

Questions and Answers Regarding Permissible Drug Testing Of Applicants for Unemployment Compensation (UC) Under Section 303(l), SSA.

Q - 1. How does the regulation define an “occupation” for purposes of permissible drug testing?

A. As noted in 20 CFR Part 620.2, “occupation” means a position or class of positions. Federal and state laws governing drug testing refer to the classes of positions that are required to be drug tested rather than occupations, such as those defined by the Bureau of Labor Statistics in the Standard Occupational Classification System. To align the regulation with these laws, we define “occupation” as a position or class of positions.

Q - 2. How does the regulation define “occupations that regularly conduct drug testing?”

A. Section 620.3 of 20 CFR identifies occupations that regularly conduct drug testing, for purposes of the regulation as an occupation:

- that requires the employee to carry a firearm;
- identified in 14 CFR 120.105 by the Federal Aviation Administration, in which the employee must be tested (Aviation flight crew members and air traffic controllers);
- identified in 49 CFR 382.103 by the Federal Motor Carrier Safety Administration, in which the employee must be tested (Commercial drivers);
- identified in 49 CFR 219.3 by the Federal Railroad Administration, in which the employee must be tested (Railroad operating crew members);
- identified in 49 CFR 655.3 by the Federal Transit Administration, in which the employee must be tested (Public transportation operators);
- identified in 49 CFR 199.2 by the Pipeline and Hazardous Materials Safety Administration, in which the employee must be tested (Pipeline operation and maintenance crew members);
- identified in 46 CFR 16.201 by the United States Coast Guard, in which the employee must be tested (Crewmembers and maritime credential holders on a commercial vessel); and
- specifically identified in a state or Federal law as requiring an employee to be tested for controlled substances.

Q - 3. What does the phrase “specifically identified in a State or Federal law” mean for purposes of identifying an occupation that requires an employee to be drug tested?

A. “Specifically identified in State or Federal law” means a Federal or state statute, or a duly promulgated Federal or state regulation that has been subject to advance public notice and opportunity for comment in the rule making process. It does not include state policy or procedures that are not specifically identified in statute or regulation.

In addition, the statute or regulation must identify an “occupation” as defined in 20 CFR 620.2. For example, states may not base the testing of UC applicants on a state law that requires drug testing by employers whose employees are working on state-funded construction projects because this testing is based on funding source, not on the occupation. Further, states may not base the testing on regulations that require drug testing in an industry or sector of an industry. For example, states may not base the testing of UC applicants on a state law that requires drug testing for the steel industry, because that is an industry, not an occupation.

Finally, this also does not include laws or regulations that permit, but do not require, employers to conduct drug testing. For example, state “drug free workplace” regulations, which generally allow drug testing, but do not require it, may not be the basis for drug testing UC applicants.

Q - 4. Are states that choose to drug test required to use the entire set of occupations identified in the regulation (as opposed to a selected subset of these occupations) for purposes of determining the individuals for whom the only suitable work is in an occupation that regularly conducts drug testing?

A. No. A state requiring drug testing as a condition of UC eligibility may use any one or more of the occupations listed under 20 CFR § 620.3, but is not required to apply drug testing to any of them for purposes of determining the individuals for whom the only suitable work is in an occupation that regularly conducts drug testing. Section 303(l), SSA, does not require a state to conduct drug tests at all. States have flexibility to decide which permitted occupations are included for this purpose. The state may not, however, include an occupation that has not been identified in state or Federal law as requiring drug testing.

Q - 5. Must the state test every applicant who is separated from their most recent employment for the illegal use of a controlled substance or for whom suitable work is only available in an occupation that regularly conducts drug testing, in order to determine whether they are eligible to receive UC?

A. No. States are not required to test every applicant who meets the criteria for testing. If states have a drug testing program for UC, they may test a randomly selected subset of applicants who meet the drug testing criteria, or states may develop a drug screening assessment tool designed to reasonably determine the likelihood that an individual is using a controlled substance and limit drug testing to those applicants identified as likely to be using a controlled substance. However, a state may not arbitrarily select the claimants to whom the drug testing requirement will apply. A state also may not drug test based on unlawful discriminatory criteria, including race, color, national origin, disability, age, religion, or sex.

Q - 6. What is a controlled substance for purposes of this regulation?

A. Section 303(l)(2)(B) of the Social Security Act provides that “the term ‘controlled substance’ has the meaning given such term in section 102 of the Controlled Substances Act (21 U.S.C. 802).” Section 102 defines “controlled substance” as “a drug or other substance,

or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.” A list of the controlled substances (Schedules I-V) is included as Attachment II to UIPL No. 1-15.

Q - 7. Are states required to test for all of the controlled substances identified in Section 102 of the Controlled Substances Act, or may the state test only for a subset of the controlled substances?

A. States have the option of testing for some, but not all, of the substances identified in Section 102 of the Act. However, if the state is testing for purposes of clause (ii) of Section 303(l)(1)(A), SSA, individuals for whom the only available “suitable work,” as defined in state law, is in an occupation that regularly conducts drug testing, the state must, at a minimum, test for the drugs that will be tested for under state or federal law in those occupations.

Provided below, for example, is a list of controlled substances that the state must test for with respect to occupations that require drug testing under DOT regulations:

- (a) Marijuana metabolites.
- (b) Cocaine metabolites.
- (c) Amphetamines.
- (d) Opiate metabolites.
- (e) Phencyclidine (PCP).