DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 604

RIN 1205–AB41

Unemployment Compensation—Eligibility

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: The Department of Labor (Department) is proposing this rule to implement the requirements of the Social Security Act (SSA) and the Federal Unemployment Tax Act (FUTA) that limit a state's payment of unemployment compensation (UC) only to individuals who are able and available (A&A) for work. This rule would apply to all state UC laws and programs.

COMMENT DATE: Written comments must be submitted on or before September 20, 2005.

ADDRESSES: You may submit written comments on the proposed rule (please identify this proposed rule by Regulatory Information Number (RIN) 1205–AB41) by any of the following methods:

- Federal e-Rulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- Comments may be mailed or delivered to Cheryl Atkinson, Administrator, Office of Workforce Security, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–4231, Washington, DC 20210.
- Comments may be submitted electronically to the Office of Workforce Security at the e-mail address: *eligibilityrule@dol.gov.* Receipt of submissions, whether by U.S. mail, other delivery, or e-mail, will not be acknowledged.

Instructions: all submissions received must include the agency name and the RIN for this rulemaking: RIN 1205–AB41. If commenters transmit comments by Fax or through the Internet and also submit a hard copy by mail, please indicate that it is a duplicate copy of the Fax or Internet transmission.

All comments will be available for public inspection and copying during normal business hours at the Office of Workforce Security, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–4231, Washington, DC 20210. Copies of the proposed rule are available in alternate formats of large print and electronic file on computer disk, which may be obtained at the above-stated address. The proposed rule is also available at the Web address *http://www.workforcesecurity.doleta.gov.*

FOR FURTHER INFORMATION CONTACT: Gerard Hildebrand, Office of Workforce Security, ETA, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4518, Washington, DC 20210. Telephone: (202) 693–3038 (voice) (this is not a toll-free number); 1–800–326–2577 (TDD); facsimile: (202) 693–2874; e-mail: *hildebrand.gerard@dol.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Department and its predecessors (the Social Security Board and the Federal Security Agency) have consistently interpreted provisions of federal UC law, contained in the SSA and the FUTA, to require that individuals must be A&A for work to be eligible for UC. Although this interpretation is longstanding, it has never been comprehensively addressed in a rule in the Code of Federal Regulations (CFR).

The A&A requirement is implicit in the structure and purpose of the SSA and the FUTA, and Congress has repeatedly adopted, acquiesced in, and relied on the Department's interpretation that federal UC law includes an A&A requirement. Nevertheless, because the A&A requirement is not explicitly stated in federal law or the CFR, there appears to be some confusion regarding the validity of the A&A requirement as well as its scope and application.

This confusion became especially clear in rulemakings that created and then removed the Birth and Adoption UC (BAA–UC) regulation. (See 65 FR 37210 (June 13, 2000) for the final BAA–UC rule and 68 FR 58540 (October 9, 2003) for the final rule removing the BAA–UC rule.) After promulgating the BAA–UC rule as an interpretation of the A&A requirement, the Department subsequently determined that the BAA–UC rule was contrary to the A&A requirement. In both rulemakings, commenters argued that there are no specific A&A requirements set out in federal law and that Congress expressly rejected A&A requirements. In the course of these rulemakings, it also became clear that misconceptions existed about the application and scope of the federal A&A requirement. For example, some situations where the Department deemed the individual to meet the A&A requirement—such as temporary lay-offs—were viewed by others as ''exceptions'' to the A&A requirement. As another example, some viewed an active work search as a necessary component of the A&A requirement, whereas the Department does not share this view.

As a result of this confusion, the Department has determined that there is a need to adopt a regulation that clearly sets forth its interpretation of the A&A requirement. This proposed rule also sets forth the requirement that aliens must meet A&A requirements to receive UC. This rule does not regulate other areas of the UC program, such as monetary entitlement or disqualifications for such actions as voluntarily quitting employment. This rule also does not address federal labor laws (such as minimum wage or overtime laws) or disability nondiscrimination laws (such as the Section 504 of the Rehabilitation Act of 1973).

Basis for the A&A Requirement

As noted above, the Department and its predecessors have interpreted and enforced federal A&A requirements since the inception of the federal-state UC program. Although no A&A requirements are explicitly stated in federal law, the Department and its predecessors interpreted five provisions of federal UC law, contained in the SSA and FUTA, as requiring that states condition the payment of UC upon a claimant being able to and available for work. Two of these provisions, at Section 3304(a)(4), FUTA, (26 U.S.C. 3304(a)(4)) and Section 303(a)(5), SSA, (42 U.S.C. 503(a)(5)) with specific exceptions, limit withdrawals from a state's unemployment fund to the payment of ''compensation.'' Section 3306(h), FUTA, (26 U.S.C. 3306(h)) defines ''compensation'' as ''cash benefits payable to individuals with respect to their unemployment.'' The A&A requirements provide a federal test of an individual's continuing ''unemployment.'' (The meaning of ''unemployment'' in this statutory framework is discussed below.) Two other provisions, found in Section 3304(a)(1), FUTA, (26 U.S.C. 3304(a)(1)) and Section 303(a)(2), SSA, (42 U.S.C. 503(a)(2)) require that compensation ''be paid through public employment offices.'' The requirement that UC be paid through the public employment system (the purpose of which is to find people jobs) ties the payment of UC to both an individual's ability to work and availability for work. These A&A

requirements serve, in effect, to limit UC eligibility.

