

March 14, 2017

Dear Member of Congress,

The undersigned organizations urge you to actively oppose H.J. Res. 42 when it comes to the floor. This measure would repeal a Department of Labor rule intended to implement a bipartisan agreement on implementing a provision in the Middle Class Tax Relief and Job Creation Act of 2012 that allows states to drug test unemployment insurance (UI) applicants in certain circumstances.

In 2012, Congress approved a bipartisan compromise on drug testing unemployment insurance claimants. The agreement permitted states to drug test UI claimants in cases where an applicant has been discharged from their last job because of unlawful drug use or cases where an applicant who “is an individual for whom suitable work (as defined under the State law) is only available in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary of Labor).” Congress therefore mandated the Department of Labor to define through regulation those occupations that regularly conduct drug testing. The final Department of Labor (DOL) rule, which would be repealed by H.J. Res 42, defined “occupation” as a position or class of positions that are required, or may be required in the future, by state or federal law to be drug tested.

Some members of Congress have criticized the regulations as being too narrowly drawn, but in fact, they track the bipartisan legislation very closely. It seems that what is really at issue is a desire to conduct broader drug testing of UI applicants, and for the reasons explained below, any proposal that seeks to expand the ability of states to drug test people for unemployment insurance should be vigorously opposed.

States already have the ability to administer drug testing and this change would needlessly shift employer costs to the states.

State UI programs already penalize job-related drug use. Virtually all states treat a drug-related discharge as disqualifying misconduct even if it is not explicitly referenced in their discharge statutes. Twenty states also explicitly deny benefits for any job loss connected to drug use or a failed drug test.¹ In addition, six states (Arizona, Arkansas, Indiana, South Carolina, Tennessee, and Wisconsin) have passed legislation equating a failed or refused pre-employment drug screen with refusing suitable work.² Employers already have testing as a tool to screen out people who use illicit drugs, at no cost to states. Proponents of drug testing argue that states want to be able to drug test UI applicants. However, only three states (Texas, Mississippi and Wisconsin) have enacted laws permitting state drug testing of UI claimants, consistent with the federal regulation, with all three of these states delaying implementation until after the final DOL rule targeted by H.J. Res 42 was issued.

Suspicionless drug testing of government benefit recipients likely violates the Fourth Amendment.

Generally, government-mandated drug testing not based on individualized suspicion is unconstitutional. Drug tests historically have been considered searches for the purposes of the Fourth Amendment. For searches to be reasonable, they generally must be based on individualized suspicion unless the government can show a special need warranting a deviation from the norm. However, social insurance or governmental benefit programs like UI,

Temporary Assistance for Needy Families (TANF), Supplemental Nutrition Assistance Program (SNAP) and Housing Assistance do not naturally evoke the special needs that the Supreme Court has recognized in the past. Indeed, when states like Michigan and Florida have tried to impose mandatory suspicionless drug testing on all TANF applicants or recipients, they have been stopped by federal courts that have found such testing to be unconstitutional under the Fourth Amendment.³ These court battles also imposed substantial legal costs for states.

State-administered drug testing is a poor investment of public funds. Claims that testing will save taxpayer money are built upon the assumption that the tests will return a high number of positive results. However, studies show that individuals who receive public benefits use drugs at rates similar to the general population,⁴ and the vast majority of such individuals do not use drugs.⁵ Most individuals, in fact, refrain from using drugs on a regular basis. Ten states have spent substantial amounts of money in recent years to set up and administer drug testing systems for TANF recipients, but have identified only a few claimants testing positive.⁶ Drug testing is also costly and prone to returning false-positives. Drug tests that do come back as positive easily identify marijuana use but often miss other drugs that ordinarily clear out of the body within a few days.⁷ Tests do not indicate if a person is impaired, or whether they are using less than they have in the past.

