MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

1409

2007 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1409

2007 HOUSE STANDING COMMITTEE MINUTES

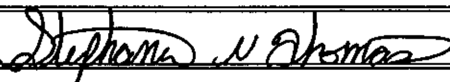
Bill/Resolution No. HB 1409

House Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: January 24, 2007

Recorder Job Number: 1796

Committee Clerk Signature 

Minutes:

Vice Chair Johnson opened the hearing on HB 1409.

Rep. George Keiser, District 47: This bill relates to the imposition of a fee by Job Service ND on certain employers for employers in the return to employer status. In the interim, the committee worked at the direction of the legislature aggressively on an issue which was job attached employees for negative balance employers. Employers in our state, when they have to lay people off, they can create, or place them into a category which is job attached. There's a good reason to do that. There are many employees in our state which are still employees. They may be in manufacturing, they may be in the construction industry, they can be in a variety of industries, but they have tremendous skills that we want to protect. So, when an employer has to lay them off, they would like to put them into a category known as job attached, which has with it certain privileges. They don't have to be as aggressively seeking employment, and doing some other things that are beneficial to the employee, and are very important and vital to the employer. They need the ability to have job attached employee. Prior to the last session, it was a case to the employee as how to become job attached. Prior to the last session, an employee became job attached simply by going to Job Service after being laid off, and they told Job Service I'm job attached, and Job Service would then say your

job attached, and life would go on. There was no penalty that was just the category you were placed in. Last session, because of a bill introduced to this committee the recognition that perhaps the employee shouldn't be determining whether or not you are job attached, it should be the employer, and there should be certain responsibilities associated with that. We made a change in the form used by job Service, and now the employer must indicate which employees are job attached. So, we now have the employer determining whose going to be job attached, and whose not. In addition to that, in the Unemployment Insurance Reserve Trust Fund, we have two large groups of employers. We have the positive balance employers, and the negative balance employers. The positive balance employers simply mean that they pay more in premiums every year than there employees that they lay off collect, and the rate that which they pay is determined by how good their reserve account is in the Unemployment Insurance Reserve Trust Fund. The negative balance employers are those employers, for whatever reason, they pay their premium in, but the benefits paid to the employees that they lay off is greater than the premiums paid in. That sounds like a pretty dumb insurance program. We wouldn't allow a situation where an insurance company keeps collecting less money then they're paying out. Historically, the legislature, and certainly my position, supports from a policy standpoint that in employment, there must, out of necessity, be the potential for the availability of negative balance employers for two reasons. One, there are some industries that really can't afford it; the road construction industry is a good example. They're going to have 4-5 months where they're not going to be able to work. Now, we could say from a policy standpoint, let's make them self insured, let's make them pay everything in, and they have to cover whatever the cost is, but that's an option that I'm not excited about for a variety of reasons. We do not require all employees to be self insured. I'm an employee in the state, and if for some reason I lose 60% of my business, I can assure you I'm going to lay a bunch of

people off, and I'm going to go into the negative balance category, and if we're going to have you self insure, I might very well be out of business. From an economic development standpoint, it would be terrible. What this bill attempts to do is say look, for the negative balance employers, if you're going to designate somebody as job attached, that's kind of a benefit to you, and it's a benefit to the employee. What we want to do on those certain employees, the ones on the return to work employer status, we want to impose a fee to each employer for which the cumulative contribution is a lesson the employers get, cumulative benefits, and it only applies to the negative balance employers. The amount of the fee imposed on this section is $100.00 per base period employee under the return to work status. So, employer A has 50 employees that they say are gong to be job attached. They then will be assessed $100.00 per employee, or $5,000 to help cover part of that cost. Where do those dollars go? 50% goes into the Unemployment Contribution, actually goes in to help us with their cost to their account, and 50% goes into the tariff, which is the federal component to help cover the cost of managing this account. These fees are nonrefundable. Why should it be $100.00? If one employee costs the fund $2,000, why isn't it $2,000? That gets back to the philosophical position, an argument of if it's self insurance or not self insurance, but the reason and the only way we came up with this approach was because, we did have a better approach, but in unemployment, it's the one unique case where the federal government has to do with all unemployment legislation so, we have to send it to our regional office in Dallas, and they said you can't do it. We did come back and the department was very creative with coming up with this, and Dallas did sign off on it. They gave us a loophole, and we took advantage of it. What we're trying to do is build in some accountability in the job attached provision of our Century Code.

Larry Anderson, Job Service ND: See written testimony #1.

Rep. Dosch: Could you explain to me if I am a job attached employee, what are the requirements on me to seek unemployment, or temporary work?

Larry: As I indicated, you are exempt from the work search requirement with one condition; you must remain in contact with your previous employer that has designated that you will return to employment with them. If you're a member of the collective bargaining agreement, then you must remain in contact with NRA.

Rep. Kasper: If we change statute in some other bill requiring that an employer now designates what employees are job attached, or is this bill intended to do so? If this is the bill intending to do that, where does it do that?

Larry: We do not have currently anywhere in statute that requirement that the employer designate the job attachment status. The Unemployment Insurance Advisory Council recommended that we make changes to the notice that we send to the business, so that it was clear to the business that if they wanted the person to be job attached, that they'd have to take some action. The previous notice could have been misleading to our employers in our state, because they may have been unknowingly job attaching people without their full knowledge.

Rep. Kasper: Currently, the situation stays the same that an employee declares that they are job attached. That employee becomes job attached, or does the employer have to sign off?

Larry: The burden to provide reason for loss of employment has always been, and will be with the business. The notice sent to the employer, the Unemployment Insurance Advisory Council felt it was hard to understand, and so they recommended changes. Instantly when a person filed a claim for unemployment, the first thing that happens is we take a statement from the individual filing the claim to the reason why they are no longer working. The second thing that we do is extend the notice to our employer's in our state asking the employer if the person is out of work through no fault of their own. The form previously said if they're out of work

through no fault of their own, then you need not take any action. The changes that have now been made to the form make it clear that if they want that person to have a job attachment status, they need to take some action on that notice by notifying them.

Rep. Kasper: Under the current system, there is no system whereby layoffs come in the fall, and the employer wishes employee certainty. There is no system currently where the employer notifies the department of who is job attached?

Larry: Correct. It's more of a rare occasion that unemployment occurs in chunks, it occurs more on the individual basis, and we treat every claim as an individual claim.

Rep. Keiser: In the past, the employee could say I'm job attached, and they were. Currently, it doesn't matter what the employee says to your department, until this $100.00 is paid for that employee by the employer, they're not job attached, and that eliminates the need for a form.

Larry: If this bill becomes legislation, you are exactly right, with one clarifier. This is imposed on negative balance employers, so positive balance employers would be treated the way they're treated now.

Rep. Amerman: The two things this is trying to solve is shift the monetary burden to the negative balance employers, and make more workers available in the workforce. If you have job attached, and they have to pay a $100.00 fee, and if an employer lays off 20 people at $20.00 an hour, and he doesn't want to pay the fee, they're just out there. In reality, they would then go through your system, and they could go out and say I don't want a $10.00 an hour job, because I was making $20.00 an hour. So, they're not actually available to the whole workforce. They might be out there, but that doesn't mean they are going to work for a lot less.

Larry: Nothing in this statute will cause us not to continue to apply the suitability provisions against work search requirements for employees.

Rep. Keiser: You made the comment that it would still operate the way it does currently for the positive balance employers, so what they're paying is not affecting other people in the system, it's just affecting them.

Larry: That's exactly right. The primary differentiation between positive balance employer and negative balance employer is positive balance employers make more in contributions, and we pay out benefits. Negative balance employers make more benefit payments then they make in contributions.

Rep. Kasper: On the positive balance employer, when the employee shows up and claims to be job attached, does that notice still go to the employer that this employee is making a claim as a job attached employee, so the positive balance employer is notified on an individual basis?

Larry: Yes.

Rep. Dosch: When we're talking about negative balance employers, could you give me a number of what kinds of an impact as a group the negative balance employers have on the unemployment fund?

Larry: The negative rate group was about ¾ of a million in deficit in 2005, and we're over a million deficit in 2004, and a little over a million dollar deficit in 2003.

Rep. Thorpe: If a positive employer temporarily slips into the negative employer balance, would they be subject to this $100.00?

Larry: Yes, if this legislation becomes law they would be.

Tom Balzer, ND Motor Carriers Association: See written testimony #2

Rep. Dosch: In your example you gave in regards to the last paragraph of your testimony on the first page, you indicated that currently under your example, this leaves an unfunded amount of about over $1600 per employee that has to be picked up by other employers. So,

your organization feels that $100.00 is probably a pretty fair exchange in relation to a $1600 cost if you were paying 100% of your premiums.

Tom: I believe so. The $1600 is the actual under funded benefit, and you're not asking to be on a self insured basis where they would pick up that full $1600. Something is better than nothing, and we feel the $100.00 rate is a reasonable rate.

Maren Daily, Job Service ND: Discussion of handout. See handout C.

Marv Scar, EWI in Fargo, ND: Support HB 1409. See handouts A and B.

Rep. Amerman: You are saying that in your industry there's a shortage of employees, and it's hard to find the workers. Then you mentioned when you lay off employees, they are on their own, they are not job attached. Why are you laying off the employees?

Marv: The point I was making is if I do lay off people.

Rep. Amerman: In the trucking industry wide, you said an 82% turnover industry wide. Why is there all of this turnover?

Marv: The reason for the turnover in nationwide trucking is lifestyle. Most people that get out of trucking try to get jobs close to home.

Dick Johnson, ND Motor Carriers Association: See written testimony #3.

Russ Hanson, Associated General Contractors of ND: Opposed to HB 1409. See written testimony #4

Rep. Kasper: How long do we have to have the positive employers subsidize the negative employers. Your chart shows about 40% of the cost of the negative balance employers are your industry. If I look at the numbers, there's about 42 million dollars that the negative balance employers are put under the fund. They're a liability. When do we get to the point where we simply say no, maybe it's time for us to pay our fair share? What would happen if

your industry had to pay their fair share, wouldn't you just simply increase profit to make up for that cost anyway?

