

extended benefit program (EB) to pay benefits "during periods of high unemployment." (H. Rep. No. 752, 91st Cong. 2d Sess. Page 6 (1970).) Indeed, one of the "triggers" for determining if a high unemployment period exists is the total unemployment rate, which includes only workers who have recently demonstrated their availability by looking for work. Several temporary extensions have also been enacted during periods of high unemployment, including the current Temporary Extended Unemployment Compensation program. When Congress extended the Emergency Unemployment Compensation program in the early 1990's, it noted that "[m]any people who have lost their jobs are spending months, and months and months, sometimes a year or more seeking the next job." (H. Rep. 268 103rd Cong. 1st Sess. Page 2 (1993).) The purpose behind these programs was clearly to pay individuals unable to find employment because of economic downturns.

As noted above, one commenter stated that special eligibility requirements exist for the EB program. Specifically, an individual claiming EB must conduct a sustained and systematic search for suitable work and must submit tangible proof of this work search. Although many commenters appeared to believe that an active work search is a federal requirement for regular UC and/or is necessary component of availability, this is not the case. Though an active work search is one way for the individual to indicate availability, it is not the only way. An individual's active registration with the state's employment service or the individual's use of union hiring halls or private recruiting firms are all acceptable indications of availability absent an active work search by the individual. Aside from the EB provisions, federal law does not require an active search for work and, as a result, one state (Pennsylvania) does not require any work search for the regular UC program. Thus, the fact that Congress required an active search for work for the long-term unemployed is unrelated to whether an A&A requirement exists for the regular program.

We note that the work search requirement was not part of the original 1970 enactment of the EB program, having been added in 1980. Also, Congress completely suspended the EB work search requirement in the early 1990's when it extended the Emergency Unemployment Compensation program. This EB requirement also is not applicable to the Temporary Extended

Unemployment Compensation Program. The effect of these suspensions was that state law eligibility requirements, including the state A&A requirements, were used for determining eligibility for programs that were designed to ameliorate widespread involuntary unemployment. In sum, the EB work search provisions do not support the argument that there is no federal A&A requirement.

We note that even Congressional prohibitions on the denial of UC assume that individuals must be available for work. When it passed a federal prohibition on denying UC solely due to pregnancy, Congress noted that an individual must be "able to work * * * and be available for employment" (H. Rep. No. 752, 91st Cong. 2d Sess. Page 19 (1970)) and that pregnant workers must continue to meet the "availability for work and ability to work" requirements. (*Id.* at 21.)

Finally, we note that Congress indicated its expectation that an "able" requirement existed for UC when it permitted states to withdraw certain employee contributions from their unemployment funds for the payment of "cash benefits with respect to their disability." (Current Sections 3304(a)(4)(A), FUTA, and 303(a)(5), SSA.) Individuals who lose their jobs because of a disability, and who are unable to perform any work because of such disability, are not unemployed due to a lack of suitable work. They are unemployed due to the disability. