the staff analysis presented to the Florida Senate advised the Senate that denials caused by positive tests cannot be relied upon to produce a net savings figure for the additional reason that the "protective payee" provision of the statute allows another adult family member who provides a negative drug test to receive

the same funds that are purported to be saved. See PROFESSIONAL STAFF OF THE BUDGET COMMITTEE, FLA. S. B. ANALYSIS AND FISCAL IMPACT STATEMENT, S. B. 556 (2011) (Dkt. 22-5 at 6); FLA. STAT. § 414.0652(3)(b). Therefore, on this record, the State has not demonstrated any financial benefit or net savings will accrue as a result of the passage of Section 414.0652.

To this, the State invokes the government's general interest in fighting the "war on drugs" and the associated ills of drug abuse generally to contend that TANF funds should not be used to fund the drug trade. The Court agrees. But, if invoking an interest in preventing public funds from potentially being used to fund drug use were the only requirement to establish a special need, the State could impose drug testing as an eligibility requirement for every beneficiary of every government program. Such blanket intrusions cannot be countenanced under the Fourth Amendment.

What the Fourth Amendment requires is that such incursions by the Government must be reserved for demonstrated special needs of government or be based on some showing of reasonable suspicion or probable cause. The State has made no showing that it would be "impracticable" to meet these prerequisites in the context of TANF recipients. Any suggestion that it would be impracticable should be based on some evidentiary showing, and any such showing would likely be belied by the fact that other states competently administer TANF funds without drug tests or with suspicion-based drug testing and no other state employs blanket suspicionless drug testing.

Even if one ascribes to the view that one of the "happy incidents of the federal system" is that a "single courageous State may, if its citizens choose, serve as a

laboratory; and try novel social and economic experiments without risk to the rest of the country,”<sup>10</sup> Florida has already conducted its experiment. It commissioned a Demonstration Project that proceeded unchallenged, and it was based on suspicion of drug use. Through this effort, Florida gathered evidence on the scope of this problem and the efficacy of the proposed solution. The results debunked the assumptions of the State, and likely many laypersons, regarding TANF applicants and drug use. The State nevertheless enacted Section 414.0652, without any concrete evidence of a special need to do so—at least not that has been proffered on this record.

The constitutional rights of a class of citizens are at stake, and the Constitution dictates that the needs asserted to justify subverting those rights must be special, as the case law defines that term, in order for this exception to the Fourth Amendment to apply. Ferguson, 532 U.S. at 81. That showing has not been made on this record.

As the State has failed to demonstrate a special need for its suspicionless drug testing statute, the Court finds no need to engage in the balancing analysis—evaluating the State’s interest in conducting the drug tests and the privacy interests of TANF applicants.

**ACCORDINGLY**, the Court finds that Plaintiff has shown a substantial likelihood of success on the merits of this action.

**b. Irreparable Harm**

The Court also finds that Plaintiff has demonstrated that he will suffer irreparable harm in the absence of preliminary injunctive relief. The right to be free from

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<sup>10</sup> Chandler, 520 U.S. at 324 (1997) (Rehquist, J., dissenting) (quoting New State Ice Co. v. Liebmann,

unreasonable searches and seizures under the Fourth Amendment is a fundamental constitutional right, the violation of which is enough to demonstrate irreparable harm. Covino v. Patrissi, 967 F.2d 73, 77 (2d Cir. 1992). A number of courts have found irreparable harm would flow from subjecting an individual to suspicionless drug testing. See, e.g., Am. Fed'n of Teachers-West Va., AFL-CIO v. Kanawha Cnty. Bd. of Educ., 592 F. Supp. 2d 883 (S.D.W. Va. 2009); Bannister v. Bd. of Cnty. Comm'rs of Leavenworth Cnty., Kan., 829 F. Supp. 1249 (D. Kan. 1993); Marchwinski, 113 F. Supp. 2d 1134 (E.D. Mich. 2000).

Subjecting Plaintiff, as well as those individuals who are similarly situated, to suspicionless drug testing as a condition of applying for TANF benefits would cause irreparable harm. See Bourgeois v. Peters, 387 F.3d 1303, 1324 (11th Cir. 2004) (reversing denial of injunctive relief where city imposed an unconstitutional condition requiring the surrender of Fourth Amendment right to be free of unreasonable searches and seizures in order to participate in a protest); Chu Drua Cha v. Noot, 696 F.2d 594, 599 (8th Cir. 1982) (“We have no doubt that irreparable harm is occurring to the plaintiff class as each month passes” without the statutorily conferred level of welfare benefits.).

**c. Balance of Harms and Public Interest**

When a state is a party, the third and fourth considerations in granting a preliminary injunction are largely the same. Scott v. Roberts, 612 F.3d 1279, 1290 (11th Cir. 2010) (citing Garcia-Mir v. Meese, 781 F.2d 1450, 1455 (11th Cir. 1986)).

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285 U.S. 262, 311 (1932)).

The State has operated TANF without drug testing since 1996, and preliminary injunctive relief would merely require the State revert to the *status quo ante* until there is a final adjudication of the rights afforded its citizens under the United States Constitution.

Conversely, imposing an injunction would serve the public interest by protecting TANF applicants from the harm caused by infringement of their constitutional right, a right here that once infringed cannot be restored. “Perhaps no greater public interest exists than protecting a citizen's rights under the constitution.” Marchwinski, 113 F. Supp. 2d at 1144 (quoting Legal Aid Soc. of Haw. v. Legal Servs. Corp., 961 F. Supp. 1402, 1418 (D. Hawaii 1997)). Accordingly, the Court concludes that preliminarily enjoining what appears likely to be deemed to be an unconstitutional intrusion on the Fourth Amendment rights of TANF applicants serves the public interest and outweighs whatever minimal harm a preliminary injunction might visit upon the State.


### III. CONCLUSION

Based on the foregoing, Plaintiff’s Motion for Preliminary Injunction is **GRANTED**. It is therefore **ORDERED** that the State is hereby **ENJOINED** from requiring Plaintiff to submit to a suspicionless drug test pursuant to Section 414.0652, Florida Statutes, as a condition for receipt of TANF benefits until this case is finally resolved on the merits. This Order does not address whether Florida is authorized to conduct drug testing of TANF applicants based on some quantum of individualized suspicion, an issue not before the Court.

It is further **ORDERED** that Plaintiff's unopposed request that he not be required to post the security that is typically required for the issuance of a preliminary injunction under Rule 65(c) of the Federal Rules of Civil Procedure is **GRANTED**. See, Complete Angler, LLC v. City of Clearwater, Fla., 607 F. Supp. 2d 1326, 1335 (M.D. Fla. 2009); All States Humane Game Fowl Org., Inc. v. City of Jacksonville, Fla., No. 3:08-cv-312-J-33MCR, 2008 WL 2949442, at \*13 (M.D. Fla. July 29, 2008).

Upon the stipulation of the State that it "will apply such a ruling to all persons similarly situated to Plaintiff," the Court finds that class certification is unnecessary. (Dkt. 30 at 4) Plaintiff's Motion for Class Certification is, accordingly, **DENIED without prejudice**.

**DONE** and **ORDERED** in Orlando, Florida, this 24th day of October 2011.

  
MARY S. SCRIVEN  
UNITED STATES DISTRICT JUDGE

Copies furnished to:  
Counsel of Record





## MEMORANDUM

September 1, 2011

**From:** Gene Falk, Specialist in Social Policy, 7-7344  
Meredith Peterson, Information Research Specialist, 7-8990

**Subject:** **Federal and State Policies Regarding Drug Testing of TANF Applicants and Recipients**

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This memorandum provides information on federal and state policies regarding drug testing for recipients and applicants for cash assistance under the block grant of Temporary Assistance for Needy Families (TANF). It was prepared to be distributed in response to requests from more than one Congressional office.

### Federal Policy

The 1996 welfare reform law (the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193) gave states the *option* of requiring drug tests for welfare recipients and penalizing those who fail such tests. (See Section 902 of P.L. 104-193.) In addition, the 1996 welfare reform law established a lifetime ban on eligibility for TANF and food stamps for those convicted of a drug-related felony. However, states may either opt out entirely or modify and limit this lifetime ban. (See Section 115 of P.L. 104-193.)

TANF was also created by the 1996 welfare law. It allows states to establish Individual Responsibility Plans (IRPs) for their TANF families. The IRP may require participation in a substance abuse treatment program. A family may be sanctioned for failure to comply with its IRP.

Under regulations issued by the Department of Health and Human Services (HHS), rehabilitative activities (including those related to substance abuse treatment) are countable toward the TANF work participation standards that states must meet, but only for a limited period of time.<sup>1</sup> Such rehabilitative activities are countable as “job readiness activities.” The TANF statute limits counting job readiness activities combined with job search to 6 weeks in a fiscal year, a limit that rises to 12 weeks if a state meets criteria of being “economically needy.”

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<sup>1</sup> These are numerical standards that apply to the state caseload as a whole. For a discussion of the work participation standards, see: CRS Report RL32748, *The Temporary Assistance for Needy Families (TANF) Block Grant: A Primer on TANF Financing and Federal Requirements*, by Gene Falk.

## State Policies

The available information on state policies regarding drug testing for TANF applicants and recipients is limited. Whether or not a state requires such drug testing is *not* a required element of TANF state plans nor do states need to report this information in any formal report to HHS required by statute or regulation. Thus, information on state TANF drug testing policies must be compiled state-by-state using source documents. For this memorandum, the Congressional Research Service (CRS) conducted a search of the LexisNexis database on state statutes and regulations regarding drug testing and screening for recipients of TANF assistance. The results of this search are shown on **Table 1**. It yielded 14 states with policies regarding drug testing.

As shown on **Table 1**, some states' (e.g. Indiana, Maryland) drug testing policy is part of a modification of the lifetime ban on TANF assistance for those with felony drug convictions. That is, those with felony drug convictions are eligible for TANF assistance in those states subject to conditions that could include drug testing. Other states (e.g. Arizona, Florida) have broader drug testing policies that apply as conditions to receive TANF for all applicants or recipients.

**Table 1. State Policies on Drug Testing for TANF Assistance Applicants and Recipients**

State	Citation	Coverage	Description	Family Implications	Other
Arizona	Ariz. ALS 3246-294	Requires any recipients "who the department has reasonable cause to believe engages in the illegal use of controlled substances" to be screened and tested. Applies to fiscal year 2011-2012.	Individuals who test positive are ineligible for TANF benefits for one year.		.
Florida	Fla. Stat. § 414.0652	All TANF applicants are drug tested, including any parent or caretaker relative included in the cash assistance group.	Individuals who test positive are ineligible for TANF benefits for one year. Individuals who reapply after one year and test positive again are ineligible for three years. Individuals who complete a substance abuse treatment program may reapply after six months.	The child's benefits are unaffected. Dependent children may receive benefits through a "protective payee." The parent may choose another person to receive benefits on behalf of the children. The parent's designee also must pass a drug test.	The cost of the drug test is to be borne by the applicant family. The applicant must be informed that she can avoid the drug test by not applying for TANF benefits. Individuals who test negative for controlled substances are reimbursed for the cost of the test through an increase in initial TANF benefit.