Russ: Sure, we'll go into bid. The question is when that amount becomes an amount at that competitive stage with somebody from out of state. Would this do it, I'm not sure. We think the solution is in SB 2035, where the negative balance employers are picking up $3.4 million.

Rep. Kasper: You're suggesting that there is another bill coming that is going to require your industry to pay $3 million dollars more in premiums?

Russ: Yes.

Rep. Clark: Does this other bill do anything to solve the shortage of workers that are facing employers in the state of ND?

Russ: No. It modifies the rates for positive and negative balance employers when the target is reached.

Rep. Dosch: Just to clarify, the other bill does deal with a totally different issue though. That deals with the surplus that the positive employers paid in, and this deals with different issues with job attached.

Russ: You're absolutely correct.

Marvin Miller, Twin City Roofing Inc. in Mandan, ND: See written testimony #5.

Brad Ballweber, Northern Improvement Company: See written testimony #6.

Rep. Kasper: Would you support getting your company just to a positive base with your rates, so you could be a positive base employer in ND?

Brad: I believe that the legislation in SB 2035 would tread towards that, and we would support that.

David Kemnitz, AFLCIO: Opposed to HB 1409.

Rep. Dosch: Is there a value to businesses having an employee on a job attached basis?

David: I would expect there's a substantial value to it. Our people help your system immensely by staying out of the administrative cost that Job Service must incur by regulating.

Rep. Dosch: We heard testimony on insurance issues, and this is an insurance fund as well. When we're talking about negative balance employers, we're talking about employers in many cases who consistently cost the fund money. One way we could have the state solve this is to go on self insured. If we would conceivably go to that, the cost we occurred this morning in testimony was that this could affectively cost every employer $1600 additional then what they are paying in premium right now. Isn't $100.00 a pretty good trade out to $1600?

David: The state the political subdivisions are in is pay as they go, so their budgets don't always reflect that they have any funds that they can repay Job Service for the actual cost of unemployment.

Hearing closed.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB 1409**

House Industry, Business and Labor

☐ Check here for Conference Committee

Hearing Date: **30 January 2007**

Recorder Job Number: **2338**

Committee Clerk Signature	

Minutes:

Chairman Kaiser opened discussion of HB 1409. This is the bill for the imposition of a fee by Job Service. This came out of the interim committee and didn't look like this at all. Out of the interim committee was developed a bill which would assign a fee to the employer based on the risk of exposure. This bill was introduced on the senate side and defeated because it hog housed. Rather than have a graduated fee from $100 to $1200, this has a flat fee of $100, Fifty percent of those dollars will go to the employer's account as an unemployment tax payment. Fifty percent will go toward paying the cost of administering the program. That enables it to minimize the fiscal impact of it and it's a self-funded program.

Representative Clark: This is the bill that none of the contractors liked. In spite of that **I move a Do Pass.**

Representative Gruchalla: I second.

Representative Amerman: I resisted this bill in the interim and am probably going to do so today. It does some things as far status negative employers--$50. I don't think it really puts more employees out on the job market like it might because this is going to affect construction workers, trade workers, etc., who get laid off seasonally. They historically make some pretty good wages. As far as them going out on the job market, all they are going to have to do is make a couple of inquiries and say I can't work and they won't be available out there anyway.

The other thing is it imposes a fee on construction and other employers. If they do a couple of week layoff here and two- three-week layoff, it certainly puts a burden on a lot of the trade people. I just can't support this bill.

Representative Ruby: The reason I like the bill is because it doesn't require employers to pay for the job that is attached to employees. It should hold down their rates somewhat. I think it's something they can accept as a necessary part of doing layoffs or seasonal work.

Representative Gruchalla: I was reading a union booklet a while back and when unemployment insurance was first announced it was set up for unions who lay off periodically. It was never designed for somebody who got laid off every year like a seasonal worker. They just got another job in the winter. I think it's gone to far and those types of industries should pay a little bit higher.

Representative Thorpe: Does anyone know the top rate for a negative employer? Is it 10.09?

Representative Kaiser: Yes. If you pay 10.09 you are receiving a significant—probably 5 – 10% back in terms of unfunded payments back to your employee. You only get the high rate, you earn it really.

Representative Kasper: This applies mostly to larger contractors who lay off workforce in the winter. The question was asked if they could absorb this in their bids. The answer was very easily because that's what will happen. They should pay more because they are using more. They'll cover it but the fund is what we have to look at.

A roll call vote was taken on the Do Pass on HB 1409: Yes: 10, No: 2, Absent: 2 (Dosch and Zaiser) **The motion carried.**

Representative Dosch will carry the bill.

FISCAL NOTE

Requested by Legislative Council
01/16/2007

Bill/Resolution No.: HB 1409

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2005-2007 Biennium		2007-2009 Biennium		2009-2011 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	$0	$0	$0	$1,118,530	$0	$906,010
Expenditures	$0	$0	$0	$379,525	$0	$0
Appropriations	$0	$0	$0	$0	$0	$0

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2005-2007 Biennium			2007-2009 Biennium			2009-2011 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
$0	$0	$0	$0	$0	$0	$0	$0	$0

2A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

Requires Job Service to impose a fee on negative rate employers for each employee they choose to place in a return-to-employer status.

B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Based upon current usage of return to employer status, it is estimated that fees collected during the first year would be approximately $588,700.00. Of this amount, 50% is being considered fee revenue and will be deposited in the Federal Advance Interest Repayment Fund. The remaining 50% is considered a contribution by the employer and will be deposited in the Unemployment Insurance Trust Fund. It is anticipated that during each successive year, return to employer status will decline by 10%, resulting in a decline in the amount of revenue generated by this fee. Estimated revenues for the 2007-2009 biennium are $$1,118,530. Estimated revenues for the 2009-2011 biennium are $906,010.

Implementing this bill will result in a significant fiscal impact due to programming of the agency mainframe Unemployment Insurance (UI) computerized system. Most areas of the Tax system and portions of the Benefits system will need modification to accommodate this new fee. Some of the individual changes required will be:
• Database modifications
• Creation of new databases
• MIS system interface modifications and additions
• Creation and modification of mainframe batch processes Automated
correspondence and billing
• Creation of required reports related to employer contributions
• Modification of MIS system for appropriate application of moneys
owed
• Modification of the data validation system
• Changes to the Tax Internet based customer application, UIEASY

Due to limited Job Service North Dakota programming staff availability, it is expected that a contractor will be needed to complete the required programming. Contractor programming costs are estimated as follows:
$372,360 - 1,284 Programmer/Analyst hours
$ 5,000 - Developer software costs
$ 1,018 - Ongoing cost of developer software
$ 175 - Network hookup

$ 232 - Ongoing network cost
$ 450 - Emulation software
$ 290 - Office Suite software
$379,525 - Total Cost

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*
   A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

The Federal Advance Interest Repayment Fund revenues will increase by $559,265 in the 2007-2009 biennium and $453,005 in the 2009-2011 biennium.

The Unemployment Insurance Trust Fund revenues will increase by $559,265 in the 2007-2009 biennium and $453,005 in the 2009-2011 biennium. Unemployment Insurance Trust funds may only be used to pay unemployment benefits.

   B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

The expenditure would be to enter into a contract with external programmers. The projected expenditure would affect the operating expense line item and would be charged to the agency's federal funds and/or would be charged to the Federal Advance Interest Repayment Fund.

The expenditures, if any, would be offset against another planned expenditure in order to stay within the available resources.

   C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

Because the agency would not be receiving any additional federal resources to fund this expenditure, an offsetting decrease in another budgeted operating expense item would need to be accomplished. Therefore, there would not be any impact on the agency's appropriation. Any Federal Advance Interest Repayment Fund revenues and expenditures are under continuing appropriation status.

Name:	Larry Anderson	**Agency:**	Job Service
Phone Number:	701-328-2843	**Date Prepared:**	01/18/2007

Date: 1-30-07
Roll Call Vote #:

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1409

House **Industry Business & Labor** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass

Motion Made By Rep Clark Seconded By Rep Gruchalla

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	X		**Rep. Amerman**		X
Vice Chairman Johnson	X		**Rep. Boe**	X	
Rep. Clark	X		**Rep. Gruchalla**	X	
Rep. Dietrich	X		**Rep. Thorpe**		X
Rep. Dosch			**Rep. Zaiser**		
Rep. Kasper	X				
Rep. Nottestad	X				
Rep. Ruby	X				
Rep. Vigesaa	X				

Total Yes 10 No 2

Absent 2

Floor Assignment Rep. Dosch

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1409: Industry, Business and Labor Committee (Rep. Keiser, Chairman) recommends **DO PASS** (10 YEAS, 2 NAYS, 2 ABSENT AND NOT VOTING). HB 1409 was placed on the Eleventh order on the calendar.

2007 HOUSE APPROPRIATIONS

HB 1409

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1409

House Appropriations Committee

☐ Check here for Conference Committee

Hearing Date: February 6, 2007

Recorder Job Number: 2959

Committee Clerk Signature	Holly N. Aand

Minutes:

Chm. Svedjan opened the hearing on HB 1409.

Rep. Keiser, Committee Chairman, Industry Business and Labor: Employers make deposits into the Unemployment Insurance Reserve Trust Fund (UIRTF) to pay for employees when they are laid off. There are two divisions within the employer groups: Positive Value Employers (paid more in premiums over the last six years than they have taken out) and Negative Balance Employers (paid into the fund, but the fund paid out more than they paid in). This is a huge policy issue.

Rep. Keiser: IBL believes it is important to maintain the negative balance employers to maintain a quality workforce in those areas that must lay off employees for relatively long period of time due to the nature of the business, such as a road construction company that does little work in winter months. It is also important to keep negative balance employers for reasons of economic development. Rep. Keiser gave the example of such an employer (Ref. 2:56). We do everything within reason to limit negative balance employers. They pay a much higher rate.

