

Comments of the Independent Regulatory Review Commission



Department of Labor and Industry Regulation #12-96 (IRRC #2939)

Unemployment Compensation; Active Search for Work

July 5, 2012

We submit for your consideration the following comments on the proposed rulemaking published in the May 5, 2012 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the RRA (71 P.S. § 745.5a(a)) directs the Department of Labor and Industry (Department) to respond to all comments received from us or any other source.

1. Determination of whether the regulation is in the public interest; Feasibility and reasonableness of the regulation; Implementation procedures; Clarity.

Preamble and the Regulatory Analysis Form (RAF)

Section 5.2 of the RRA (71 P.S. § 745.5b) directs the Independent Regulatory Review Commission (IRRC) to determine whether a regulation is in the public interest. When making this determination, IRRC considers criteria such as feasibility and reasonableness of the regulation. To make that determination, IRRC must analyze the text of the Preamble and proposed regulation and the reasons for the new or amended language. IRRC also considers the information a promulgating agency is required to provide under Section 5(a) (71 P.S. § 745.5(a)) in the Regulatory Analysis Form (RAF).

The explanation of the regulation in the Preamble and the information in the RAF do not provide any corresponding data or specific information to quantify, justify or explain the imposition of the specific active search requirements that are being proposed. Without a detailed description of the regulation and its impact, it is difficult to determine whether the requirements in the rulemaking are reasonable or feasible.

In the final-form regulation submittal, the Preamble and the RAF should include a more detailed description of the basis for the amendments proposed in each section of the regulation. Additionally, we request that the Department provide data on the average number of weeks a claimant is unemployed and the typical number of positions applied for throughout this time period. We will review the Department's response as part of our determination of whether the final-form regulation is in the public interest.

2. Legislative comments.

On June 26, 2012, Representative William F. Keller, Democratic Chairman of the House Labor and Industry Committee, submitted comments on behalf of the Committee's Democratic members that address the following:

- The department cannot enforce work search requirements against claimants for any weeks prior to the date that approved regulations are published in the Pennsylvania Bulletin.
- The department must ensure claimants will receive detailed instructions of the work search registration process as well as confirmation of completed registration.
- The requirement to retain work search records for two-years after an initial claim for benefits and make them available for audits by the department is excessive.
- The requirement for claimants to submit a minimum number of job applications to employers each week is arbitrary, exceeds the intent of the law, and may be counterproductive for claimants and employers.
- The two-tiered system of work search requirements which increases requirements based on benefit weeks may be confusing and exceeds the work search requirement intended by the law.
- The regulations fail to include several waivers or exemptions, inducing those for claimants seeking work in industries or occupations in which resumes are not commonly used, for situations where compliance with work search requirements would be oppressive or inconsistent with the intent of the law, and for certain claimants who are notified of a work recall date.
- The regulations fail to identify a process by which claimants may obtain allowable waivers or exemptions.
- The regulations should allow for leniency to claimants who are limited in work opportunities due to a disability or other special circumstances.
- Good cause exceptions should be provided where failure to comply with the regulations is not willful or through no fault of the claimant's.

We will review the Department's responses to these issues in our determination of whether the final-form regulation is in the public interest.

3. Timetables for compliance.

It is difficult to determine the expected dates of compliance for this regulation. According to the Preamble, this proposed rulemaking will "affect claimants who file an application for UC [unemployment compensation] benefits that take effect on or after January 1, 2012." Both Community Legal Services, Inc. (CLS) and Representative Keller challenge this implementation date, and point out that a regulation is not effective until it has been properly promulgated through the regulatory review process.

We recognize that January 1, 2012 is the date the corresponding provisions of Act 6 of 2011 (Act) became effective. However, it is unclear whether application of this date to the regulation will result in a change in compliance for existing claimants who already are receiving

compensation. The Preamble does not clarify whether these claimants will be required to completely overhaul their existing job searches or even whether they will need to re-apply for unemployment. In addition, there is no explanation of how the Department will notify them of potential changes to their eligibility. Unless the Department can explain the need for imposing these eligibility requirements retroactively, we recommend that the regulation only apply to claimants who file an application for unemployment compensation subsequent to the effective date of the final-form regulation.