The experience rating requirements at Section 3303(a), FUTA, 26 U.S.C. 3303(a)), are also tied to the test of involuntary unemployment due to lack of work. Experience rating was originally established to ensure an equitable distribution among employers of the cost of the system, and to encourage employers to stabilize their work forces. (''Credits'' will be provided ''in the form of lower contribution rates * * * to employers who have stabilized their employment.'' (S. Rep. 628, 74th Cong. 1st Sess. 1935 Page 14.)) Under an experience rating system approved under Section 3303(a), FUTA, an employer who lays off fewer workers will generally pay lower contributions (used to fund benefits) than an employer who lays off more workers. If not for the A&A requirement, the intent of experience rating would be negated since benefits could be based on an individual's own actions without regard to an employer's attempt to stabilize employment by offering suitable work to its current and former employees.

In enactments following the original SSA, Congress has acted several times to reaffirm that UC is payable only to individuals who are able and available for work. In 1946, Congress amended the SSA and FUTA to permit states to withdraw certain employee contributions from their unemployment funds for the payment of ''cash benefits with respect to * * * disability.'' (Current Sections 303(a)(5), SSA, and 3304(a)(4)(A), FUTA.) Because individuals whose disabilities render them completely unable to work do not meet the ''able'' requirements, Congress determined that explicit statutory authority was necessary to permit payment of cash benefits from state unemployment funds to such individuals and, even then Congress limited this authority to withdrawals of employee contributions. These individuals would not otherwise be entitled to such cash benefits because they are not unemployed due to a lack of suitable work; rather they are unemployed because the severity of their disabilities prevents them from working.

When Congress passed a federal prohibition on denying UC solely due to pregnancy (Section 3304(a)(12), FUTA), it noted that an individual must be ''able to work * * * and be available for employment'' (H. Rep. No. 752, 91st Cong. 2d Sess. Page 19 (1970)) and that pregnant workers must continue to meet the ''availability for work and ability to work'' requirements. (*Id.* at 21.) Simply put, a state could no longer deny UC to a woman merely because she was pregnant, but the woman nevertheless would need to be A&A as a condition of eligibility.

When Congress first enacted a provision requiring the reduction of UC due to receipt of retirement pay (Section 3304(a)(15), FUTA), it explained that it was establishing a ''uniform rule'' to address the fact that some recipients of retirement payments ''have actually withdrawn from the labor force,'' that is, are not A&A. (S. Rep No. 1265, 94th Cong. 2d Sess. 22 (1976).) In seeking to remedy this problem, Congress demonstrated its continuing resolve that individuals be A&A as a condition of UC eligibility.

In 1993, Congress required that states refer individuals likely to exhaust UC to reemployment services and deny UC to individuals who failed to participate in these services. (Sections 303(a)(10) and (j), SSA.) This requirement reflected Congress' interest in helping UC claimants get back to work, especially those expected to have the hardest time returning to work quickly, and its willingness to deny UC to those individuals unwilling to take positive steps toward reemployment. Providing reemployment services to individuals who are not able or willing to accept employment (that is, who are not A&A) would waste resources while denying reemployment services to others who could benefit.

The Social Security Board, the original administrator of the Federal-State UC program, adopted the federal A&A requirements contemporaneously with the passage of the original Social Security Act of 1935. The basis for the federal A&A requirements was summarized in a March 11, 1939, letter from the Chair of the Social Security Board to the Governor of California, concerning whether the state could use its unemployment fund to pay benefits for temporary disability:

> The entire legislative history [of the UC titles of the original SSA] including the Report to the President of the Committee on Economic Security, the report of the House Committee on Ways and Means, the report of the Senate Committee on Finance, and the Congressional debates all indicate, either expressly or by implication, the compensation contemplated under [these titles] is compensation to individuals who are able to work but are unemployed by reason of lack of work. Several provisions of those titles are meaningful only if applied to State laws for the payment of such compensation. For example, the requirement that compensation be paid through public employment offices, or the requirement that States make [certain information] available to agencies of the United States charged with the administration of public works or assistance through public employment, are obviously without reasonable basis if applied to payments to disabled individuals [whose impairments render them totally unable to work].[1] Many of the standards contained [in the experience rating provisions] are similarly without reasonable basis if applied to a State law for the payment of disability compensation [under these circumstances].
>
> For these reasons, the Board is of the opinion that the [UC titles of the SSA] are applicable solely to State laws for the payment of compensation to individuals who are able to work and are unemployed by reason of lack of work. [Emphasis added.]

The ''legislative history'' cited in this letter included Congressional Committee Reports asserting that:

> The essential idea in unemployment compensation * * * is the accumulation of reserves in time of employment from which partial compensation may be paid to workers who become unemployed and are unable to find work. * * * In normal times it will enable most workers who lose their jobs to tide themselves over, until they get back to their old work or find other employment without having to resort to relief. [H. Rep. 615, 74th Cong. 1st Sess. 1935 Page 7.]
>
> The essential idea in unemployment compensation is the creation of reserves during periods of employment from which compensation is paid to workmen who lose their positions when employment slackens and who cannot find other work. Unemployment compensation differs from relief in that payments are made as a matter of right, not on a needs basis, but only while the worker is involuntarily unemployed. * * * Payment of compensation is conditioned upon continued involuntary unemployment. Beneficiaries must accept suitable employment offered them or they lose their right to compensation. [S. Rep. 628, 74th Cong. 1st Sess. 1935 Page 11.]
>
> For the great bulk of industrial workers unemployment compensation will mean security during the period following unemployment while they are seeking another job, or are waiting to return to their old position. [*Id.* Page 12.]

As illustrated by this history, the UC program is designed to provide temporary wage insurance for individuals who are unemployed due to lack of suitable work. An individual must be able to accept an offer of suitable work, must be available to accept that work offer and must not refuse suitable work if offered to be eligible for UC. The federal A&A requirements implement this design by testing whether the fact that an

[1] The term ''disabled'' as it was used in this letter presumed a total disability that rendered the individual completely unable to perform any work. In current nondiscrimination law, the presumption is that an individual with a disability is able to work and, indeed, should be encouraged to work. The effect, if any, of an individual's disability on his or her ability to work and availability for work for UC purposes must be determined on a case-by-case basis.

individual did not work for any week was involuntary due to the unavailability of suitable work.

The legislative history quoted above indicates that eligibility for UC is not based on the individual's personal need, except to the extent that his/her ''need'' is created by lack of suitable work. The legislative history also establishes a link between the public works programs in existence in 1935 and the UC program that bears on the A&A requirements. As noted in the Social Security Board's contemporaneous interpretation, an SSA provision (Section 303(a)(7)) requires that states make the name, address, ordinary occupation, and employment status of UC recipients available to agencies of the United States charged with the administration of public works or assistance through public employment. This requirement is predicated upon the understanding that UC recipients must be out of work due to lack of available work. It would make no sense to refer an individual, for whom work was available, to a public works program, which should be the employer of last resort. Senator Wagner, who introduced the SSA in the Senate, described the relationship between the proposed UC program and the government's public works programs (as well as public employment offices) as follows in the floor debate on the SSA:

> [Unemployment insurance] is not designed to supplant, but rather to supplement the public-works projects which must absorb the bulk of persons who may be disinherited for long periods of time by private industry. * * * A provision in the present bill requires that the Federal tax rebate shall be used to encourage a close connection between State job-insurance laws and unemployment-exchange offices. This provision emphasizes the fact that the [monetary] relief of existent unemployment is but a subordinate phase of the main task of providing work for all who are strong and willing. [79 Cong. Rec. 9284 (June 14, 1934).]

Senator Wagner's remarks demonstrate that Congress intended the UC system to be subordinate to the main task of getting people back to work. The A&A requirement is integral to this purpose.

As noted above, the Department and its predecessors have long interpreted federal law to require that individuals be A&A. That longstanding interpretation is reflected in the Employment Security Manual (ESM), which was first issued to the states about 1950 and interprets federal law to require that ''a state law provide for * * * the payment of benefits only to individuals who are unemployed and who are able to work and available for work.'' (See part V, section 5000 B, ESM.) Although the A&A requirements described in the ESM were never formally promulgated as regulations governing the basic federal-state program, they have been codified as appendices to the regulations governing federal UC programs. (See 20 CFR 614, Appendix A (the UC program for former military personnel (UCX)); 20 CFR 625, Appendix A (Disaster Unemployment Assistance (DUA)); and 20 CFR 617, Appendix A (Trade Adjustment Assistance (TAA)). They are also made applicable to the Unemployment Compensation for former Federal Civilian Employees (UCFE) program by 20 CFR 609.5(c). The UCFE and UCX programs provide that ''compensation will be paid by the State to a Federal employee * * * subject to the same conditions as the compensation which would be payable * * * under the unemployment compensation law of the State * * *.'' 5 U.S.C. 8502(b). Further, the TAA program provides that the ''availability and disqualification provisions'' of the state UC law apply to trade readjustment allowances (cash benefits in the nature of UC), except where inconsistent with the Trade Act or the Secretary's regulations. 19 U.S.C. 2294.

The Department made the A&A requirements of the ESM applicable to the federal UCFE, UCX, and TAA programs because those programs are required to apply state law regarding eligibility for UC, and the Department has in turn always taken the position that federal law requires state UC programs to have A&A requirements. Further, although the statute (42 U.S.C. 5177) creating the DUA program did not include any requirement to follow state law, the Department imposed the ESM's A&A requirements on that program in the belief that the A&A requirements are such a fundamental part of any unemployment compensation program that it could not truly be an unemployment compensation program without an A&A requirement. Thus, like Congress, the Department, by incorporating the ESM's A&A requirements into federal UC programs, has long recognized the A&A requirement to be an essential part of the UC program.

The Department has also stated that whether a claimant is available for work should be determined by whether there is a labor market for his or her services:

> The availability requirement means that the claimant *must* be available for suitable work which is ordinarily performed in his chosen locality in sufficient amount to constitute a substantial labor market for his services. A claimant does not satisfy the requirement by being available for an insignificant amount of work. Ordinarily, for example, a concert pianist in a rural area who limits his availability to concert work in that area is not available for enough suitable work to meet the requirement. [Emphasis added. U.S. Department of Labor, Bureau of Employment Security, Unemployment Insurance Legislative Policy—Recommendations for State Legislation 1962 (October 1962).]

Section-by-Section Description of Proposed Rule

Section 604.1, Purpose and Scope

This proposed section sets forth the purpose and scope of the proposed rule, which is to implement the requirements of federal UC law that limit a state's payment of UC only to individuals who are able to work and who are available for work. The regulation applies to all state UC laws and programs. It does not, by its terms, apply to the federal unemployment compensation programs mentioned above. However, those federal programs, as noted above, follow state requirements with respect to A&A, and those state requirements would need to meet the minimum requirements established by this rulemaking.