This bill addresses negative balance employers and "job attached" employees. Job attached employees are those employees (for a negative balance employer) that are not required to meet typical conditions. It's advantageous to be job attached. The reason to job attach

employees is to keep them in the state or go to another job. We want the employees to be ready when they are needed.

During the interim we did a study and recognized two problems: 1. Who decides an employee is job attached? Up until a year ago, the employee decided. As of today, the employer must designate who is job attached, but there is no restriction or penalty to putting an employee in a job attached category. This bill says that the employer must name the employees designated as job attached and pay $100 for every job attached employee. Fifty percent of that money will go into the fund against benefits paid. Fifty percent will go into FAIRF (Federal Advance Interest Repayment Fund). The reason for this is to pay for recurring costs as indicated on the Fiscal Note.

Chm. Svedjan: Funds go into that fund (FAIRF) because they have operational expenses that relate to this?

Rep. Keiser: That is correct. They are projecting revenues of $1, 118,530, expenditures of $379,525. Half of that $1 million is going to be applied toward your experience rating. The money stays within Job Service. The interim committee had a bill with a graduated scale and the feds ruled it was illegal. IBL found this as the only way to circumvent the federal rules on putting a penalty on job attachment. This formula has been approved by the federal government relative to Job Service.

Chm. Svedjan: There are no general funds involved here. This goes into Job Service and is split into those two funds. The $100 is per employee to job attach an employee.

Rep. Hawken: I am getting a lot of email about this bill and no one is asking me to vote for it. Where do our negative rates compare to the national?

Rep. Keiser: Our top negative rate is about at the top rate nationally. Our lowest negative rate is not the highest in the country. You EARN the rate you get based on utilization. Our formula

allows employers to reduce their rate. They can buy down their rate at any time and get into the positive category or a lower negative rate.

Rep. Gulleson: Is there an inherent incentive for the employer to keep an employee attached through the off season? Wouldn't it be to their advantage to just let the employee go?

Rep. Keiser: Right now I would bet 90-100 percent of your employees if you're a negative balance employer are declaring they are job attached and the employer is saying "I would like you to come back." That's not the purpose of job attached. The purpose was for the critical employees you need to start up your business, bring it back online, and with qualified, experienced employees. On the other hand, there are a lot of employees who are hired for one or two years and have no intention of coming back and don't qualify for job attached and shouldn't be subsidized.

Rep. Ekstrom: What kind of negative testimony did you have on this bill?

Rep. Keiser: The AGC spoke in opposition to this bill. I don't remember anyone else. Other groups spoke in support of this bill.

Chm. Svedjan: Business representative groups?

Rep. Keiser: Motor carriers, for example.

Rep. Carlson: How did you establish the $100 fee?

Rep. Keiser: We backed into it. How much do we need to pay for the program? Based on the numbers, we'll need about $50 per person. The federal guidelines said you need a 50/50 split. You can't go over %40 on the administrative, so we said we want the penalty to be reasonable.

Rep. Carlson: By using the job attached formula and the $100, does this increase the liability of this negative fund employer?

Rep. Keiser: It reduces it because they are less likely to consider someone job attached and those people are then more likely to go out and find employment. Also, when they make this

payment, fifty percent goes into their account. You are actually putting additional money into your fund which could potentially reduce the rate.

Rep. Carlson: There is no adverse affect to the premiums that are being paid by the positive balance employer?

Rep. Keiser: The only affect it can have is a positive one.

Rep. Carlson: I have some concern from the positive balance employers like me who are paying higher premiums.

Rep. Keiser: I disagree. It does help you. It puts fifty new dollars there that weren't there before into that fund to help pay the costs of the benefits paid. That's $50 that will not be coming out of the positive balance employer's pocket.

Rep. Gulleson motioned for a Do Not Pass. Rep. Kerzman seconded the motion. The motion carried by a roll call vote o 19 ayes, 4 nays and 1 absent and not voting. Rep. Gulleson was designated to carry the bill.

Date: 2/6/07
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1409

House Appropriations Full Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number —

Action Taken Do Not Pass

Motion Made By Gulleson Seconded By Kerzman

Representatives	Yes	No	Representatives	Yes	No
Chairman Svedjan		✓			
Vice Chairman Kempenich	—	—			
Representative Wald	✓		Representative Aarsvold	✓	
Representative Monson	✓		Representative Gulleson	✓	
Representative Hawken	✓				
Representative Klein	✓				
Representative Martinson	✓				
Representative Carlson	✓		Representative Glassheim	✓	
Representative Carlisle	✓		Representative Kroeber	✓	
Representative Skarphol		✓	Representative Williams	✓	
Representative Thoreson	✓				
Representative Pollert	✓		Representative Ekstrom	✓	
Representative Bellew		✓	Representative Kerzman	✓	
Representative Kreidt	✓		Representative Metcalf	✓	
Representative Nelson		✓			
Representative Wieland	✓				

Total (Yes) 19 No 4

Absent 1

Floor Assignment Gulleson

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1409: Appropriations Committee (Rep. Svedjan, Chairman) recommends **DO NOT PASS** (19 YEAS, 4 NAYS, 1 ABSENT AND NOT VOTING). HB 1409 was placed on the Eleventh order on the calendar.

Date: 2/9/07
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1409

House Appropriations Full Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number ——

Action Taken Reconsider HB 1409

Motion Made By Carlson Seconded By Carlisle

Representatives	Yes	No	Representatives	Yes	No
Chairman Svedjan					
Vice Chairman Kempenich					
Representative Wald			Representative Aarsvold		
Representative Monson			Representative Gulleson		
Representative Hawken					
Representative Klein					
Representative Martinson					
Representative Carlson			Representative Glassheim		
Representative Carlisle			Representative Kroeber		
Representative Skarphol			Representative Williams		
Representative Thoreson					
Representative Pollert			Representative Ekstrom		
Representative Bellew			Representative Kerzman		
Representative Kreidt			Representative Metcalf		
Representative Nelson					
Representative Wieland					

Total (Yes) ______ No ______

Absent ______

Floor Assignment ______

If the vote is on an amendment, briefly indicate intent:

Voice Vote - fail

2007 TESTIMONY

HB 1409

#1

House Bill 1409
Testimony of Larry D. Anderson
Job Service North Dakota
before the
House Committee On
Industry, Business and Labor
Representative George Keiser, Chairman
January 24, 2007

Mr. Chairman and Members of the Committee, I am Larry Anderson, Director of Workforce and Unemployment Insurance Programs with Job Service North Dakota. I am here today to discuss House Bill 1409, a bill which requires Job Service North Dakota to impose a fee upon employers in the negative tax rate category who choose to utilize return-to-employer status for laid off employees of their firms.

This bill is the result of work by the Interim Industry Business and Labor Committee based upon the results of a report on the Reemployment Policies and Practices of Job Service North Dakota as directed by HB 1198 of the 59th Legislative session.

House Bill 1409, requires that Job Service North Dakota assess a fee to negative balance employers choosing to utilize return-to-employer status for employees they have laid off, but who they wish to have return to employment with them after the layoff period. The bill also outlines the specific uses for the moneys collected as a result of the fee.

In order to properly explain the bill, I will first provide some information as to the Unemployment Insurance process. This information should help to understand the various aspects associated with this legislation.

When an unemployment insurance claimant is placed in a return-to-employer status, the program eligibility requirements that must be met by the claimant are different than for a claimant who is laid off permanently. One of the key differences is that claimants who are coded as returning-to-employer are not required to search for work during the time in which they are unemployed. Return-to-employer status is an important piece of the Unemployment Insurance program for many North Dakota employers. At this time, approximately 59% of the unemployment insurance claimants in North Dakota are coded as returning-to-employer. This equates to 10,478 individuals in return-to-employer status. Of these 10,478 claimants, 5,887 work for negative balance employers. This is approximately 56% of all of the claimants coded as returning-to-employment. The other 44% work for positive balance employers.

Many employers rely upon the return of trained employees from short-term or seasonal layoffs in order to maintain the viability of their businesses. It should also be noted that there are many businesses in need of employees to maintain an appropriate level of staffing, even as unemployed individuals who could effectively fill these open positions are drawing UI benefits. Although the skill sets desired by these employers does not

match the available skill sets of all of the UI claimants coded as returning-to-employer, many of these claimants possess the necessary training and skills required to complete the available work, and many employers have expressed the desire to put these UI claimants to work within their organizations, even if only for a limited period of time.

During the course of the study of Reemployment Policies and Practices of Job Service North Dakota, concerns were raised by a segment of employers that both fell into the positive balance category, and desired to hire additional staff. These employers expressed frustration in the fact that as positive balance employers, they had borne a majority of the costs of building the UI Trust Fund up to the designated target, while negative balance employers were able to "protect" their workforce during times of layoff, even though they had not contributed to the UI Trust Fund at the level that positive balance employers had. It was felt that by imposing a fee upon negative balance employers; only those employees who the employer felt were critical to the operation of the business would be coded as returning-to-employer, thus making available to other employers a segment of claimants previously out of the workforce due to return-to-employer status. Additionally, it was felt that imposition of a return-to-employer fee would shift additional monetary burden of the UI program to the negative balance employers of North Dakota.

House Bill 1409 is designed to address both concerns raised during the study; the availability of workers, and the shift of monetary burden to negative balance employers. This is accomplished by the imposition of a fee of $100.00 per employee coded as returning-to-employer at the request of a negative balance employer.

Based on past usage of return-to-employer status, approximately 1,655 employers would potentially be affected by the fee. These employers would be assessed fees totaling approximately $1,118,350 in the first year. Of this amount, 50% of the moneys collected would be considered as a contribution to the UI Trust fund, and 50% would be deposited in the Federal Advance Interest Repayment Account to be used to fund re-employment efforts of UI claimants in North Dakota, and to assist in maintaining the integrity of the UI program. While the numbers provided are based upon actual experience, Job Service North Dakota feels that by applying this fee, use of return-to-employer status will be reduced significantly in subsequent years, and collected fees will decline from the noted amounts.

