



December 17, 2018

Ms. Adele Gagliardi
Administrator, Office of Policy Development and Research
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-5641
Washington, DC 20210

Re: Proposed Regulation on Federal-State Unemployment
Compensation Program; Establishing Appropriate Occupations for
Drug Testing of Unemployment Compensation Applicants Under
the Middle Class Tax Relief and Job Creation Act of 2012 [RIN
1205-AB81]

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Dear Ms. Gagliardi:

The American Civil Liberties Union (ACLU) respectfully submits these comments urging the Department of Labor (DoL) to reject its proposed rule on drug testing of applicants for unemployment insurance.

The proposed rule encourages states to drug test all workers seeking unemployment insurance.

The Middle Class Tax Relief and Job Creation Act was passed in 2012 and includes a provision that allows states to drug test applicants for unemployment insurance under narrow circumstances.¹ As required by the new law, DoL issued a rule in 2016 to implement the drug testing provision.² That rule established two limited circumstances under which drug testing for unemployment insurance could occur, which were (1) if a person was terminated from employment due to drug use (which makes a person ineligible for unemployment insurance under current law)³ and (2) if a person was seeking work in an occupation that legally requires drug testing.⁴

¹ Act of Feb. 22, 2012, Pub. L. No. 112-96, 126 Stat. 156.

² 20 CFR § 620 (2016) (repealed 2017).

³ 42 U.S.C. § 503(l)(1)(A)(i).

⁴ Id.

In March 2017, Congress used the Congressional Review Act to repeal the rule⁵ and DoL is now proposing a new rule. This latest proposal significantly broadens state discretion in determining who can be subject to a mandatory drug test for unemployment insurance. It allows a state to test those in occupations where “employers in that [s]tate conduct drug testing as a standard eligibility requirement for employees.”⁶ Unlike the last rule that was limited to drug testing for occupations that regularly conduct such testing of employees,⁷ the proposed rule would allow states to drug test those seeking unemployment insurance for jobs that test only as a condition of hiring. This opens the door for states to institute suspicionless drug testing on a large number of people who are simply trying to access unemployment insurance.

Government drug testing is subject to the protections of the Fourth Amendment.

The Fourth Amendment provides protection from unreasonable searches by a government actor.⁸ Courts have deemed drug testing a search and therefore subject to Fourth Amendment protections.⁹ Under most circumstances, searches must be based on probable cause¹⁰ and with a determination of individualized suspicion.¹¹ An exception to these requirements is made when a government actor can show a “special need,” beyond the realm of traditional criminal law enforcement, to conduct a suspicionless search.¹² To conduct suspicionless drug tests under the “special need” exception, a government actor must show that an individual’s privacy rights are outweighed by the interest the government has in the search.¹³

“Special need” has not been interpreted as an all-encompassing category. In fact, a “special need” is considered quite limited, especially in the case of a privacy intrusion as significant as a drug test.¹⁴ Courts have held that government cannot

⁵ Act of Mar. 31, 2017, Pub. L. No. 115-17, 131 Stat. 81; see Lydia Wheeler, *Labor Department eyes drug test rule for unemployment pay*, The Hill (January 3, 2018) <https://thehill.com/business-a-lobbying/367154-labor-department-eyes-drug-test-rule-for-unemployment-pay>.

⁶ Federal-State Unemployment Compensation Program; Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants Under the Middle Class Tax Relief and Job Creation Act of 2012, 83 Fed. Reg. 55311, 55312 (proposed Nov. 5, 2018) (to be codified at 20 CFR § 620), <https://www.federalregister.gov/documents/2018/11/05/2018-23952/federal-state-unemployment-compensation-program-establishing-appropriate-occupations-for-drug>.

⁷ 20 CFR § 620 (2016) (repealed 2017).

⁸ U.S. Const. Amend. IV.

⁹ *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989).

¹⁰ See *Griffin v. Wisconsin*, 483 U.S. 868, 873, (1987); *United States v. Karo*, 468 U.S. 705, 717, 104 (1984).

¹¹ See *United States v. Martinez-Fuerte*, 428 U.S. 543, 560–561, (1976). See also *Camara v. Municipal Court*, 387 U.S. 523, (1967).

¹² *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

¹³ *Id.*

¹⁴ *Lebron v. Sec'y of Fla. Dep't of Children & Families*, 772 F.3d 1352 (11th Cir. 2014).

mandate suspicionless drug tests for people applying for public assistance¹⁵ or for incoming college students¹⁶ without some level of individualized suspicion or a warrant. In *Barrett v. Claycomb*, the ACLU successfully argued that a public technical college did not have special needs that justified broadly drug testing all incoming students, even if some of those students would end up enrolled in programs that pose some safety risk.¹⁷

Government cannot demonstrate a “special need” to mandate drug testing for unemployment insurance.

A drug testing mandate for those applying for unemployment insurance would raise flags as an unconstitutional search under the Fourth Amendment. Since such a mandate has no warrant requirement and is not based on individualized suspicion, the government imposing the mandate would have to demonstrate a “special need” in order to justify the searches.¹⁸ In the case of mandated drug testing for unemployment applicants, the government would have to show that their interest in drug testing outweighs individual privacy rights.