Section 604.2, Definitions

This proposed section provides definitions which apply to the proposed rule. In general, these are the same definitions as used in other federal regulations pertaining to UC.

Section 604.3, Able and Available Requirement—General Principles

This proposed section sets forth the Department's general interpretation concerning the A&A requirements. It provides that a state may pay UC only to an individual who is unemployed due to a lack of suitable work for the week for which UC is claimed. To test whether the individual is unemployed due to a lack of suitable work for such week, the state must ensure the individual is A&A.

The proposed section goes on to provide that whether an individual is able to work and available for work will be tested by determining whether that individual is offering services for which a labor market exists. This does not mean that job vacancies must exist, only that, at a minimum, the type of services the individual is able and available to perform is generally performed in the labor market. This ''labor market test'' is designed to ensure that an individual's unemployment is due to a lack of suitable work. That is, if the services offered by an individual are so restricted that there is no labor market for those services, then that individual is not able

and available, and is not unemployed due to a lack of suitable work. Rather, the individual is unemployed because of those restrictions. Those restrictions on services could be for any number of reasons, such as hours of availability, limitations on the distance the individual is willing to commute, or what types of jobs the claimant is willing to accept.

For example, if an individual limits his or her availability only to evening hours, the test of availability is whether there is a labor market for the individual's services given these restrictions. Similarly, if, for reasons such as the need to care for parents or a child, an individual limits his or her availability only to part-time work in certain occupations, the test of availability is whether there is a labor market for part-time work in those occupations. If there is a market, the State may regard the individual as meeting the availability test. If there is not, the individual must be denied. In sum, while individuals are not expected to be available for all work to be eligible for UC, they may not impose restrictions that effectively remove them from the labor market.

The same principle applies with respect to the ''able to work'' requirement: a state may find that an individual with one or more disabilities is ''able'' to work if there are jobs in the individual's labor market that the individual can perform with reasonable accommodation.

Under the proposal, states retain the authority to determine what constitutes the labor market for an individual under their UC laws. States already have well established laws concerning the labor market, and the regulation is not intended to disturb this. Generally, states look at local labor markets, but in some cases, due to telecommuting, it is possible for individuals to be legitimately attached to the labor force even though they will not relocate and their employment opportunities are outside the local area. As a result, the rule would permit states to consider such individuals to be available for work.

The proposed section also clarifies how the A&A requirement relates to the individual's initial separation from the labor market. It does not look to why the individual was separated from employment, except to the extent that the individual may not have been A&A for the week of the separation. Thus, there is no Federal requirement that the initial separation be involuntary for an individual to be eligible for UC. As a result, state eligibility requirements concerning voluntarily leaving employment are outside the scope of this rule. What the rule does test is whether an individual is able to work and available for work for the week for which UC is claimed.

An example may help explain how the separation provisions of state law, such as voluntary leaving provisions, are distinct from the A&A requirements. Assume an individual left work to care for an ill child. Whether to disqualify this individual for voluntarily leaving employment is entirely left to state law. However, if the state does not disqualify the individual for voluntarily leaving employment, the individual must still be A&A to be eligible for UC. If caring for the ill child prevents the individual from being available for a new job, the individual will be held ineligible for not meeting the state's A&A requirements because the individual is not involuntarily unemployed due to lack of suitable work. However, after the child no longer needs care and the individual becomes available for work, the individual may immediately commence collecting UC.

In this regard, the Department stresses that the proposed regulation places minimum requirements on states. It does not prohibit states from imposing more stringent A&A tests, assuming that these tests are consistent with other applicable Federal laws.

Section 604.4, Application—Ability To Work

Proposed paragraph (a) provides that an individual may be considered able to work under the state UC law if the individual is able to work for all or a portion of the week claimed, provided that any limitation on his or her ability to work does not constitute a withdrawal from the labor market. An individual may, under this proposed paragraph, be able to work only part-time, provided this limitation does not constitute a withdrawal from the labor market. In this case, the individual is able to perform some work, which is the minimum federal requirement.

Proposed paragraph (b) provides for the treatment of individuals who initially meet the A&A requirements, but who later refuse suitable work because of illness. These individuals may, at a state's option, be found eligible for the period before they refuse suitable work. The reasoning behind this is that, until work is refused, the unemployment is due to lack of work, which is what the A&A requirements are designed to test. The A&A requirements are preserved because the individual must initially demonstrate ability and availability before the illness, cannot have voluntarily withdrawn from the work force, and must be held ineligible if he or she refuses suitable work offered during the illness.

Section 604.5, Application—Availability for Work

This proposed section provides for application of the available for work requirement. Proposed paragraph (a)(1) provides that an individual may be considered available under the state UC law if the individual is available for any work for all or a portion of the week claimed, provided that any limitation placed by the individual on his or her availability does not constitute a withdrawal from the labor market. An individual may, under this proposed paragraph, limit his or her availability to part-time work, provided this limitation does not constitute a withdrawal from the labor market. In this case, the individual is available for some employment, which is the minimum federal requirement. States may craft additional stipulations on any part-time availability requirement they may create as long as such stipulations are consistent with other applicable Federal laws. For example, a state may require the worker to have had previous part-time work in the base period, or limit its part-time provision to individuals who can work only part-time due to disability.

Proposed paragraph (a)(2) takes into account that, since the A&A requirement tests whether an individual is unemployed due to a lack of suitable work, a state may find an individual to be available when the individual limits his or her availability to suitable work as defined under state UC law. Limitations on what constitutes suitable work for an individual are treated the same as any other restriction that might be imposed on the services an individual offers in the labor market. As a result, the concept of suitable work is flexible—generally, the longer an individual is unemployed, the more types of work will be considered suitable for the individual.

The proposed paragraph provides that an individual may be considered to be available for work if the individual limits his/her availability to ''suitable work'' as defined under a state's UC law, provided such limitation does not constitute a withdrawal from the labor market. Generally, suitable work involves a determination of whether the work for which the individual is available is consistent with the individual's education and training, whether the job is in the local labor market (usually measured by the distance or time of commute from the

individual's home to the worksite) and the individual's previous work history (which may include factors such as occupation, pay and fringe benefits), and how long the individual has been unemployed.

As noted, the proposed paragraph provides that the limitation to suitable work may in some circumstances constitute a withdrawal from the labor market. Such a withdrawal could happen if, for example, the individual's availability is limited to his or her traditional occupation and to the local labor market. If that occupation no longer exists in the local labor market, then, in this case, the individual cannot be said to be available for work. The expectation is that, prior to denying any individual, the state would first advise the individual that because such work is no longer available in the local labor market, such a limited availability is unacceptable and the individual should expand his or her availability to jobs for which a labor market exists.

Proposed paragraph (a)(3) provides that an individual on temporary lay-off from an employer may limit his or her availability to that employer. What constitutes a ''temporary'' lay-off will be determined under state law. (Typically, the employer must advise the state UC agency of when the employee is expected to return to work, and the state agency uses this response in determining, under its law, whether the lay-off is temporary.) An individual on temporary lay-off must be available to work for the employer who laid-off the individual as soon as the employer again offers work to the individual. While this limits an individual's availability for work to only one employer, it is nonetheless a test of whether the unemployment is due to lack of suitable work. Indeed, payment of UC to individuals on temporary lay-off allows employers to preserve their skilled workforces, which has been cited as one of the purposes of the UC program. It also reflects a practical reality: Most other employers are unlikely to hire an individual on temporary lay-off because that individual will leave any new employment to return to the prior employment.

Proposed paragraph (b) provides that an unemployed individual, who is appearing for jury duty before any court under a lawfully issued summons, may, if the state UC law so provides, be considered to be available, provided that, prior to any required appearance at such court, the individual demonstrated that s/he was available for work. The availability requirement still applies because the individual must initially demonstrate availability before being called for jury duty and because while serving on the jury the individual is no less available for work than he or she would have been if required to serve while employed. Attendance at jury duty may be taken as evidence that the individual continues to be available for work. This exception does not apply to individuals who are employed but unable to go to work because of jury duty. Nor does this exception apply to an individual who is laid-off from employment to attend jury. These individuals have not previously established availability and the unemployment is not due to a lack of suitable work, but instead, absence from work due to the call for jury duty. We note that other state laws may provide employment protections for individuals called to jury duty. This regulation is not meant to supersede or alter those laws or their interpretation.

This proposed paragraph is also consistent with Congress's treatment of jury duty in the Federal-State Extended Unemployment Compensation Act (EUCA) of 1970, which provides that extended benefits shall not be denied to an individual during a week in which s/he fails to actively engage in seeking work if the individual has been summoned to appear for jury duty before any court of the United States or any state for that week *if* such exemption applies to recipients of regular benefits. (Section 202(a)(3)(A) of Pub. L. 91–373, as amended.)

An individual summoned to jury duty is available in the same sense that an employee is available for work; that is, the individual would be available but for the fact that the court summoned him or her to jury duty. This application of the availability requirement recognizes that it is unreasonable to deny UC to an individual who has initially met the availability requirement because of a governmental compulsion to serve on a jury.

Finally, if the individual does not appear as required by the jury summons, the proposed paragraph would provide that the state must determine if the reason for non-appearance indicates that the individual is not able to work or is not available for work.

Proposed paragraph (c) addresses a specific case in which UC may not be denied due to the application of the availability requirement. It implements Section 3304(a)(8), FUTA, with respect to its ban on applying availability provisions to individuals who are in state-approved training. Specifically, this section of FUTA provides that UC ''shall not be denied to an individual for any week because he is in training with the approval of the State agency (or because of the application, to any such week in training, of State law provisions relating to availability for work, active search for work, or refusal to accept work).'' The proposed paragraph provides that an individual may not be denied UC for failure to be available for a week if, during such week, the individual is in training with the approval of the state agency. Since failure to attend or participate in approved training may mean the individual is no longer interested in maintaining an attachment to the labor market, the paragraph goes on to provide that if the individual fails to attend or participate in training during a week, then the state must evaluate the individual's eligibility under its A&A provisions.

The proposed rule does not otherwise implement the requirements of Section 3304(a)(8), FUTA, because those requirements are beyond the scope of this rule. What types of training will be approved continues to be left to the individual states, although the Department encourages states to consider approving training under the Workforce Investment Act, Public Law 105–220 (29 U.S.C. 2801 *et seq.*) While states may not deny individuals who are actually ''in'' (that is, attending) state approved training under their availability provisions, states remain free to otherwise determine what constitutes being ''in training.'' For example, states may consider an individual to be ''in'' training during breaks in training. If, however, an individual fails to attend or otherwise participate in such training, the proposed rule requires states to determine whether the reason for non-attendance or non-participation indicates the individual is not able to work or is not available for work.

Section 236(d) of the Trade Act of 1974, as amended, prohibits a state from denying UC to a worker ''in'' TAA-approved training ''because of the application'' of ''provisions of State law or Federal unemployment insurance law relating to availability for work, active search for work, or refusal to accept work.'' This rule does not address this provision because it is already implemented by TAA rules at 20 CFR 617.18(b)(i).

Proposed paragraph (d) addresses the treatment of availability for purposes of the Self-Employment Assistance (SEA) program under Section 3306(t)(2), FUTA. That section provides that ''State requirements relating to availability for work, active search for work, and refusals to accept work are not

applicable to such individuals * * * long as such individual meet the requirements'' for the SEA program. Thus, the rule provides that individuals who meet SEA program requirements may not be denied UC because they are not available for work. The proposed rule does not otherwise implement the SEA provisions of federal UC law.

Proposed paragraph (e) addresses the treatment of availability for purposes of short-time compensation (STC) programs described by Section 401 of Public Law 102–318. In STC (or ''worksharing'') programs, the employees of a company may work a reduced workweek in lieu of some of the employees being totally laid-off so long as certain conditions are met. The proposed paragraph recognizes that, under the STC legislation, individuals working a reduced work week are not required to meet a state UC law's availability requirement, but instead may be required to be available only for his/her regular work week. The proposed rule does not otherwise address STC programs.

Proposed paragraph (f) addresses the treatment of aliens. It provides that aliens must meet the A&A requirements of the regulation. In addition, it provides that, to be considered available for work in the United States for a week, the alien must be legally authorized to work in the United States during such week by the appropriate agency of the United States government. That agency is currently the United States Citizenship and Immigration Services (USCIS), a bureau of the Department of Homeland Security. An alien not legally authorized to work is not available for work; thus, the regulations would require a state to deny an alien benefits for any week the alien was not legally authorized to work.

The proposed rule does not address specific classes of aliens, nor does it specifically address what evidence is needed to prove the alien is authorized to work, as these may change over time. In determining whether the alien is legally authorized to work, including the acceptability of any documentation provided, the proposed rule requires the state to follow the requirements of Section 1137(d), SSA, (42 U.S.C. 1320b–7(d)). These requirements, commonly called ''Systematic Alien Verification for Entitlements,'' or SAVE, are made applicable to the UC program by Section 1137(b)(3), SSA, (42 U.S.C. 1320b–7(b)(3)). A state must meet these requirements to receive UC administrative grants under Section 303(f), SSA, (42 U.S.C. 503(f)).

The proposed rule does not address Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which limits the eligibility of aliens for public benefits, including UC, based upon their alien status. Since it does not govern the ability or availability of aliens for work, it is beyond the scope of this rulemaking. However, states will need to take account of the provisions of Title IV in determining the eligibility of aliens for UC.

Proposed paragraph (g) clarifies the relationship between the availability requirement and the requirement, found in almost every state law, that the individual conduct an active search for work. It provides that an active work search is not required by the rule, although a state may require an individual to be actively seeking work to be considered available for work, or impose a separate requirement that the individual must actively seek work.

An active search for work is not a necessary component of availability and is not, therefore, a federal requirement for regular UC. Although an active work search is one way for the individual to indicate availability, it is not the only way and, in some cases, such as temporary lay-offs, requiring an active search for work may be viewed as unreasonable. Other ways of determining availability may be an individual's active registration with the state's employment service or, when appropriate, the individual's use of union hiring halls or private recruiting firms.

Section 604.6, Conformity and Substantial Compliance

For a state to receive federal grants to fund UC administration, and for employers in the state to receive credit against the federal unemployment tax, state law must conform to federal UC law. A state law would conform to federal UC law as interpreted by this rulemaking when the state law includes provisions which meet or exceed the minimum A&A requirements established by this rulemaking. A state must also administer its UC laws so as to substantially comply with the requirements of federal UC law. Substantial compliance with federal UC law, as interpreted by this rulemaking, means the state's administration of its law is substantially consistent with the minimum A&A requirements established by this rulemaking. Additionally, where a state consistently administers its law differently from its express provisions, the Department assumes that a state's administration of its law reflects the requirements of its law. Thus, a state's administration of its law may raise issues of whether its law conforms to the federal requirements. ''Conformity,'' unlike ''compliance,'' is not preceded by the adjective ''substantial,'' meaning that a state law must conform with the federal requirements without qualification.

This proposed section provides that the requirements of the rule are requirements for purposes of conformity and substantial compliance. It also sets forth how the Department of Labor would determine and enforce conformity and substantial compliance with the A&A requirements of Title III of the SSA and the FUTA. The procedures in 20 CFR 601.5 would apply, meaning that if any issue involving conformity and substantial compliance arose, the Department would generally first hold informal discussions with state officials. Should informal discussions fail to resolve the issue, the Department would offer the state UC agency an opportunity for a hearing. If the Secretary of Labor were to find, after reasonable notice and opportunity for a hearing, a failure to conform or substantially comply with the rule's A&A requirements, the Secretary would notify the Governor of the state that grants to fund state administration of the UC program would be withheld and the Secretary would make no certification under FUTA to the Secretary of the Treasury that employers in the state are eligible to receive credit against the federal unemployment tax.

Because this rule is intended to implement long-standing Departmental interpretations, it does not, in and of itself, require amendments to state law (including regulations).