Mr. Chairman, this concludes my testimony. At this time I would be happy to answer any questions from the committee.

#2

TESTAMONY
HOUSE BILL 1409
INDUSTRY BUSINESS & LABOR COMMITTEE
JANUARY 24, 2007

Mr. Chairman and members of the House Industry, Business and Labor committee my name is Tom Balzer, managing director of the North Dakota Motor Carriers Association. I am here this morning to testify in support of House Bill 1409.

The return to employer status was established over 25 years ago as a management tool by Job Service to balance workloads during times of seasonal employment and layoffs. With nearly 70% of the claimants being job attached this management decision by Job Service has grown into a full fledged employee retention program for some employers at the expense of others.

In both federal and state law, for a claimant to be eligible for unemployment compensation they must meet four criteria:

1. They must have lost employment at no fault of their own,
2. They must be able to work,
3. They must be available for work, and
4. They must be actively seeking work

Our concern is that a job attached employee is given special treatment as they are not required to be available for work nor actively seek work. The unemployment trust fund is paying for approximately 12,000 claimants annually without a requirement to follow both state and federal law.

We do acknowledge the need for the return-to-employer option as a method of keeping our workforce available in the state; and in order to find a compromise to the situation, there are two important factors:

First is accountability by the employers to closely monitor which employees are utilizing the return to employer status. Currently, the process starts with the employee filing a claim and designates them self as job attached. Then a notice is sent to an employer, if the employer does not contest this claim or does not respond the employee by default is job attached. We feel that there is an over-utilization under the current system, that some employees who are not necessary to the operations of the business are job attached because there is no incentive for the employer to return the form.

The second is that employers who benefit from this system do not unduly burden the system. Currently an employer can pay up to $2,048.27 ($20,300 x 10.09%) per employee for their contribution to the unemployment compensation fund. The average job attached claimant draws unemployment compensation for 10.93 weeks at $340 therefore receiving benefits of $3,716.20. This leaves an under-funded amount of $1,667.93 per employee that must be covered by other employers.

The largest single employer utilizing the return to employer status does so for approximately 260 employees. Under House Bill 1409 this employer would have to pay $26,000. Now take the $1,667.93 of under-funded benefits in the above example multiplied by those 260 employees, resulting in a total of $433,661.80 annually to be picked up by other employers to cover the under-funded unemployment benefits of this one employer. Is a $26,000 contribution too much to ask for 17 times the return?

We feel the $100 fee is a fair and reasonable assessment as well as provide enough incentive for employers to only place those employees that are truly necessary for their business on return to employer status.

I have with me today Marv Skar, president of E.W. Wylie in Fargo and Dick Johnsen, president of Johnsen Trailer Sales in Bismarck and Fargo to give you a perspective of how this affects their business.

Mr. Chairman, this concludes my testimony and I would be happy to answer any questions the committee may have, before Mr. Skar and Mr. Johnsen address you.

#3

CHAIMAN KEISER AND MEMBERS OF THE HOUSE IBL COMMITTEE

FOR THE RECORD MY NAME IS DICK JOHNSENM I CHAIR THE LEGISLATIVE COMMITTEE OF THE NDMCA

I APPEAR TODAY IN SUPPORT OF HB 1409

THE NDMCA HAS A LONGTERM INVOLVEMENT IN JOB SERVICE MATTERS AND LEGISLATION GOING BACK TO THE 80'S.

AS AN INDUSTRY WE SUPPORT THIS LEGISLATION HOWEVER MOST OF OUR MEMBERS DO NOT THINK IT GOES FAR ENOUGH. IT IS HOWEVER A STEP IN THE RIGHT DIRECTON.

A MAJORITY OF OUR MEMBERS ARE POSITIVE BALANCE EMPLOYERS.

IN OUR OPINION IF AN EMPLOYER WANTS TO DECLARE HIS UNEMPLOYED WORKERS AS HAVING RETURN TO WORK STATUS THEY SHOULD BE RESPONSIBLE FOR ALL ASSOCIATED COSTS. BEING A REALIST I UNDERSTAND THAT THAT WILL PROBABLY NEVER HAPPEN. WE UNDERSTAND THAT WE ARE DEALING WITH A FORM OF INSURANCE BUT IT IS AN INSURANCE THAT IS NOT BASED ON LOSS RATIOS AND EXPOSURE ALONE LIKE INDEMNITY INSURANCE, THERE IS A SOCIAL ELEMENT INVOLVED.

OUR INDUSTRY DOESN'T THINK THAT A $100 FEE FOR THE RIGHT TO DECLARE THAT AN EMPLOYEE HAS RETURN TO WORK STATUS IS A HIGH PRICE TO PAY FOR AN EMPLOYER TO HAVE SOME REASSURANE THAT AN EMPLOYEE WILL BE AVAILABLE TO THAT EMPLOYER WHEN WORK BECOMES AVAILABLE

HB 1409 AND HB 1413 WHICH YOU HEAR NEXT SOMEWHAT LEVEL THE FIELD BETWEEN THE POSITIVE BALANCE EMPLOYERS AS A GROUP THAT CONTRIBUTE FAR IN EXCESS OF BENEFITS PAID AND NEGATIVE BALANCE EMPLOYERS AS A GROUP.
THAT EXCESS IN THE YEARS 2003-2005 TOTALED MORE THAN 43 MILLION DOLLARS AND ENABLED THE RESERVE TO REACH TARGET AHEAD OF SCHEDULE.

MR CHAIMAN I WANT TO THAN YOU FOR THE OPPORTUNITY TO EXPRESS OUR INDUSTRIES VIEWS ON THIS IMPORTANT LEGISLATION.

#4

Testimony – HB 1409
House Industry, Business, & Labor Committee
January 24, 2007

Mr. Chairman and members of the House Industry, Business, & Labor Committee, my name is Russ Hanson with the Associated General Contractors of North Dakota and the association is opposed to HB 1409.

We acknowledge the issue the positive balance employers have regarding the inability to find an adequate number of employees for their profession. However, the AGC believes HB 1409 will not solve it. North Dakota has one of the lowest unemployment rates in the nation and all occupations are having difficulty finding employees to fill vacancies. We view the problem as a labor shortage and changing the "return to work" policy will not address the situation in our opinion.

The "Return to Work" provision is one our industry takes very seriously and the respective employers who utilize it do so to protect key employees who return to work annually. These employees are critical to the operation. The nature of their occupation coupled with the seasonal limits make "Return to Work" critical. An excellent improvement to this process is being implemented by changing the UI claim form to clarify to the employer which employees are being named to "return to work" status. The previous form was confusing and we applaud Job Service for listening to industry and adopting the change.

To clarify a couple of assumptions, I have attached several items to this testimony. Please refer to **attachment one**. This is an illustration of the composition of the negative balance employers. While the construction industry is the largest single negative balance employer – please note there are several other key industries which would be affected by the policy change in HB 1409. Agriculture, manufacturing, wholesale, transportation, administrative, and service industries are all affected by HB 1409. It is not simply a provision utilized by the construction industry.

Another assumption is that the negative balance employers have been a "drain" on the Unemployment Insurance Fund and perhaps abuse of the "Return to Work" provision is the cause. We do not view it that way. Please refer to **attachment two** and note the difference between contributions given and benefits paid for the positive and negative balance employers. The majority of the negative balance employers actually contribute more than they receive in benefits. When comparing the difference – it outlines the fact that the negatives do not drain the fund – rather the positive balance employers were more responsible for building the reserves of the fund to the level it is today.

We outlined attachment two to illustrate what we believe is the policy solution the Legislature should consider to reward the positive balance employers who built the reserves rather than implement an additional fee for employers who utilize a provision necessary to retain key employees.

After crossover, the House will consider SB 2035 which was a companion bill to HB 1409 from a 2005-07 interim study. This legislation rewards the positive balance employers by issuing them a reduction in premium when the UI fund is at or above its reserve target while the negative balance employers will receive no reduction. In fact the negatives will accept additional premium responsibility. This is illustrated in **attachment three** which outlines the rate modification proposed in SB 2035. This is legislation we support and proactively addresses a situation which deserves attention.

We are opposed to HB 1409 because we do not believe it will address the issue of positive balance employers gaining access to the "return to work" status employees and we believe an additional fee to utilize this provision is unfair. The negative balance employers pay a rate that is sometimes ten times higher than the lowest negative balance employers. We envision the result from the enactment of HB 1409 would be one of two scenarios. Either the employers will pay the additional tax/fee to retain the key employees and that will be passed on to the consumer. Or, key employees may decide to find employment elsewhere (other states) where this policy is not in place. Either way, the issue of accessing these employees is not achieved and our state faces the possibility

of losing valuable employees. Another reason we do not believe HB 1409 is necessary is the fact that the duration of receiving benefits for "Return to Work" employees is nearly identical to those who are actively seeking work. We believe this fact illustrates key employees receive UI benefits when they are unable to work and return to the employer as soon as work is available.

In conclusion, when our UI reserves are at targeted levels ($80 million plus) - adding an additional $1.8 million dollar assessment to business is a policy proposal we strongly oppose.

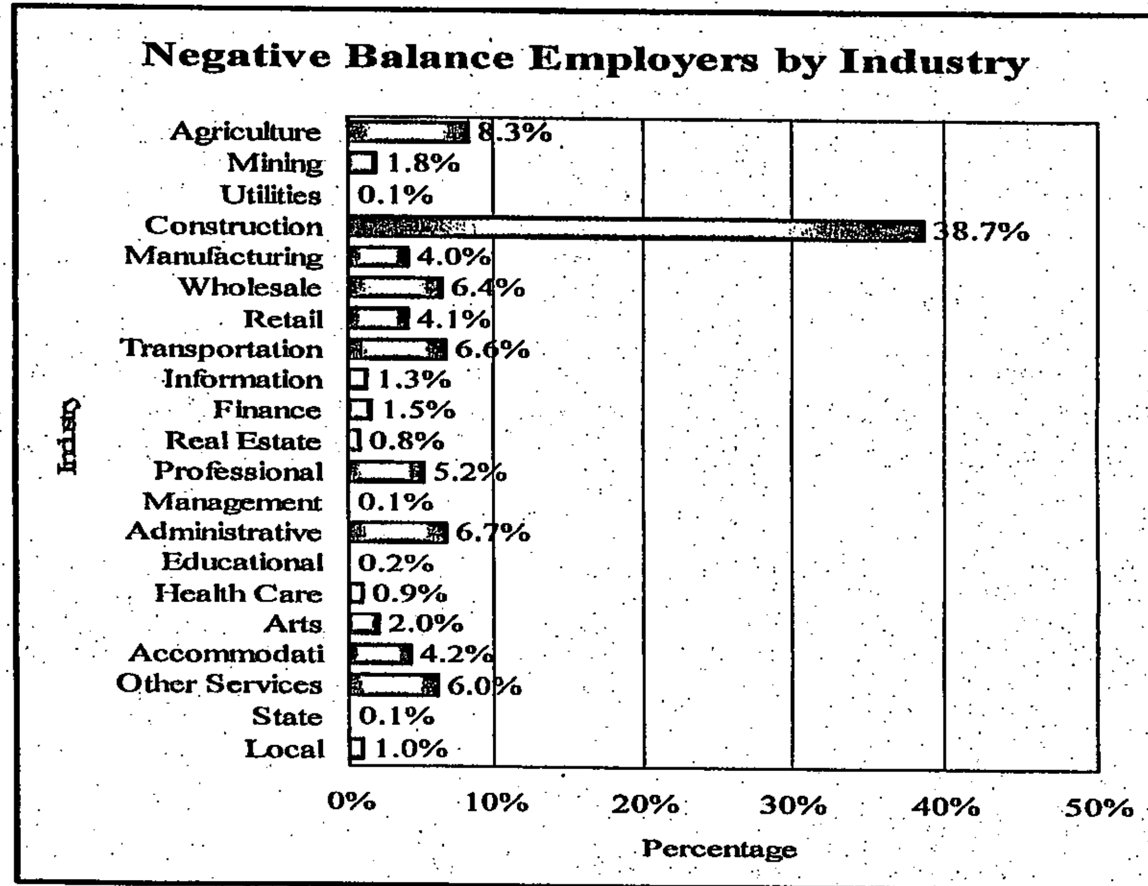
There are contractors who are present who will illustrate the scenarios considered when utilizing "return to work" provision and why it is important to their business.

Mr. Chairman and members of the committee, thank you for the opportunity to testify today. We request you issue a Do Not Pass recommendation to HB 1409 and communicate to you there is another legislative proposal which addresses the issues of positive balance employers. I would be happy to attempt to address any questions.

Attachment 1

Negative Balance Employers by Industry

Agriculture	147
Mining	32
Utilities	1
Construction	689
Manufacturing	72
Wholesale	114
Retail	73
Transportation	118
Information	23
Finance	26
Real Estate	14
Professional	93
Management	2
Administrative	120
Educational	4
Health Care	16
Arts	36
Accommodations	75
Other Services	107
State	1
Local	16
Total	1,779



Source: CY 2005 experience rate run, negative balance employers. Excluded if there were no recent taxable wages.

Attachment 2

Prepared [redacted] D/LMI

Categories	Average Tax Rate	10-1-2002 to 9-30-2003 - FY 2003 Contributions	Benefits	Difference	10-1-2003 to 9-30-2004 - FY 2004 Contributions	Benefits	Difference	10-1-2004 to 9-30-2005 - FY 2005 Contributions	Benefits	Difference
Positive Rated	0.94%	28,708,734.64	19,429,755.28	9,278,979.36	30,733,560.82	14,589,993.56	16,143,567.26	33,152,183.57	14,868,408.97	18,283,774.60
Negative Rated	8.29%	17,366,948.35	19,197,402.83	-1,830,454.48	20,132,537.77	19,359,879.11	772,658.66	17,501,067.43	17,757,530.93	-256,463.50
Negative Maximum	10.09%	236,370.78	382,774.44	-146,403.66	285,861.39	328,200.68	-42,339.29	472,566.46	576,446.12	-103,879.66
Negative Minimum	6.49%	888,320.63	1,641,123.40	-752,802.77	256,355.11	781,570.57	-525,215.46	108,859.67	455,218.30	-346,358.63
New - nonconstruction	2.08%	3,668,333.90	970,885.30	2,697,448.60	3,856,034.44	443,440.94	3,412,593.50	3,916,054.53	666,453.72	3,249,600.81
New - construction	10.09%	1,667,588.23	454,339.96	1,213,248.27	2,511,392.48	365,308.78	2,146,083.70	2,409,682.85	656,915.95	1,752,766.90
Total		52,536,296.53	42,076,281.21	10,460,015.32	57,775,742.01	35,868,393.64	21,907,348.37	57,560,414.51	34,980,973.99	22,579,440.52

Categories	Average Tax Rate	FY 2003 Contributions	Benefits	Difference	FY 2004 Contributions	Benefits	Difference	FY 2005 Contributions	Benefits	Difference
Positive Rated	0.49%	1,721,841.51	2,359,158.74	-637,317.23	1,770,039.69	1,914,871.21	-144,831.52	2,230,510.33	2,469,736.01	-239,225.68
	0.59%	1,960,219.51	2,156,719.47	-196,499.96	1,926,481.42	1,185,928.57	740,552.85	2,284,692.85	1,033,311.34	1,251,381.51
	0.69%	2,099,712.45	1,054,987.36	1,044,725.09	2,312,060.15	730,800.26	1,581,259.89	2,503,969.65	549,991.37	1,953,978.28
	0.79%	2,296,790.20	1,080,839.13	1,215,951.07	2,474,053.98	911,598.72	1,562,455.26	2,751,537.52	587,382.59	2,164,154.93
	0.89%	2,527,171.58	1,156,647.90	1,370,523.68	2,851,402.22	702,691.75	2,148,710.47	3,310,578.22	566,767.14	2,743,811.08
	0.99%	2,778,440.73	814,285.80	1,964,154.93	3,017,744.73	999,317.14	2,018,427.59	3,041,641.75	544,042.57	2,497,599.18
	1.09%	3,266,331.37	1,288,761.65	1,977,569.72	2,803,656.15	659,371.46	2,144,284.69	3,317,477.44	793,937.29	2,523,540.15
	1.19%	3,371,608.35	1,349,090.15	2,022,518.20	4,106,066.87	1,658,551.30	2,447,515.57	3,481,484.35	1,235,546.14	2,245,938.21
	1.29%	3,560,847.08	1,851,507.17	1,709,339.91	3,616,844.02	2,056,979.58	1,559,864.44	4,295,770.51	2,130,020.77	2,165,749.74
	1.39%	5,125,771.86	6,317,757.91	-1,191,986.05	5,855,211.59	3,769,883.57	2,085,328.02	5,934,520.95	4,957,673.75	976,847.20
Negative Rated	6.49%	2,274,815.54	1,419,541.26	855,274.28	2,289,209.91	1,174,173.57	1,115,036.34	2,009,168.95	1,530,372.15	478,796.80
	6.89%	1,094,740.92	1,101,944.26	-7,203.34	1,616,586.21	1,409,188.31	207,397.90	865,901.66	782,682.17	83,219.49
	7.29%	815,177.43	989,436.13	-174,258.70	940,439.15	715,019.23	225,419.92	494,443.05	291,765.29	202,677.76
	7.69%	1,166,062.33	964,049.61	202,012.72	1,578,130.53	1,072,334.11	505,796.42	1,138,906.95	811,412.62	327,494.33
	8.09%	1,760,947.17	1,199,315.41	561,631.76	882,568.27	785,044.20	97,524.07	1,807,634.91	1,268,858.10	538,776.81
	8.49%	314,339.31	310,248.33	4,090.98	1,495,987.94	1,627,032.90	-131,044.96	1,262,362.90	1,151,127.40	111,235.50
	8.89%	2,444,164.08	2,083,558.25	360,605.83	2,152,981.54	2,177,182.18	-24,200.64	1,939,092.67	2,096,574.38	-157,481.71
	9.29%	2,140,608.85	2,619,017.16	-478,408.31	2,414,465.15	2,400,201.54	14,263.61	2,345,333.86	3,210,987.39	-865,653.53
	9.69%	3,084,216.23	5,102,874.52	-2,018,658.29	3,670,277.26	3,664,337.70	5,939.56	2,839,082.56	3,018,404.88	-179,322.32
	10.09%	2,271,876.49	3,407,417.90	-1,135,541.41	3,091,891.81	4,335,365.37	-1,243,473.56	2,799,139.92	3,595,346.55	-796,206.63
Negative Maximum	10.09%	236,370.78	382,774.44	-146,403.66	285,861.39	328,200.68	-42,339.29	472,566.46	576,446.12	-103,879.66
Negative Minimum	6.49%	888,320.63	1,641,123.40	-752,802.77	256,355.11	781,570.57	-525,215.46	108,859.67	455,218.30	-346,358.63
New - nonconstruction	2.08%	3,668,333.90	970,885.30	2,697,448.60	3,856,034.44	443,440.94	3,412,593.50	3,916,054.53	666,453.72	3,249,600.81
New - construction	10.09%	1,667,588.23	454,339.96	1,213,248.27	2,511,392.48	365,308.78	2,146,083.70	2,409,682.85	656,915.95	1,752,766.90
Total		52,536,296.53	42,076,281.21	10,460,015.32	57,775,742.01	35,868,393.64	21,907,348.37	57,560,414.51	34,980,973.99	22,579,440.52