4. Section 65.11 (c) – Weekly requirements. – Reasonableness; Implementation procedures; Clarity.

Subsection (c)(2)

Subsection (c)(2) requires a claimant to create a record of weekly work search activities, and this record must contain “the information required by the Department.” According to the Department, this “information” is contained in a Department form. To improve clarity, we recommend that the final-form regulation reference this form and identify how claimants can access the form.

Subsection (c)(3)

Subsection (c)(3) requires the claimant to maintain the weekly work search record for two years. The Department should explain why this timeframe is appropriate.

Subsection (c)(4)

Subsection (c)(4) requires a claimant to “produce the record for the Department’s review at the times and in a format and manner as required by the Department.” The Department should clarify in the regulation under what circumstances, and in what format, it would request the weekly work search record.

5. Section 65.11 (d) – Weekly work search activities. – Consistency with the intent of the General Assembly; Consistency with the statute; Feasibility and reasonableness of the regulation; Implementation procedures; Clarity.

Benefit year

Subsections (d)(1) and (2) contain specific search requirements that coincide with consecutive weeks of the benefit year. Why does the regulation base search requirements on the consecutive weeks of the benefit year and not the consecutive number of weeks the claimant has actually been unemployed? The Department should clarify this issue.

Subsection (d)(1)

Subsection (d)(1) establishes the weekly work search activities for claimants “during each week from the third consecutive week of the benefit year through the eighth consecutive week of the benefit year.” Subsection (d)(1)(ii) permits the claimant to limit his search during the third

through the eighth consecutive week to positions that would “provide employment and wages similar to those the claimant had prior to his unemployment . . .” We address three areas of concern.

First, it is unclear how this 5-week timeframe affords all claimants, regardless of their profession, sufficient time to search for a job within their field before the additional search requirements of Subsection (d)(2) are required. Neither the Preamble nor the RAF establishes the reasonableness of this timeframe. Therefore, the Department should explain how it determined this timeframe is appropriate. We request that the Department include as part of its explanation, corresponding data that indicates the average amount of time it takes claimants to find jobs within their fields.

Second, the Pennsylvania Chamber of Business and Industry (Chamber) contends that the term “similar” in Subsection (d)(1)(ii) is ambiguous. We acknowledge that the word “similar” is used in the Act. *See* 43 P.S. § 801(b)(1)(iii). However, the regulation does not clarify how the Department will implement this provision of the Act. Therefore, we recommend the Department explain how claimants can determine whether potential employment and wages qualify under this regulation as “similar” to those received prior to unemployment.

Finally, Subsection (d)(1)(ii) also permits claimants to limit their search to positions: “within a 45 minute commuting distance or a commuting distance that is generally accepted in the claimant’s labor market, whichever is greater.” Similar language is included in the Act. *See* 43 P.S. § 801(b)(1)(iii). However, why did the Department expand upon the provisions contained in the Act by adding the phrase “whichever is greater?” The Department should also explain how a claimant can conclude what commuting distance is “generally accepted” in a particular field.

Subsection (d)(2)

Subsection (d)(2) establishes the weekly work search activities for claimants who are unemployed after the eighth consecutive week.

Subsection (d)(2)(i) requires these claimants to apply weekly for three positions that would result in “suitable employment.” Suitable work is not limited to positions held prior to unemployment, but encompasses “all work which the employee is capable of performing.” *See* 43 P.S. § 753 (t). Suitability is based on, among other things, “the length of time [the claimant] has been unemployed and the reasons therefore, the prospect of obtaining local work in his customary occupation, his previous earnings . . .” *See* 43 P.S. § 753 (t). The Department should explain how it determined that nine weeks is the appropriate benchmark for expanding the job search requirements. The Department should provide as part of its explanation corresponding data that establishes the number of weeks a claimant normally is unemployed when they begin to apply for jobs outside of their chosen line of work.

Subsection (d)(2)(ii) prohibits claimants from limiting their weekly searches to similar positions held prior to unemployment if doing so would result in the claimant applying for less than three jobs. Should a claimant exhaust all potential employment options for similar work prior to the

ninth week, this subsection does not provide credit to claimants for these past searches. If claimants cannot apply prior searches to comply with this subsection, are they unfairly penalized for their efforts to find jobs within their field? Representative Keller indicates in his comments that such a result does not reflect the intent of the legislature when it enacted the Act.

In its comments, CLS also suggests that implementation of the regulation may result in unreasonable and impractical consequences for certain types of claimants. For example, CLS asserts that a union employee who cannot find three positions to apply for within their field, may have to search for non-union jobs, which could bar the claimant from further employment within the union. The final-form regulation should clarify how such situations would be addressed under this regulation.

6. Section 65.11 (e) – Alternative requirements. – Consistency with statute; Implementation procedures; Clarity.

Subsection (e) lists the exceptions to the active search requirement. This subsection does not contain the provisions of the Act granting waivers for “oppressive or inconsistent . . .” search requirements. *See* 43 P.S. § 801 (b)(6). We recommend that the final-form regulation include or cross-reference this statutory waiver. We also recommend that the final-form regulation include criteria the Department will use to implement this provision.

Subsection (e)(1)(ii) permits as an alternative to the weekly job search requirements, that a claimant can actively participate in “a program or activity approved by the Department as an acceptable work search alternative.” We recommend that the final-form regulation identify the types of programs or activities the Department would find to be acceptable work search alternatives and where claimants can find a list of such work search alternatives.

7. Section 65.11 (h) – Definitions. – Clarity.

Subsection (h) contains definitions for terms used in the regulation. According to Section 1.7 (a) of the *Pennsylvania Code and Bulletin Style Manual*, definitions should be placed near the beginning of a chapter. To improve clarity, we recommend that in the final-form regulation, Subsection (h) be moved to the beginning of Section 65.11.

8. Miscellaneous clarity.

Statutory citations

The proposed regulation includes certain provisions contained in the Act, but excludes others. Both CLS and Representative Keller raise similar concerns. We ask the Department to explain the reason for this inconsistency. In addition, to improve clarity, we recommend that the Department include cross-references to the relevant sections of the Act in the final-form regulation, including:

Subsection:

- §65.11(b)
- §65.11(d)(1)(ii)
- §65.11 (e)
- §65.11 (e)(4)
- §65.11 (f)

Cross-Reference to:

- 43 P.S. § 801(b)(1)(ii)
- 43 P.S. § 801(b)(1)(iii)
- 43 P.S. § 801(b)(6)
- 43 P.S. § 801(b)(3)
- 43 P.S. § 801(b)(5)

References to the Law and Purdon 's citations

Many sections of this regulation reference both a particular section of the Pennsylvania Unemployment Compensation Law (Law) and the corresponding Purdon's citation. For example, Section 65.11 (d)(2)(i) references "section 4(t) of the law (43 P.S § 753(t))." Other sections of this regulation only reference a particular section of the Law. For consistency, the Department should add the appropriate Purdon's citations to the following sections of the final-form regulation:

- § 65.11(e)(2)
- § 65.11(f)(1)(i)
- § 65.11 (f)(2)
- § 65.11 (f)(2)(ii)
- § 65.11 (h)

Subsection (d)(3)

When applying for a position, Subsection (d)(3) states, in part, “. . . a claimant may apply for a position by **expressing an interest in employment . . .**” (Emphasis added.) The phrase “by expressing an interest in employment” is vague and appears to be redundant. We recommend the Department delete this phrase in the final-form regulation.