State	Citation	Coverage	Description	Family Implications	Other
Idaho	Idaho Code § 56-209j IDAPA 16.03.08.111	All TANF applicants are screened for substance abuse and tested if the screening indicates the person is engaged in or at high risk for substance abuse.	Participants must enter a substance abuse treatment program and cooperate with treatment, if screening, assessment or testing shows them in need of substance abuse treatment.	If the applicant chooses not to comply with substance abuse screening and testing requirements, the children in the case can still be eligible for assistance.	
Indiana	Burns Ind. Code Ann. § 12-14-28-3.3	TANF recipients convicted of felony possession or use of controlled substance are covered.	TANF recipients convicted of a drug felony must be tested once every two months.		
Louisiana	La. R.S. 46:460.10 LAC 67:III.1249	All adult applicants for and recipients of TANF are screened for illegal drug use. When indicated by the screening or other reasonable cause, recipient undergoes formal assessment, which may include urine testing.	Failure to cooperate in screening, assessment or drug treatment results in case closure.  If the formal assessment determines the recipient is using or is dependent on illegal drugs, the most appropriate and cost-effective method of education and rehabilitation will be determined.  Individuals determined to be using drugs after completion of a treatment program are ineligible for cash benefits until they are determined to be drug free.	Eligibility of other family members is not affected as long as the individual participates in a treatment program.	The assessment of a recipient determined to be using illegal drugs will determine her ability to participate in activities other than rehabilitation.  If residential treatment is recommended and the recipient is unable to arrange temporary care for children, arrangements will be made for the care of children.
Maine	2011 Me. Laws 380 Sec. LL-1.22 MRSA Section 3762, sub-Section 18	TANF recipients who have been convicted of a drug-related felony may be drug tested.	Individuals who test positive must request a fair hearing and submit to a second drug test or TANF assistance is terminated. Individuals whose second drug test is positive may maintain benefits by enrolling in a substance abuse treatment program.		

State	Citation	Coverage	Description	Family Implications	Other
Maryland	Md. Human Services Code Ann. § 5-601  COMAR 07.03.03.09	TANF applicants and recipients convicted of a drug-related felony are subject to testing for substance abuse for two years.	Applicants who do not comply are denied assistance. Benefits for recipients who do not comply are reduced by the individual's incremental portion.	Benefits for other household members are paid to a third-party.	
Minnesota	Minn. Stat. §609B.435  Minn. Stat. § 256J.26	All applicants who have been convicted of a drug offense must submit to random drug testing.	TANF benefits are reduced by 30% of the MN family investment program standard if the drug test is positive. A second positive test results in permanent disqualification from assistance.		
Missouri	H.B. 73 (2011) (approved by Governor 7/12/11)  Amends RSMO 208.027	Requires all applicants and recipients to be screened. Testing is required if the screening determines "reasonable cause to believe" the applicant/recipient "engages in illegal use of controlled substances."	Requires a urine dipstick five panel test. Positive test results in an administrative hearing. Those tested positive are referred to an appropriate substance abuse treatment program. Individuals continue to receive benefits while in the substance abuse treatment program. Those who do not successfully complete the program are ineligible for TANF benefits for three years unless they successfully complete a substance abuse treatment program and test negative for illegal substances for six months.	Other members of the household may continue to receive TANF benefits if otherwise eligible. Benefits are paid to a vendor or third-party payee.	
Montana	Mont. Code Anno., § 53-4-212	Requires the Department to adopt rules concerning random drug testing or reporting requirements for convicted drug felons.			

State	Citation	Coverage	Description	Family Implications	Other
New Jersey	N.J. Stat. § 44:10-48  N.J.A.C. 10:90-18.6	In order to be eligible, individuals convicted of a drug related offense must complete drug treatment program, and undergo drug testing while in the program and for a 60-day period after completion.	Eligibility is terminated if the individual fails a drug test while in treatment or for a 60-day period following treatment.		
Pennsylvania	2011 Pa. Laws 22 (Approved by the Governor 6/30/11)  Amends Public Welfare Code §432.24	All public assistance (TANF, food stamps, general assistance, State supplemental assistance) applicants convicted of a felony drug offense. At least 20% of recipients convicted of a felony must undergo random drug testing during each six month period following enactment.	Individuals who fail the test are provided treatment. If the individual fails a second test, benefits are suspended for 12 months. Individuals who fail a third test are no longer eligible for assistance.		
South Carolina	S.C. Code Ann. § 43-5-1190  S.C. Code Regs. 114-1130	TANF recipients who are “identified as requiring alcohol and other drug abuse service,” or convicted of an alcohol or drug related offense or give birth to a child with evidence of maternal substance abuse must submit to random drug testing and/or participate in a treatment program.	Individuals who complete a treatment program are monitored through random drug tests. Individuals who subsequently test positive for drugs or are convicted for a controlled substance violation are ineligible for assistance.	“The Department may impose a full-family sanction for noncompliance with the Individual Self-Sufficiency Plan participants who complete treatment and fail to pass a random test for use of illegal drugs.”	
Wisconsin	Wis. Stat. § 49.148  Wis. Stat. § 49.79	Wisconsin Works participants in community service jobs or transitional placements who have been convicted of a drug felony must submit to drug testing.	Benefits for individuals who test positive are reduced by 15% or less for at least 12 months. After 12 months, individuals who test negative may have full benefits restored.		