Attachment 3

Description	① Number of Employers	Tax Rate Before Multiplier	Tax Rate After 80.70% Multiplier	Percentage of Taxable Wages	Percentage of Taxable Wages per Group	Projected Income
Calendar Year 2007 Tax Rate Schedule						
10 groups = 100% of positive employer taxable wages	5,232	0.42%	0.34%	88.78%	10.000%	$1,285,000
	2,536	0.52%	0.42%	88.78%	10.000%	1,587,000
	1,584	0.62%	0.50%	88.78%	10.000%	1,890,000
	1,046	0.72%	0.58%	88.78%	10.000%	2,192,000
	1,297	0.82%	0.66%	88.78%	10.000%	2,494,000
	861	0.92%	0.74%	88.78%	10.000%	2,797,000
	915	1.02%	0.82%	88.78%	10.000%	3,099,000
	1,304	1.12%	0.90%	88.78%	10.000%	3,401,000
	1,328	1.22%	0.98%	88.78%	10.000%	3,703,000
	1,880	1.32%	1.07%	88.78%	10.000%	4,044,000
Positive	17,983					$26,492,000
10 groups = 100% of negative employer taxable wages	172	6.42%	5.18%	5.50%	10.000%	1,213,000
	108	6.82%	5.50%	5.50%	10.000%	1,288,000
	115	7.22%	5.83%	5.50%	10.000%	1,365,000
	78	7.62%	6.15%	5.50%	10.000%	1,440,000
	88	8.02%	6.47%	5.50%	10.000%	1,515,000
	226	8.42%	6.79%	5.50%	10.000%	1,590,000
	121	8.82%	7.12%	5.50%	10.000%	1,667,000
	43	9.22%	7.44%	5.50%	10.000%	1,742,000
	131	9.62%	7.76%	5.50%	10.000%	1,817,000
	439	10.02%	8.09%	5.50%	10.000%	1,894,000
Negative	1,521					$15,531,000
Positive & Negative	19,504					$42,023,000
Negative - construction		10.02%	8.09%	0.15%	100.000%	517,000
Negative - non-construction		6.42%	5.18%	0.15%	100.000%	331,000
New - non-construction		1.98%	1.60%	4.58%	100.000%	3,119,000
New - construction		10.02%	8.09%	0.84%	100.000%	2,893,000
Rounding						
Total						$48,883,000
Average Tax Rate						1.15%

Description	Tax Rate Before Multiplier	Tax Rate After 80.70% Multiplier	Percentage of Taxable Wages	Percentage of Taxable Wages per Group	Projected Income
Negative Employer Multiplier Cannot Be Less Than 100%					
10 groups = 100% of positive employer taxable wages	0.31%	0.25%	88.78%	10.000%	$945,000
	0.41%	0.33%	88.78%	10.000%	1,247,000
	0.51%	0.41%	88.78%	10.000%	1,549,000
	0.61%	0.49%	88.78%	10.000%	1,852,000
	0.71%	0.57%	88.78%	10.000%	2,154,000
	0.81%	0.65%	88.78%	10.000%	2,456,000
	0.91%	0.73%	88.78%	10.000%	2,759,000
	1.01%	0.82%	88.78%	10.000%	3,099,000
	1.11%	0.90%	88.78%	10.000%	3,401,000
	1.21%	0.98%	88.78%	10.000%	3,703,000
Positive					$23,165,000
10 groups = 100% of negative employer taxable wages	6.31%	6.31%	5.50%	10.000%	1,477,000
	6.71%	6.71%	5.50%	10.000%	1,571,000
	7.11%	7.11%	5.50%	10.000%	1,665,000
	7.51%	7.51%	5.50%	10.000%	1,758,000
	7.91%	7.91%	5.50%	10.000%	1,852,000
	8.31%	8.31%	5.50%	10.000%	1,946,000
	8.71%	8.71%	5.50%	10.000%	2,039,000
	9.11%	9.11%	5.50%	10.000%	2,133,000
	9.51%	9.51%	5.50%	10.000%	2,226,000
	9.91%	9.91%	5.50%	10.000%	2,320,000
Negative					$18,987,000
Positive & Negative					$42,152,000
Negative - construction	9.91%	9.91%	0.15%	100.000%	633,000
Negative - non-construction	6.31%	6.31%	0.15%	100.000%	403,000
New - non-construction	1.81%	1.46%	4.58%	100.000%	2,846,000
New - construction	9.91%	8.00%	0.84%	100.000%	2,860,000
Rounding					-11,000
Total					$48,883,000
					1.15%

Projected CY 2007 Taxable Wages $4,256,680,000 Income Difference
-$340,000
-340,000
-341,000
-340,000
-340,000
-341,000
-340,000
-302,000
-302,000
-341,000
-$3,327,000
$264,000
283,000
300,000
318,000
337,000
356,000
372,000
391,000
409,000
426,000
$3,456,000
$129,000
116,000
72,000
-273,000
-33,000
-11,000
$0
0.00%

① Employer counts are from a database with 10-1-2005 to 9-30-2006 taxable wages used for CY 2007 tax rates.

#5

Chairman Kaiser and Members of the Committee:

My name is Marvin Miller. I am a partner in and Vice President of Twin City Roofing Inc. located in Mandan. Our company is a commercial roofing contractor doing work in about half of the state of North Dakota. I am opposed to H.B. 1409.

We are a seasonal employer. We vary from approximately 12 to 15 employees in the winter months to 40 to 45 employees at our peak. Since all of our work is outside we are very much at the mercy of the weather. We will work whatever hours we can during the winter months however temperatures and snow or ice have a direct impact on the quality of our finished product. As a result there are times every winter when we are not able to work. We recall our employees whenever weather allows us to work.

We have been able to have our employees be considered as job attached by Job Service. Obviously most of them are not out seeking other employment during this time when Twin City Roofing is not able to work.

Our work requires a considerable amount of on-the-job training. The first few months we have an employee those people are not very productive for us. That is not to say they are not working hard, but it takes time for them to learn the many facets of our industry. When we start a new hire in April that person has become a fairly skilled worker by fall. Many years that is just about the time the weather turns and we are not able to work on a consistent basis. If this worker is not able to file as job attached he must seek other employment. If another employer hires this worker our training dollars have been wasted. Our productivity would also be impacted as we would not have the nucleus of experienced workers.

These workers become more valuable to us each successive season we are able to retain them. Probably after 4 or 5 years they will have obtained the skills needed to be a foreman. Yet each year, if they are not allowed to file as job attached, we risk losing them. I realize

we could lose any worker at any time but if these people enjoy their work enough to return season after season why do we have to constantly be concerned that we may not be able to retain them?

We continue to pay for health, life and disability insurance during the time these workers are drawing benefits.

The workers in the roofing trade, as well as the entire construction industry, are getting older. Within the next 15 years a huge percentage of the current workers will be retired. We are not able to replace these workers nearly fast enough to sustain the industry. We need the ability to job attach workers, especially in the seasonal trades.

The proposed fee, or tax increase, will cost Twin City Roofing approximately $2000 per year. This additional expenditure will increase the cost of doing business. As you are well aware, in order to recover this additional cost we need to do more volume. That requires workers, more specifically, trained workers.

The fiscal note attached to the H.B. 1409 indicates an anticipated 10% annual decline. Can this be interpreted to mean the fee will be raised in the future so that it will be high enough that those of us who wish to job attach employees will not be able to afford it after a few years?

I respectfully request this committee to give H.B. 1409 a **"DO NOT PASS"** recommendation.

Marvin Miller
Vice President
Twin City Roofing, Inc.

#26

House Bill 1409

Chairman Kaiser, Members of the Committee. My name is Brad Ballweber. I am VP/Treasurer of Northern Improvement Company. We are a heavy/highway contractor headquartered in North Dakota. **We oppose HB 1409.**

- A $100.00/employee job attached fee would have a detrimental effect on competitive bids. By way of example, if our job attached employee total is 200, our cost would be $20,000.00. Out of state contractors would not have this additional cost. We have lost many competitively bid state projects to out of state contractors by far less dollar values.

- Due to weather, our work force is seasonal. Skilled construction people are becoming more difficult to find each year. Legislation of this kind may force key employees to move to another state to avoid the process outlined in HB 1409.

- In 1999, the legislature and ND Job Service implemented major changes. Today, because of these changes, the adjustable rate system has brought unemployment insurance out of its financial hole and we have exceeded the surplus goal. Granted, there are still some inequities between the positive and negative balance employers; however, with a little tweaking of the formula, greater balance will be achieved. I urge you not to implement a penalty fee for job attached employees as proposed in HB 1409. Rather, allow the adjustable formula system time to evolve and assess the results at a later date.

We oppose House Bill 1409.

A

job-attached participation and members of labor groups that are identified with job-attached populations such as construction workers.

Areas where the employer groups tend to agree are in responses to questions 6 and 12 concerning:

- Verification of job attachment
- Requiring employers to respond to JSND to verify claimant job search

Respondents that are job-attached UI Claimants strongly disfavor change. Respondents with standard occupational codes most disfavoring changes are (selected either disagree or strongly disagree responding to Question 3):

•Transportation	99%
•Construction	93%
•Repair	87%

In the final summation, this study raises a fundamental social policy question. That is whether or not job attachment for the retention of an industry's employees during off-season is an appropriate use of our state's Unemployment Insurance Program. This study points to sharp differences in opinion to the continuation or change of the current policy among the various groups affected. While the majority of employers tend to favor change, those most affected by any change, construction employers and UI Claimants, strongly oppose any change to the current policy. Any change--or for that matter, no change at all--is likely to antagonize one or more groups involved in unemployment compensation job attachment discussion. This is a situation in which common ground for all parties will likely be difficult to find. It is unlikely that any policy regarding job attachment will satisfy all groups with an interest in the discussion.

1-042 JTA43J B

JOB SERVICE NORTH DAKOTA
UNEMPLOYMENT INSURANCE/BUSINESS SERVICES
PO BOX 5507
BISMARCK, ND 58506-5507
(701)328-2814

2007 UNEMPLOYMENT INSURANCE TAX RATE AND TAXABLE WAGE BASE NOTICE

T
E W WYLIE CORPORATION
PO BOX 1188
FARGO ND 58107

DATE: 12-05-06

YOUR 2007 UNEMPLOYMENT INSURANCE TAX RATE IS 0.66%

IN 2007 THE FIRST $21,300 PAID EACH WORKER IS TAXABLE.