Executive Order 12866

This proposed rule is a ''significant regulatory action'' within the meaning of Executive Order 12866 because it meets the criteria of Section 3(f)(4) of that Order in that it raises novel or legal policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Accordingly, the proposed rule has been submitted to, and reviewed by, the Office of Management and Budget (OMB).

However, the proposed rule is not ''economically significant'' because it would not have an annual effect on the economy of $100 million or more. The proposed rule merely codifies in regulation interpretations which have existed since the beginning of the program and which are already applied by the states. Thus, it imposes no new conditions on states, employers, or workers. We have also determined that the proposed rule would have no

adverse material impact upon the economy and that it would not materially alter the budgeting impact of entitlements, grants, user fees or loan programs, or the rights and obligations of recipients thereof.

Further, we have evaluated the proposed rule and found it consistent with the regulatory philosophy and principles set forth in Executive Order 12866, which governs agency rulemaking. Although the proposed rule would impact states and state UC agencies, it would not adversely affect them in a material way. The proposed rule would ensure that the UC program operates as wage insurance by setting forth a test to assure that only individuals involuntarily unemployed due to lack of suitable work receive benefits.

Executive Order 13132

We have reviewed this regulatory action in accordance with Executive Order 13132 regarding federalism. This Executive Order requires agencies, when formulating and implementing policies that have federalism implications, to the extent possible, to refrain from limiting state policy options, to consult with states before taking any action which would restrict states' policy options, and to take such action only where there is clear statutory and constitutional authority and the presence of a problem of national scope. The UC program is a matter of national scope, as evidenced by existing federal legislation, which limits state flexibility in certain areas.

Policies with federalism implications are those with substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. We have determined that this proposed rule may have federalism implications. We intend to consult with organizations representing state elected officials about this rule in the upcoming weeks.

Executive Order 12988

We drafted and reviewed this proposed regulation in accordance with Executive Order 12988, Civil Justice Reform, and it would not unduly burden the federal court system. The proposed rule was written to minimize litigation and provide a clear legal standard for affected conduct, and was reviewed carefully to eliminate drafting errors and ambiguities.

Unfunded Mandates Reform Act of 1995 and Executive Order 12875

This proposed rule was reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*) and Executive Order 12875. We have determined that this proposed rule does not include any Federal mandate that may result in increased expenditures by state, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, we have not prepared a budgetary impact statement.

Paperwork Reduction Act

This regulatory action contains no information collection requirements.

Regulatory Flexibility Act

This proposed rule would not have a ''significant economic impact on a substantial number of small entities.'' The proposed rule affects states and state agencies, which are not within the definition of ''small entity'' under 5 U.S.C. 601(6). Under 5 U.S.C. 605(b), the Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect. Accordingly, no regulatory flexibility analysis is required.

Congressional Review Act

This proposed rule is not a ''major rule'' as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This proposed rule would not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Effect on Family Life

We certify that this proposed rule was assessed in accordance with Public Law 105–277, 112 Stat. 2681, and that the proposed rule would not adversely affect the well-being of the nation's families.

List of Subjects in 20 CFR Part 604

Employment and Training Administration, Labor, Unemployment compensation.

Catalogue of Federal Domestic Assistance Number

This program is listed in the Catalogue of Federal Domestic Assistance at No. 17.225, Unemployment Insurance.

Signed at Washington, DC on July 14, 2005.

Emily Stover DeRocco,

Assistant Secretary of Labor, Employment and Training Administration.

Words of Issuance

For the reasons set forth in the preamble, the Department of Labor proposes that Chapter V of Title 20, Code of Federal Regulations, be amended by adding new part 604 to read as follows:

PART 604—REGULATIONS FOR ELIGIBILITY FOR UNEMPLOYMENT COMPENSATION

Sec.
604.1 Purpose and scope.
604.2 Definitions.
604.3 Able and available requirement—general principles.
604.4 Application—ability to work.
604.5 Application—availability for work.
604.6 Conformity and substantial compliance.

Authority: 42 U.S.C. 1302(a); 42 U.S.C. 503(a)(2) and (5); 26 U.S.C. 3304(a)(1) and (4); 26 U.S.C. 3306(h); 42 U.S.C. 1320b–7(d); Secretary's Order No. 4–75 (40 FR 18515); and Secretary's Order No. 14–75 (November 12, 1975).

§ 604.1 Purpose and Scope.

The purpose of this part is to implement the requirements of federal UC law that limit a state's payment of UC to individuals who are able to work and available for work. This part applies to all state UC laws and programs.

§ 604.2 Definitions.

Department means the United States Department of Labor.

FUTA means the Federal Unemployment Tax Act, 26 U.S.C 3301 *et seq.*

Social Security Act means the Social Security Act, 42 U.S.C.

State means a state of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands.

State UC agency means the agency of the state charged with the administration of the state's UC law.

State UC law means the law of a state approved under Section 3304(a), FUTA (26 U.S.C. 3304(a)).

Unemployment Compensation (UC) means cash benefits payable to individuals with respect to their unemployment.

Week of unemployment means a week of total, part-total or partial unemployment as defined in the state's UC law.

§ 604.3 Able and available requirement—general principles.

(a) A state may pay UC only to an individual who is able to work and available for work for the week for which UC is claimed.