**Source:** Congressional Research Service (CRS) based information in the LexisNexis legal database.

82R385 KSD-D

By: Legler

H.B. No. 126

A BILL TO BE ENTITLED

AN ACT

relating to required drug testing for applicants and recipients of unemployment compensation benefits.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 207.021, Labor Code, is amended by adding Subsection (d) to read as follows:

(d) In addition to meeting the requirements of Subsections (a)-(c), to be eligible to receive benefits under this subtitle a claimant must comply with Section 207.026.

SECTION 2. Subchapter B, Chapter 207, Labor Code, is amended by adding Section 207.026 to read as follows:

Sec. 207.026. REQUIRED DRUG TESTING; DISQUALIFICATION FOR BENEFITS. (a) Each individual who files a claim for benefits under Chapter 208 or receives benefits under this subtitle must submit to drug testing as provided by this section.

(b) The commission by rule shall adopt a drug testing program as part of the requirements for the receipt of benefits under this subtitle. The program must:

(1) comply with the drug testing requirements of 49 C.F.R. Part 382 or other similar national requirements for drug

testing programs recognized by the commission; and

(2) be designed to protect the rights of benefit applicants and recipients.

(c) Each individual who files an initial claim under Section 208.001 must successfully pass a drug test conducted by the commission before being eligible to receive benefits.

(d) If an individual who is receiving benefits under this subtitle applies for employment with an employer who requires a preemployment drug test and the individual fails the drug test, the individual must disclose the results of that test to the commission in the manner prescribed by the commission. The individual must disclose the test results within 72 hours of receipt by the individual of the notice that the individual failed the drug test. Except as provided by Subsection (f), an individual described by this subsection who fails a preemployment drug test is disqualified for benefits under this subtitle until the individual meets the requirements of Subsection (e).

(e) An applicant for or recipient of benefits who does not successfully pass a drug test required under this section is disqualified for benefits. Disqualification under this section continues until the individual has returned to employment and:

(1) worked for six weeks; or

(2) earned wages equal to six times the individual's benefit amount.

(f) Notwithstanding Subsection (d) or (e), an individual is not disqualified for benefits based on a failure to successfully pass a drug test required by this section if, on the basis of evidence presented by the individual, the commission finds that:

(1) the individual is participating in a treatment program for drug abuse; or

(2) the failure to pass the drug test is caused by the use of a drug that was prescribed by a physician as medically necessary for the individual.

(g) Notwithstanding Subsection (f), an individual who fails to report test results to the commission as required by Subsection (d) must repay the commission for any benefits received under this subtitle from the date on which the individual knows or should have known that the individual failed the preemployment drug test until the date on which the commission receives notice that the individual failed the preemployment drug test.

SECTION 3. The change in law made by this Act applies only to a claim for unemployment compensation benefits that is filed with the Texas Workforce Commission on or after March 1, 2012.

SECTION 4. This Act takes effect September 1, 2011.