Working people paid for this insurance policy, and jobless workers earned the right to access UI through their service to their employer.⁸ Proposals to drug test UI beneficiaries needlessly stigmatize and punish jobless workers and their families who are trying to get back on their feet. If legislators have genuine concerns about drug use, there are far better ways to respond than targeting and stigmatizing the unemployed.

We urge you to oppose H.J. Res 42 and any legislation that seeks to expand the ability of states to condition the receipt of unemployment insurance and other forms of public assistance on a drug test.

Sincerely,

9to5, National Association of Working Women
AFL-CIO
African American Ministers in Action (AAMIA)
AME Church – Social Action Commission
American Civil Liberties Union
American Federation of State, County and Municipal Employees (AFSCME)
Bend the Arc Jewish Action
Bill of Rights Defense Committee/ Defending Dissent Foundation
Center for Community Change Action
The Center for HIV Law and Policy
Center for Law and Social Policy (CLASP)
Colorado Center on Law and Policy
Drug Policy Alliance
Economic Policy Institute Policy Center
FedCURE

Food Research & Action Center
Harm Reduction Coalition
Housing Works
Institute for Science and Human Values
Interfaith Worker Justice
LatinoJustice PRLDEF
The Leadership Conference on Civil and Human Rights
Legal Action Center
Legal Aid at Work
Life for Pot
The Los Angeles LGBT Center
Massachusetts Law Reform Institute
MomsRising
NAACP
National Action Network
National Asian Pacific American Women's Forum
National Association of Social Workers
National Center for Transgender Equality
National Council of Churches
National Employment Law Project
National Employment Lawyers Association
National LGBTQ Task Force Action Fund
National Women's Law Center
NCADD-MD
New Mexico Voices for Children
North Carolina Justice Center
Public Justice Center
Sargent Shriver National Center on Poverty Law
StopTheDrugWar.org
Students for Sensible Drug Policy (SSDP)
The Sugar Law Center for Economic & Social Justice
Union for Reform Judaism
The United Methodist Church - General Board of Church and Society
Witness to Mass Incarceration
Workplace Fairness

¹ "Limiting Drug Testing for UI," Unemployment Insurance Policy Advocate's Toolkit, *National Employment Law Project*, <http://www.nelp.org/content/uploads/2C-Limiting-Drug-Testing-for-UI.pdf>.

² "Drug Testing for Welfare Recipients and Public Assistance," *National Conference of State Legislatures*, March 28, 2016, <http://www.ncsl.org/research/human-services/drug-testing-and-public-assistance.aspx>.

³ "Drug Testing and Public Assistance," *Center for Law and Social Policy*, Updated October 2016, <http://www.clasp.org/resources-and-publications/publication-1/2016.02.04-Drug-Testing-and-Public-Assistance-Brief-Final.pdf>.

⁴ U.S. Department of Health and Human Services, National Institutes of Health, *NIAAA Researchers Estimate Alcohol and Drug Use, Abuse, and Dependence*, (Washington: n.p., 1996).

⁵ "Drug Testing for Welfare Recipients and Public Assistance," *National Conference of State Legislatures*, March 28, 2016, <http://www.ncsl.org/research/human-services/drug-testing-and-public-assistance.aspx>.

⁶ "Drug Testing and Public Assistance," *Center for Law and Social Policy*, Updated October 2016, <http://www.clasp.org/resources-and-publications/publication-1/2016.02.04-Drug-Testing-and-Public-Assistance-Brief-Final.pdf>.

⁷ "Drugs of Abuse Reference Guide," LabCorp Inc, available at http://www.labcorpsolutions.com/images/Drugs_of_Abuse_Reference_Guide_Flyer_3166.pdf.

⁸ "Protecting UI as Earned Benefits for Claimants," Unemployment Insurance Policy Advocate's Toolkit, *National Employment Law Project*, <http://www.nelp.org/content/uploads/2-Protecting-UI-as-Earned-Benefits-for-Claimants.pdf>.