

Comments From State Workforce Agencies

All the comments from the state workforce agencies, and nearly all the labor organizations and worker advocacy groups, complimented the Department for the provisions included in the interim final rule. The Kansas agency supported the amendment made by the interim final rule. Likewise, the Iowa agency supported the amendment, focusing particularly on how the rule would likely help small businesses in Iowa that serve farmers affected by major disasters.

The New Jersey agency also supported the amendment but requested a broadening of the rule to ensure DUA eligibility for individuals not generally eligible for regular UC. Specifically, New Jersey suggested that individuals who worked exclusively out of an airport, such as limousine drivers, would be excluded from DUA eligibility unless the airport was closed or taken over by the government. While that may be true, the Department notes that the amendment expands the coverage for DUA to include the unemployment of employees and self-employed individuals where, before the disaster, the employer, or the business in the case of a self-employed individual, received at least a majority of its revenue or income from an entity that was either damaged or destroyed in the disaster, or an entity in the major disaster area closed by the federal, state or local government in immediate response to the disaster. Thus, if a limousine driver lost the majority of his or her business due to the government closing an airport, or if the driver obtained the majority of his or her income from serving guests at hotels and the hotels were closed because of a major disaster, then the individual would be potentially eligible for DUA. The Department recognizes that the amendment is more restrictive than New Jersey advocates. However, the Department chose not to broaden the scope of the rule as this would overextend the rule's coverage to include individuals indirectly injured by the major disaster, such as workers secondarily affected by the economic "ripple effect" after the terrorist attacks of September 11, 2001, as discussed above with regard to the airline industry.

Comments From Labor and Employee Advocacy Organizations

Nearly all of the comments from labor and employee organizations advocated an expansion of the DUA program to reach more workers. The three labor

organizations and the five employee advocacy organizations, along with a New York state senator, submitted nearly identical comments on one or more of the following issues:

1. Workers otherwise covered by DUA should not be denied DUA when the order rendering the business inaccessible is issued by a private or public/governmental entity other than the federal government in response to security concerns or the provision of services related to a disaster.

2. Workers unemployed because their company did business with an entity damaged or destroyed by the disaster should receive DUA when the loss of revenue from the company "contributed importantly" or "contributed significantly" (rather than losing the majority of one's income) to the employer's decision (or self-employed individual's decision) to order a layoff or reduce hours of work.

3. The regulations should abandon the requirement that a worker, initially determined as separated from work due to the disaster, must establish on a weekly basis that his or her unemployment is still the direct result of the disaster.

4. Because the interim final rule expanded coverage and was a shift in policy, any workers who had been denied DUA prior to the publication of the interim final rule, as well as all individuals filing for DUA after the rule's publication should be entitled to receive DUA retroactively.

In addition, the AFL-CIO argued that the regulations should provide that a worker's immigration status is immaterial to DUA eligibility. The AFL-CIO also advocated expanding DUA eligibility to include individuals employed in areas near, but not specifically designated as, disaster areas.

The Department agrees, in part, with the first proposal to amend § 625.5(c) to cover workers due to business closures by private or public and governmental entities in the major disaster area in response to security concerns or the provision of services related to that disaster. The interim final rule added paragraphs (c)(2) and (c)(3) to § 625.5 which expanded the circumstances under which individuals would be considered unemployed as a direct result of the disaster. The Department intended that individuals would be covered if their unemployment resulted from their place of employment in the major disaster area being closed or taken over by the federal government in immediate response to that disaster, or where, prior to the disaster, the employer, or the business in the case of

a self-employed individual, received at least a majority of its revenue or income from an entity in the major disaster area that was either damaged or destroyed in that disaster, or an entity in the major disaster area was closed by the federal government, in immediate response to that disaster resulting in lack of work or loss of revenues. A major reason for adopting these provisions was that, as far as the Department knows, there had never been a disaster situation where the federal government, as a result of the disaster, closed facilities separate and apart from the actual disaster site. The Department wanted to ensure that individuals unemployed at those sites due to a federal closure were considered unemployed as a direct result of the major disaster. In all major disasters, geographic areas within a state (generally counties and sometimes cities) are designated as the major disaster areas. The Department has consistently held that state and local governments' decisions affecting the closure of businesses and the health and safety of individuals determine whether individuals are unemployed as a direct result of the major disaster. For example, if a city waste treatment facility were flooded and the city ordered certain businesses in an area of the city to close because the waste treatment facility was not functioning as a result of the disaster, the Department would conclude that out-of-work individuals from those businesses were unemployed as a direct result of the disaster. The Department did not intend to suggest that the rights of state and local governments to manage disasters in their jurisdictions were limited by this regulation, which defines unemployment as a direct result of the disaster. Consequently, in order to be clear that the amendment covers such government closings, the Department has revised § 625.5(c)(2) and (c)(3) to include closures by the federal, state, or local government.

The Department, however, does not believe it sensible to add businesses closed by private entities, unless such entities were advised or required by governmental agencies to close for health or safety reasons related to the disaster. Indeed, while a private entity could decide to close down its operations for any reason, only governmental agencies have authority to force a closure of facilities or businesses due to a disaster, usually to protect the health and safety of the populace. Given that government agencies are vested with such responsibility, the Department believes it best to limit coverage to individuals unemployed