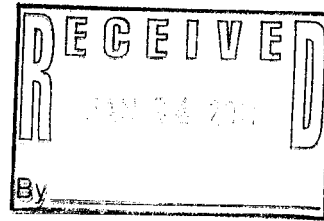


U.S. Department of Labor

Employment and Training Administration  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210



JAN 18 2011



Mr. Larry Temple  
Executive Director  
Texas Workforce Commission  
TWC Building - 101 East 15th Street  
Room 618  
Austin, TX 78778

Dear Director Temple:

We have reviewed proposed House Bill (HB) 126, relating to drug testing of unemployment compensation (UC) claimants, for conformity with Federal UC law. The proposed bill would require claimants to take and pass a drug test conducted by the commission as a condition of eligibility to receive UC. While we appreciate Texas's efforts to deter drug use, we have several comments and questions about the legislation. A detailed discussion follows.

Cost of conducting a drug testing program.

While HB 126 refers to a drug test conducted by the commission, it is unclear who would be responsible for paying for these tests. Section 3304(a)(4) of the Federal Unemployment Tax Act (FUTA) requires, as a condition for employers in the state receiving credit against the Federal unemployment tax, that state law provide that "[a]ll money withdrawn from the unemployment fund of the state shall be used solely in the payment of unemployment compensation . . . ." Section 303(a)(5) of the Social Security Act (SSA) provides a similar requirement as a condition for a state to receive administrative grants. Section 3306(h), FUTA, defines compensation as "cash benefits payable to individuals with respect to their unemployment." (Emphasis added.)

These sections require that withdrawals may be made from a state's unemployment fund only for the payment of cash benefits with respect to an individual's unemployment. The cost of administering a drug test is not a cash benefit with respect to an individual's unemployment and therefore may not be paid for with amounts withdrawn from the state's unemployment fund, including deduction from a claimant's UC payment. While there are some exceptions to the withdrawal standard, none authorize the state to pay for the cost of drug testing of claimants.

Additionally, Section 303(a)(1), SSA, requires, as a condition of a state receiving administrative grants for the operation of the UC program, that state law include provision for "[S]uch methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due." This section has been interpreted to prohibit the state from transferring the costs of administering the state law to the claimant. Requiring the claimant to pay more than de minimus costs of drug testing would violate this principle.

Section 303(a)(8), SSA, requires a state to limit use of its administrative grants to those expenses found necessary for the proper and efficient administration of its UC law, including costs involved in determining eligibility for benefits. Although administrative grant funds may be used to pay for the drug tests required by HB 126, increased funding for such expenses would not likely be provided by the U.S. Department of Labor.

Requirement that individuals inform the commission of failure to pass a pre-employment drug test.

HB 126 would amend state law to provide that if an individual who is receiving UC applies for employment with an employer who requires a pre-employment drug test and the individual fails the drug test, the individual must disclose the results of the test to the commission. Individuals who fail the test would be disqualified for UC until they have returned to employment and worked for six weeks or earned wages equal to six times the individual's benefit amount.

We note that this requalification provision is identical to the requalification provisions for individuals who refuse an offer of suitable work. As such, it appears that this provision may be intended to apply the refusal of suitable work provisions currently in state law to failure of a pre-employment drug test by equating such failure as a refusal of an offer of work. If this is the case, we remind you that the Federal requirements related to failure to accept suitable work must be applied. (See UIPL 41-98.)

Specifically, Section 3304(a)(5), FUTA, requires that "compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

- (A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;
- (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;
- (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;

Before determining that an individual has refused an offer of suitable work by failing a pre-employment drug test, the state must first determine that the job offered did not meet any of the conditions listed. If the job offered was not suitable, the individual may not be denied for failure to accept the job, regardless of the reason for the refusal.

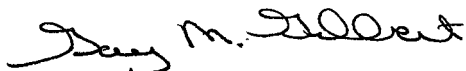
The state may, however, based on the failure to pass a pre-employment drug test, investigate whether the individual remains available for work in the same manner as any other claimant whose actions indicate they may not be available for work.

Drug testing may not delay payment of UC.