Your rate is determined in two steps. Step 1: It is determined if your Total All Years Reserve is positive or negative. Because your TOTAL ALL YEARS RESERVE is positive, your rate is from the enclosed POSITIVE ACCOUNT TAX RATE SCHEDULE.

Step 2: Your Reserve Ratio is determined by dividing the Last 6-Year Reserve by the Av[illegible]ge Taxable Payroll. The Reserve Ratio determines your rate within the Positive A[illegible]t Tax Rate Schedule.

YO[illegible] RESERVE RATIO IS 3.61 (LAST 6-YEAR RESERVE DIVIDED BY AVERAGE PAYROLL.)

	TOTAL ALL YEARS*	LAST 6 YEARS**
TAXES PAID	645,573	150,205
BENEFIT CHARGES	133,798	40,983
RESERVE =	511,775	109,222

YEAR ENDING	TAXABLE PAYROLL
9/06	3,001,046
9/05	3,142,286
9/04	2,909,307
AVERAGE =	3,017,547

Information Purposes Only: YEAR ENDING 9/06 TAXES PAID 29,527
BENEFIT CHARGES 4,614

Additional payments may be made to lower your rate. To figure the amount needed to place you in a lower rate within the schedule, multiply your average payroll by the reserve ratio needed for the desired rate, and subtract the present 6-year reserve. Such payment must be made by April 30, 2007, in addition to taxes due.

* Total All Years Reserve is the Taxes Paid through October 31, 2006, minus the Benefit Charges to your account through September 30, 2006.

**Last 6-Year Reserve is the Taxes Paid for the last six years through October 31, 2006, minus the Benefit Charges to your account for the last six years through September 30, 2006.

If you disagree with this determination,
YOU HAVE 15 DAYS FROM THE DATE OF THIS NOTICE TO FILE AN APPEAL.

Federal Register

Tuesday,
January 16, 2007

Part III

Department of Labor

Employment and Training Administration

20 CFR Part 604

Unemployment Compensation—Eligibility; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 604

RIN 1205–AB41

Unemployment Compensation—Eligibility

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (Department) is issuing this Final 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 applies to all State UC laws and programs.

DATES: *Effective Date:* This Final Rule is effective February 15, 2007.

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:

I. Background

On July 22, 2005, the Department published a Notice of Proposed Rulemaking (NPRM) concerning the A&A requirement at 70 FR 42474. The Department invited comments through September 20, 2005.

II. General Discussion of the Final Rule

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 States, as a condition of participation in the Federal-State UC program, limit the payment of UC to individuals who are A&A. As explained in the NPRM, the UC program is designed to provide temporary wage insurance for individuals who are unemployed due to a lack of suitable work. The Federal A&A rules implement this design by testing whether the fact that an individual did not work for any week was involuntary due to the unavailability of suitable work. 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, some confusion exists 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, which permitted States to pay UC to new parents who stopped work following the birth or adoption of a child. *See* 65 FR 37210 (June 13, 2000) for the BAA–UC Final Rule, and 68 FR 58540 (Oct. 9, 2003) for the final rule removing the BAA–UC rule. 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, misconceptions existed about why the Department permitted individuals to be treated as A&A in certain situations. The Department discussed these situations in detail at 68 FR 58540, 58543–58545 (Oct. 9, 2003). As another example, some commenters viewed an active work search as a necessary component of the A&A requirement. However, this is not the Department's position.

As a result of this confusion, the Department issued an NPRM clearly setting forth its interpretation of the A&A requirement and is now issuing this Final Rule. This Final Rule does not regulate other areas of the UC program, such as monetary entitlement or disqualifications for such actions as voluntarily quitting employment. This Final 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), which might affect the administration of the A&A requirement.

III. Summary of the Comments and Regulatory Changes

Comments Received on the Proposed Rule

The Department received 25 pieces of correspondence commenting on the NPRM by the close of the comment period. Thirteen comments were from State UC agencies. Five comments were from business or employer interest groups, and seven comments were from worker advocacy groups. The Department considered all timely comments and included them in the rulemaking record. One late comment was not considered.

These comments are discussed below in the Discussion of Comments. Also discussed below are all substantive changes made to the rule that stem from the comments received. Non-substantive changes are not discussed.

Discussion of Comments

Need for Rule. Several commenters supported the rule. One of these supporters noted that "Although the 'A&A' test has always been a Federal requirement, the absence of any clear, readily available and legally binding statement articulating this policy has encouraged many inappropriate" legislative proposals. Another supporter stated that "In recent years, we have seen legislation introduced in a number of States, which we believe to be in violation of the longstanding interpretation of the eligibility rules under FUTA. This proposed rule will greatly clarify the situation for the States * * *."

Conversely, several commenters stated that the rule was either not necessary, or that the Department failed to specify any controversy or confusion over the validity of the A&A requirement, aside from issues related to the BAA–UC regulation. Nonetheless, one of these commenters did acknowledge that there is a "difference of opinion between the Department and some commentators" concerning the existence and nature of the A&A requirement.

The Department believes that the commenters' divergence of opinion on this matter serve to reinforce its view that rulemaking is necessary to put any doubt about its position to rest and to avoid controversies regarding the existence and nature of a Federal A&A requirement.

Individuals with Disabilities. Several commenters suggested the rule address the making of a "reasonable accommodation" under the Americans with Disabilities Act for individuals with disabilities. The principal reason

the Department undertook the creation of the rule was to eliminate confusion about the existence and nature of the A&A requirement in Federal UC law. This limited purpose was noted in the NPRM at 70 FR 42474: "This rule also does not address federal labor laws * * * or disability nondiscrimination laws * * *" In addition, the Department's regulations at 29 CFR part 32 already place obligations on States regarding nondiscrimination on the basis of disability. Determining whether an individual with a disability is A&A under the rule is a case-by-case determination. The Department believes that program letters rather than a regulation are better vehicles for applying general nondiscrimination obligations to case-by-case State determinations on whether an individual with a disability is A&A. Therefore, no change is made to the rule as a result of these comments.

Minimum Requirement and State Flexibility. Several commenters viewed the rule as restricting State flexibility in ways that would adversely affect eligibility. For example, one commenter stated that, "As currently written, the standards actively restrict or discourage States from taking steps to make the UI system accessible to the changing workforce, including individuals who are domestic violence survivors, who must seek work on a part-time basis * * *" This commenter went on to state "that the proposed regulations * * * may serve to restrict UI coverage and deal a serious blow to State laws currently in effect that have expanded coverage to previously underserved categories of workers." Conversely, one commenter suggested that the rule be clarified to more clearly state that it creates only minimum requirements.

Although the Department agrees that States should retain wide latitude in crafting their UC laws, it also believes that State laws must assure that an individual's unemployment for any week is involuntary due to the unavailability of suitable work. This requirement protects the integrity of the UC program and the State's unemployment fund. The Department believes that the rule provides States with considerable flexibility because it merely provides that States must require an individual to meet a minimum test of A&A.

More specifically, nothing in the rule requires that a State apply a single A&A test to all individuals. As a result, States continue to have the flexibility to apply a more liberal A&A test to victims of domestic violence than to other individuals. All that is required is that the individual meet the rule's minimum A&A test.

Concerning part-time work, the proposed rule established a very broad test of availability: an individual may be considered available if the "individual is available for any work for all *or a portion* of the week claimed," as long as the individual is not withdrawing from the labor market. 70 FR 42474, 42481 (emphasis added); § 604.5(a)(1). Similar language exists for the "able" requirement. *See* 70 FR 42474, 42481; § 604.4(a). The language referring to "a portion of the week" recognizes that an individual may be eligible if "A&A" only for part-time work. Accordingly, the Department has not changed the proposed rule as a result of these comments regarding State flexibility.

Concerning the comment that the rule should more clearly state that it creates only a minimum requirement, the Department believes the proposed rule was clear in its statement that it "does not limit the States' ability to impose additional able and available requirements that are consistent with applicable Federal laws." 70 FR 42474, 42481; § 604.3(c). Accordingly, the Department has not changed the proposed rule as a result of this comment.

Work Search. Several commenters stated that conducting an active search for work is a necessary component of availability and should be addressed in future rulemakings. The Department agrees that, as a policy matter, States should require an active search for work, but does not agree that the suggested rulemaking is appropriate. The Department's contemporaneous interpretation of the original SSA in 1935 was that Federal law does not require a work search for the regular UC program.

Thereafter, in the early 1980's, Congress examined the issue of work search in the UC program. This examination did not result in a search for work requirement for the regular UC program. Instead, it resulted in the creation of a "sustained and systematic" search for work requirement only for the Federal-State extended benefits program. Pub. L. 96–499, § 1024(a) (1980) (amending the Federal-State Extended Unemployment Compensation Act of 1970 § 202(a)(3), tit. II at § 202(a)(3)(E)). Therefore, the Department believes that Congress is well aware of the Department's longstanding interpretation that there is no Federal work search requirement and has not chosen to add a work search requirement. Any work search requirement would need to be legislated by Congress.

Labor Market Attachment. Several commenters objected to the requirement that A&A be tested in terms of whether the individual has withdrawn from the labor market as discussed in §§ 604.4(a) and 604.5(a)(1)–(2). Specifically, these commenters averred that this "withdrawal" test imposed a new and more rigid standard for A&A and suitable work cases than had previously existed. Commenters also expressed concerns that application of the "withdrawal" test would result in States denying UC to an individual even though no "suitable" work is available in the labor market, which would be inconsistent with one of the Department's stated rationales for this rulemaking in that UC should be paid for a lack of "suitable" work.

The Department does not believe that this test is new, rigid, or would require a denial of UC where no "suitable" work is available. Several commenters claiming the test was new stated that it was a departure from a Departmental issuance from 1962. However, as noted in the preamble to the proposed rule, that issuance actually provided for the labor market test described in the proposed rule:

> "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."

