

due to governmental actions or recommendations designed to protect the public's health and safety, as opposed to purely private closures.

The Department declines to accept the second proposal to amend § 625.5(c) to consider an individual unemployed due to the major disaster if that individual's loss of income "contributed importantly" or "contributed significantly" to his or her unemployment rather than as provided in the regulation, which requires that an individual received at least a majority of his or her revenue or income from the entity that was damaged, destroyed, or closed by the federal government. The genesis of this majority of revenue or income test came in the form of a 1994 Advanced Notice of Proposed Rulemaking (59 FR 63670, 63672), where, for purposes of § 625.5(a)(1), (a)(3), (b)(1) and (b)(3), the Department proposed that a worker or self-employed individual was considered unemployed due to the disaster where (s)he was unable to perform more than 50 percent of his or her usual and customary services that were being performed prior to the major disaster because sales to customers coming to the job site or work location were substantially reduced as a direct result of the major disaster. While this interpretation was never adopted as a regulation, the Department did apply it informally on a case-by-case basis. The Department then revised and formalized this interpretation in the interim final rule to include such unemployment due to lack of work, or loss of revenues, 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 closed by the federal government in immediate response to that disaster.

This majority of income or revenue test is a defined amount, can be determined with a good degree of accuracy, utilizes a simple calculation, and is an equitable standard applicable to all claimants. On the other hand, the terms "contributed importantly" or "contributed significantly" do not easily translate into a quantifiable amount, thus lacking the relative ease and certitude of the majority of income or revenue test. Adopting such subjective criteria would be administratively difficult for state workforce agencies dealing with the exigencies of a disaster to implement. While such a "contributed importantly" test is used under the Department's Trade Act programs (19 U.S.C. 2272(a)(3) and

2331(a)), the authorizing statute permits the agency 60 days under the Trade Act and 30 days under the expiring North American Free Trade Agreement transitional adjustment assistance program to make this determination (19 U.S.C. 2273(a) and 2331(c)(1)), and the recent amendments to the Trade Act now change that time period to 40 days. Trade Act of 2002, Public Law 107-210, section 112(b). Under DUA, however, the Department believes that a bright line test is necessary to ensure benefit determinations can be made quickly so assistance can be given out expeditiously to those in need. Furthermore, several of the comments criticized this "majority of income or revenue" standard in the interim final rule as burdensome on claimants because it limits them to producing tax and financial documents. The Department disagrees and notes that all evidence (e.g., affidavits, employer statements, and other credible evidence) will be considered in establishing a claim and not only typical financial records. Thus, the Department believes that the "majority of income or revenue" test is fair and provides a more workable standard.

The Department also declines to adopt comment three to amend § 625.5(c) to eliminate the requirement for establishing on a weekly basis that a claimant's unemployment is still the direct result of the major disaster. Those advocating this comment believe that eliminating this requirement would make DUA more like the regular UC program, in that once a claimant qualifies for benefits (s)he no longer is required to establish that the unemployment is a result of the original layoff or separation. However, the Department notes that this weekly requirement follows the statutory requirements of section 410(a) of the Stafford Act whereby "[t]he President is authorized to provide to any individual unemployed as a result of a major disaster such benefit assistance as he deems appropriate while such individual is unemployed for the weeks of such unemployment with respect to which the individual is not entitled to any other unemployment compensation." 42 U.S.C. 5177(a). The Department cannot adopt this proposal as it contravenes the DUA authorizing statute, which establishes eligibility for benefits on a weekly basis.

Comment four on the retroactive payment of DUA did not propose a change to § 625.5(c) but instead addressed the administration of the new DUA regulatory provision. While advocates for comment four requested retroactive benefits due to the change in

DUA eligibility, several commenters also requested aggressive publicity of these new eligibility rules. In response to these comments, the Department notes that it advised the state agencies in New York and Virginia, in a memorandum before publication of the interim final rule, of the Department's position on both retroactive and partial payments and that individuals could be eligible in accordance with the yet unpublished rule. Thus, the Department made it clear that New York and Virginia were to apply the principles of this rule to all claims arising out of the September 11 terrorist attacks. New York, for example, made significant efforts to publicize DUA eligibility criteria using various media in several different languages.

Lastly, the AFL-CIO made two separate comments. They proposed paying DUA to all aliens, whether legally in the United States or not. However, the Department cannot adopt this proposal due to limitations placed on the DUA program by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). Section 432 of the PRWORA (Pub. L. 104-193), as amended, provides that only aliens falling within the definition of "qualified aliens" are eligible for federal public benefits, which include benefits under the DUA program. Therefore, DUA payments to other than qualified aliens are prohibited.

The AFL-CIO also advocated expanding DUA eligibility to include areas close to, but not specifically designated as, major disaster areas. They posited that workers in the District of Columbia who were adjacent to the disaster area in Arlington, Virginia were ineligible for DUA even though they may have been negatively affected by the disaster. The AFL-CIO suggests broadening coverage because the disaster hurt, in a general way, the District of Columbia's economy, so that the unemployed in DC should be eligible to receive DUA. The Department has sought to limit coverage to a "direct result" of the disaster, since the "ripple effect" on the DC economy and other adjacent jurisdictions would be endless. The Department notes that the interim final rule at § 624.5(c)(3) allows for the coverage of individuals outside the major disaster area when they can establish that a majority of their income or business revenue came from an entity in the major disaster area either damaged or destroyed in the disaster, or closed by the federal government in immediate response to the disaster. Thus, an independent contractor in Washington, DC, who lost a majority of its income due to the Pentagon attack or