While drug-free workplaces may be a government goal, there is no evidence suggesting that drug testing deters drug use.¹⁹ Nor can the government point to any evidence suggesting that workplace drug use is a significant problem across professions, thus justifying such extraordinary state action.²⁰ Given this lack of evidence, it is unreasonable for the government to argue its interest in denying unemployment benefits to a small percentage of people outweighs compromising the privacy interests of the majority of people seeking unemployment insurance. Therefore, a government mandate to drug test unemployment insurance applicants does not constitute a “special need” on the part of the government and may violate the Fourth Amendment.

¹⁵ Id.

¹⁶ *Barrett v. Claycomb*, 936 F.Supp.2d 1099 (2013) (W.D. Mo. 2014).

¹⁷ Id.

¹⁸ *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989).

¹⁹ Mark A.R. Kleiman, *Is it time to do away with job applicant drug testing?*, VOX (July 30, 2018), <https://www.vox.com/the-big-idea/2018/7/27/17619750/drug-testing-job-market-marijuana-opioids-cost-benefit>.

²⁰ Rontel Batie and George Wentworth, *Drug Testing Unemployment Insurance Applicants: An Unconstitutional Solution in Search of a Problem*, National Employment Law Project (Feb, 2017), <https://www.nelp.org/wp-content/uploads/Drug-Testing-Unemployment-Insurance-Applicants.pdf>.

A rule allowing states to broadly drug test for unemployment insurance may result in Fourth Amendment violations.

The proposed rule gives states sweeping discretion to determine which jobs “regularly drug test.”²¹ This proposal would capture occupations that use drug screenings only as part of their application process, not as any part of maintaining workplace safety through regular drug testing. This broad discretion could result in states identifying a large range of occupations that “regularly drug test,” requiring those caught in that wide net to submit to drug testing for unemployment benefits. Sweeping a large number of people into mandated drug tests, who do not work in occupations that the government has a particular safety or other interest in keeping drug-free, amounts to unconstitutional searches.

Suspicionless drug testing for other government benefits has been deemed unconstitutional.

In cases where states mandated drug testing for other government benefits, courts have not found special governmental needs to justify the suspicionless search. In the ACLU case *Lebron v. Secretary of the Florida Department of Children and Families*, the court found that “encouraging employability...and conserving public funds” did not constitute a “special need” that would justify a warrantless and suspicionless drug test mandate.²² Further, the court found that broad, suspicionless drug testing mandates for a government benefit (Temporary Assistance for Needy Families (TANF)) violated Fourth Amendment protections against unreasonable searches and seizures.²³

Suspicionless drug testing for unemployment benefits is also bad policy.

Finally, opening the door for states to broadly drug test for unemployment insurance not only raises constitutional concerns, but imposes substantial human and financial costs. The proposed regulation admits that state funding for unemployment is at an all-time low and that drug testing is an expensive endeavor.²⁴ If the past is any indication, drug testing mandates for government

²¹ Federal-State Unemployment Compensation Program; Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants Under the Middle Class Tax Relief and Job Creation Act of 2012, 83 Fed. Reg. 55311, 55312 (proposed Nov. 5, 2018) (to be codified at 20 CFR § 620), <https://www.federalregister.gov/documents/2018/11/05/2018-23952/federal-state-unemployment-compensation-program-establishing-appropriate-occupations-for-drug>.

²² *Lebron v. Sec'y of Fla. Dep't of Children & Families*, 772 F.3d 1352, 1364(11th Cir. 2014).

²³ *Id.* at 1355.

²⁴ Federal-State Unemployment Compensation Program; Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants Under the Middle Class Tax Relief and Job Creation Act of 2012, 83 Fed. Reg. 55315 (proposed Nov. 5, 2018) (to be codified at 20 CFR § 620), <https://www.federalregister.gov/documents/2018/11/05/2018-23952/federal-state-unemployment-compensation-program-establishing-appropriate-occupations-for-drug>.

benefits cost states substantial amounts of money and produce negligible results. In 2016, in 13 states that spent \$1.6 million dollars collectively to drug test TANF applicants, only 369 people tested positive out of approximately 250,000.²⁵

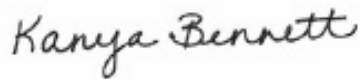
In addition to the financial cost, drug testing of unemployment insurance applicants adds an unnecessary and degrading toll to the existing stigma of being out of work.²⁶ Those who were fired from previous positions due to drug use are already ineligible for unemployment insurance.²⁷ As such, these drug tests serve to further demean people who the government has no reason to suspect of using drugs.

Thank you for considering these comments. If you have any questions, please follow-up with Kanya Bennett, ACLU Senior Legislative Counsel, at kbennett@aclu.org or (202) 715-0808.

Sincerely,



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National Political Director



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²⁵ Bryce Covert, ThinkProgress, States have green light to drug test the unemployed (May 11, 2017), <https://thinkprogress.org/states-drug-test-unemployment-labor-department-fe642403a7c6/>.

²⁶ Ho C. Geoffrey, Margaret Shih, Daniel J. Walters, & Todd L. Pittinsky, Institute for Research on Labor and Employment, *The Stigma of Unemployment: When joblessness leads to being jobless* (Dec. 2011), <https://escholarship.org/uc/item/7nh039h>.

²⁷ 42 U.S.C. § 503(l)(1)(A)(i).