The "methods of administration" provision in Section 303(a)(1), SSA, has been interpreted to require that UC be paid with the greatest promptness as administratively feasible. (See 20 CFR 640.3(a) and the Supreme Court's decision in *California v. Java*, 402 U.S. 121. See also *Jenkins v Bowling*, 691 F.2d 1225, which concluded that a state's practice of delaying the payment of UC pending the outcome of another proceeding violates this requirement.) In short, states may not create administrative barriers to the prompt payment of UC. Thus, HB 126 may not result in more than incidental delays in payments of UC or determinations of eligibility.

Please contact Margie Shahin, your legislative liaison in the Dallas Regional Office, at [Shahin.margie@dol.gov](mailto:Shahin.margie@dol.gov) or by telephone at 972-850-4626 should you have questions regarding this letter.

Sincerely,



Gay M. Gilbert  
Administrator  
Office of Unemployment Insurance

cc: Joseph Juarez  
Regional Administrator  
Dallas



APR 20 2011

Mr. Larry Temple  
Executive Director  
Texas Workforce Commission  
TWC Building - 101 East 15th Street  
Room 618  
Austin, Texas 78778

Dear Director Temple:

We have reviewed proposed House Bill (HB) 126, relating to drug testing of unemployment compensation (UC) claimants, for conformity with Federal UC law. The proposed bill would require claimants to take and pass a drug test conducted by the commission as a condition of eligibility to receive UC. In our letter to you on January 18, 2011, we provided comments and raised questions about this bill. This letter provides information about a conformity issue the bill presents. A detailed discussion follows.

HB 126 provides:

- (a) Each individual who files a claim for benefits under Chapter 208 or receives benefits under this subtitle must submit to drug testing as provided by this section. . . .
- (c) Each individual who files an initial claim under Section 208.001 must successfully pass a drug test conducted by the commission before being eligible to receive benefits. [Emphasis added.]

Section 3304(a)(4) of the Federal Unemployment Tax Act (FUTA) requires, as a condition for employers in a state to receive credit against the Federal tax, that state law provide that "all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund . . ." Section 303(a)(5) of the Social Security Act provides a similar requirement as a condition for a state to receive administrative grants. Section 3306(h), FUTA, defines compensation as "cash benefits payable to individuals with respect to their unemployment."

The Secretary of Labor's decision in the 1964 conformity case involving South Dakota interpreted these sections to mean UC eligibility must be based on the "fact or cause" of unemployment:

[I]t was the intent of Congress to create a social insurance system under which entitlement to benefits was a matter of right on the part of those who became involuntarily unemployed because of lack of work, e.g., laid off from work or otherwise unemployed through no fault of their own, and who are able to work

and available for work, but who are unable to find suitable work. In short, what Congress was prescribing was wage insurance for the relief of the unemployed, to compensate for wage loss resulting from unemployment due to lack of work, without regard to any . . . criteria of entitlement having no reasonable relationship to 'unemployment.'

The payment (or non-payment) of UC must be based on the reasons related to the individual's unemployment, not on some other factor unrelated to unemployment. HB 126 provides that individuals' must successfully pass a drug test conducted by the commission before being eligible to receive benefits payment of UC. Passing a drug test is not related to the fact or cause of the current unemployment. Therefore, this bill raises an issue. (The Secretary's decision, which explains the applicable Federal law, is attached to Unemployment Insurance Program Letter 787. You may access it at [http://ows.doleta.gov/unemploy/pdf/UIPL\\_787.pdf](http://ows.doleta.gov/unemploy/pdf/UIPL_787.pdf).)

If the intent of this bill is to ensure that individuals applying for UC are drug free, the state could implement a drug testing program and condition finding that an individual is available for work on submitting to and passing a drug test. The drug test would then be a test of whether the individual was available for work. If the individual refused to provide a sample, or failed the test, they could be held not available for work and ineligible for benefits until such time as they take and pass the test.

Please contact Margie Shahin, your legislative liaison in the Dallas Regional Office, at [Shahin.margie@dol.gov](mailto:Shahin.margie@dol.gov) or by telephone at 972-850-4626 should you have questions regarding this letter.

Sincerely,



Gay M. Gilbert  
Administrator  
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cc: Joseph Juarez  
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Dallas