70 FR 42474, 42476 (July 22, 2005) (quoting U.S. Department of Labor, Bureau of Employment Security, Unemployment Insurance Legislative Policy—Recommendations for State Legislation 1962 (October 1962)).

The Department believes the "withdrawal" test balances the need to assure genuine attachment by the individual to the labor market—which is what the A&A requirement is testing—with the need to recognize that, due to labor market fluctuations, work in the individual's usual and customary occupation may not be available at any given time. In fact, contrary to the commenters' assertions, the "withdrawal" test provides the States with greater flexibility as it permits States to pay UC to individuals who have A&A restrictions, such as limiting availability to part-time work, as long as the restrictions do not amount to a withdrawal from the labor market. Without this "withdrawal" test, individuals with *any* restrictions would

be denied and the regulation would be rigid, as the commenters assert.

The proposed and final rule at § 604.3(b) emphasizes the minimal nature of the "withdrawal" test by stating that:

> Whether an individual is able to work and available for work * * * will 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 is generally performed in the labor market.

Under this test, if the services offered by an individual are restricted to the point that the services are not generally performed in the labor market (that is, the individual has withdrawn from the labor market), then the individual is unemployed as a result of those restrictions and is not eligible for UC. Those restrictions on services could be for any number of reasons, such as hours of availability, the distance the individual is willing to commute, or what types of jobs the individual is willing or able to accept. Holding an individual unavailable due to such restrictions is neither novel nor inconsistent with the notion that UC is for individuals who are involuntarily unemployed due to lack of suitable work. At the same time, as noted, the "withdrawal" test provides flexibility as it permits payment of benefits to individuals who place some restrictions on their availability, but who have not withdrawn from the labor market.

The Department also notes that the rule does not require a denial of UC simply because no "suitable" work was available at a particular time. As noted, the rule balances the need to assure genuine attachment to the labor force with labor market conditions that cause a lack of work in the individual's usual and customary occupation. Thus, on the one hand, jobs of the type that the individual is making him or herself available for must be performed in the labor market, even if no new job openings currently exist. On the other hand, if the individual restricts his or her availability to jobs for which there is no labor market, the individual is not available.

The proposed and final rule at § 604.5(a)(2) affords further flexibility by providing that what is "suitable" is determined under State law. This provision allows the State to take into consideration the education and training of the individual, among other factors.

What a State law may not do, however, is to define "suitable" work in such a way that it permits the individual to limit his or her availability in a way that constitutes a withdrawal from the labor market. To emphasize this point, § 604.5(a)(2) of the proposed rule has been changed from "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" to "The individual limits his or her availability to work which is suitable for such individual as determined under the State UC law, provided the State law definition of suitable work does not permit the individual to limit his or her availability in such a way that the individual has withdrawn from the labor market."

Availability and Illness. A State comment addressed the proposed rule's provision at § 604.4(b), which permits an individual to be considered "able" to work if the "individual has previously demonstrated his or her ability to work and availability for work following the most recent separation from employment," unless the individual has refused an offer of suitable work due to such illness or injury. This commenter noted the lack of a parallel provision in the "available for work" section of the rule and questioned whether this meant the individual, although considered "able to work," must be denied for not being available for work. The Department did not intend this individual to be denied for not being available for work. As a result of this comment, § 604.5(g) of the Final Rule allows a State to find an individual available for work if it finds that the individual is able to work under § 604.4(b), despite the individual's illness or injury. Further, as a result of this change, § 604.5(g) of the proposed rule was re-designated to § 604.5(h) in this Final Rule.

Aliens. Section 604.5(f) of the proposed rule provided that to be considered available for work for a week (and thus potentially eligible for UC for that week), an "alien must be legally authorized to work that week in the United States by the appropriate agency of the United States government." Several commenters requested that specific situations involving alien eligibility be addressed in the Final Rule, notably regarding aliens with H–1B visas. Since legislation and Federal regulations governing alien status and work authorization frequently change, the Department believes it unwise to specify in Part 604 which classes of aliens have work authorization and may therefore be found legally available for work. Rather, the Department will issue program letters relaying information on alien work authorization from the United States Citizenship and Immigration Service. Accordingly, no change is made to the rule as a result of this comment. The Department did delete unnecessary language, however.

Finally, the Department put a number of the provisions of the regulatory text into the active voice and substituted "must" for "shall" in several places. These changes are purely stylistic; the Department intends no substantive change in meaning of the amended provisions.

IV. Administrative Information

Executive Order 12866

The Department has determined that this Final Rule is a "significant regulatory action" within the meaning of Executive Order 12866 because it raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order at section 3(f)(4). Accordingly, the Final Rule has been submitted to, and reviewed by, the Office of Management and Budget (OMB).

However, the Department has determined that this Final Rule is not "economically significant" because it does not have an annual effect on the economy of $100 million or more. The Department has also determined that the Final Rule has no adverse material impact upon the economy and that it does not materially alter the budgeting impact of entitlements, grants, user fees or loan programs, or the rights and obligations of recipients. This Final Rule implements the A&A requirements of the program consistent with the authorizing legislation and serves to codify longstanding program interpretations.

Further, the Department has evaluated the rule and found it consistent with the regulatory philosophy and principles set forth in Executive Order 12866, which governs agency rulemaking. Although it impacts States and State UC agencies, it does not adversely affect them in a material way. The rule limits a State's payment of UC only to individuals who are A&A for work, and all State laws currently contain A&A requirements.

Executive Order 13132

The Department reviewed this rule in accordance with Executive Order 13132, and determined that the rule may have Federalism implications. To this end, organizations representing State elected officials were contacted. These organizations expressed no concerns. About one-half of the comments received were from individual State

agencies. The Department believes this Final Rule adequately addresses the concerns expressed in those comments.

Executive Order 12988

The Department drafted and reviewed this regulation according to Executive Order 12988 on Civil Justice Reform, and it does not unduly burden the Federal court system. The Department drafted the rule to minimize litigation and provide a clear legal standard for affected conduct. The Department has reviewed this Final Rule carefully to eliminate drafting errors and ambiguities.

Unfunded Mandates Reform Act of 1995 and Executive Order 12875

The Department reviewed this rule under the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*) and Executive Order 12875. The Department has determined that this Final 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, the Department has not prepared a budgetary impact statement.

Paperwork Reduction Act

This regulatory action contains no information collection requirements.

Regulatory Flexibility Act/SBREFA

We have notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification under the Regulatory Flexibility Act (RFA) at 5 U.S.C. 605(b), that this proposed rule will not have a significant economic impact on a substantial number of small entities. Under the RFA, no regulatory flexibility analysis is required when the rule "will not * * * have a significant economic impact on a substantial number of small entities." 5 U.S.C. 605(b). A small entity is defined as a small business, small not-for-profit organization, or small governmental jurisdiction. 5 U.S.C. 601(3)–(5). Therefore, the definition of the term "small entity" does not include States, State UC agencies, or individuals.

This Final Rule codifies a longstanding interpretation for determining eligibility for unemployed individuals. This Final Rule, therefore, governs an entitlement program administered by the States and not by small governmental jurisdictions. In addition, the entitlement program offers benefits to unemployed individuals and does not directly affect the small entities as defined by the RFA. Therefore, the Department certifies that this Final Rule will not have a significant impact on a substantial number of small entities and, as a result, no regulatory flexibility analysis is required.

In addition, the Department certifies that this Final Rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996 (SBREFA). Under section 804 of SBREFA, a major rule is one that is an "economically significant regulatory action" within the meaning of Executive Order 12866. The Department certifies that, because this Final Rule is not an economically significant rule under Executive Order 12866, it also is not a major rule under SBREFA.

Effect on Family Life

The Department certifies that this rule was assessed in accordance with Pub. L. 105–277, 112 Stat. 2681, and that the rule does not adversely affect the well-being of the nation's families.

List of Subjects in 20 CFR Part 604

Employment and Training Administration, Labor, and Unemployment Compensation.

Catalogue of Federal Domestic Assistance Number

This program is listed in the Catalogue of Federal Domestic Assistance at 17.225, Unemployment Insurance.

Emily Stover DeRocco,

Assistant Secretary of Labor, Employment and Training Administration.

■ For the reasons set forth in this preamble, Chapter V of Title 20, Code of Federal Regulations, is amended by adding a 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 regulation applies to all State UC laws and programs.

§ 604.2 Definitions.

(a) *Department* means the United States Department of Labor.

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

(c) *Social Security Act* means the Social Security Act, 42 U.S.C. 501 *et seq.*

(d) *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.

(e) *State UC agency* means the agency of the State charged with the administration of the State's UC law.

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

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

(h) *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 must be tested by determining whether the individual is offering services for which a labor market exists. This requirement 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. The State must 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 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 individual 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 the State law definition of suitable work does not permit the individual to limit his or her availability in such a way that the individual has withdrawn 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.* A State must not deny UC to an individual 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.* A State must not deny UC to an individual 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.* A State must not deny UC to an individual participating in a short-time compensation (also known as worksharing) program under State UC law for failure to be available for work during a week, but such individual will be required to be available for his or her normal workweek.

(f) *Alien status.* 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 must follow the requirements of section 1137(d) of the SSA (42 U.S.C. 1320b-7(d)), which relate to verification of and determination of an alien's status.

(g) *Relation to ability to work requirement.* A State may consider an individual available for work if the State finds the individual able to work under § 604.4(b) despite illness or injury.

(h) *Work search.* 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 regulation for purposes of certification under:

(1) Section 3304(c) of the FUTA (26 U.S.C. 3304(c)), with respect to whether employers are eligible to receive credit against the Federal unemployment tax established by section 3301 of the FUTA (26 U.S.C. 3301), and

(2) Section 302 of the SSA (42 U.S.C. 502), 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 regulation, the following provisions of 20 CFR 601.5 apply:

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

(2) Paragraph (d) of this section, 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 regulation, 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 must 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 (42 U.S.C. 501–504), as implemented in this regulation, then the Secretary of Labor must 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 will not make further payments to such State.

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