(b) Whether an individual is able to work and available for work under paragraph (a) of this section shall be tested by determining whether the individual is offering services for which a labor market exists. This does not mean that job vacancies must exist, only that, at a minimum, the type of services the individual is able and available to perform are generally performed in the labor market. The state shall determine the geographical scope of the labor market for an individual under its UC law.

(c) The requirement that an individual be able to work and available for work applies only to the week of unemployment for which UC is claimed. It does not apply to the reasons for the individual's separation from employment, although the separation may indicate the individual was not able to work or available for work during the week the separation occurred. This part does not address the authority of states to impose disqualifications with respect to separations. This part does not limit the states' ability to impose additional able and available requirements that are consistent with applicable Federal laws.

§ 604.4 Application—ability to work.

(a) A state may consider an individual to be able to work during the week of unemployment claimed if the individual is able to work for all or a portion of the week claimed, provided that any limitation on his or her ability to work does not constitute a withdrawal from the labor market.

(b) If an individual has previously demonstrated his or her ability to work and availability for work following the most recent separation from employment, the state may consider the individual able to work during the week of unemployment claimed despite the individual's illness or injury, unless the individual has refused an offer of suitable work due to such illness or injury.

§ 604.5 Application—availability for work.

(a) *General application.* A state may consider an individual to be available for work during the week of unemployment claimed under any of the following circumstances:

(1) The individual is available for any work for all or a portion of the week claimed, provided that any limitation placed by the claimant on his or her availability does not constitute a withdrawal from the labor market.

(2) The individual limits his or her availability to work which is suitable for such individual as determined under the state UC law, provided such limitation does not constitute a withdrawal from the labor market. In determining whether the work is suitable, states may, among other factors, take into consideration the education and training of the individual, the commuting distance from the individual's home to the job, the previous work history of the individual (including salary and fringe benefits), and how long the individual has been unemployed.

(3) The individual is on temporary lay-off and is available to work only for the employer that has temporarily laid-off the individual.

(b) *Jury service.* If an individual has previously demonstrated his or her availability for work following the most recent separation from employment and is appearing for duty before any court under a lawfully issued summons during the week of unemployment claimed, a state may consider the individual to be available for work. For such an individual, attendance at jury duty may be taken as evidence of continued availability for work. However, if the individual does not appear as required by the summons, the state must determine if the reason for non-attendance indicates that the individual is not able to work or is not available for work.

(c) *Approved training.* An individual may not be denied UC for failure to be available for work during a week if, during such week, the individual is in training with the approval of the state agency. However, if the individual fails to attend or otherwise participate in such training, the state must determine if the reason for non-attendance or non-participation indicates that the individual is not able to work or is not available for work.

(d) *Self-employment assistance.* An individual may not be denied UC for failure to be available for work during a week if, during such week, the individual is participating in a self-employment assistance program and meets all the eligibility requirements of such self-employment assistance program.

(e) *Short-time compensation.* An individual participating in a short-time compensation (also known as worksharing) program shall not be denied UC under the state UC law for failure to be available for work during a week, but such individual shall be required to be available for his or her normal workweek.

(f) *Alien status.* To be eligible for UC for a week, an alien must meet the able to work and available for work requirements of this part. To be considered available for work in the United States for a week, the alien must be legally authorized to work that week in the United States by the appropriate agency of the United States government. In determining whether an alien is legally authorized to work in the United States, the state shall follow the requirements of Section 1137(d), SSA, which relate to verification of and determination of an alien's status.

(g) The requirement that an individual be available for work does not require an active work search on the part of the individual. States may, however, require an individual to be actively seeking work to be considered available for work, or states may impose a separate requirement that the individual must actively seek work.

§ 604.6 Conformity and substantial compliance.

(a) *In general.* A state's UC law must conform with, and the administration of its law must substantially comply with, the requirements of this part for purposes of certification under:

(1) Section 3304(c), FUTA, with respect to whether employers are eligible to receive credit against the federal unemployment tax established by Section 3301, FUTA, and

(2) Section 302, SSA, with respect to whether a state is eligible to receive federal grants for the administration of its UC program.

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

(1) Paragraph (b), pertaining to informal discussions with the Department of Labor to resolve conformity and substantial compliance issues, and

(2) Paragraph (d), pertaining to the Secretary of Labor's hearing and decision on conformity and substantial compliance.

(c) *Result of Failure to Conform or Substantially Comply.*

(1) *FUTA Requirements.* Whenever the Secretary of Labor, after reasonable notice and opportunity for a hearing to the state UC agency, finds that the state UC law fails to conform, or that the state or state UC agency fails to comply substantially, with the requirements of the FUTA, as implemented in this part,

then the Secretary of Labor shall make no certification under such act to the Secretary of the Treasury for such state as of October 31 of the 12-month period for which such finding is made. Further, the Secretary of Labor shall notify the Governor of the state and such state UC agency that further payments for the administration of the state UC law will not be made to the state.

(2) *SSA Requirements.* Whenever the Secretary of Labor, after reasonable notice and opportunity for a hearing to the state UC agency, finds that the state UC law fails to conform, or that the state or state UC agency fails to comply substantially, with the requirements of Title III, SSA, as implemented in this regulation, then the Secretary of Labor shall notify the Governor of the state and such state UC agency that further payments for the administration of the state UC law will not be made to the state until the Secretary of Labor is satisfied that there is no longer any such failure. Until the Secretary of Labor is so satisfied, the Department of Labor shall make no further payments to such state.

[FR Doc. 05–14384 Filed 7–21–05; 8:45 am]

BILLING CODE 4510–30–P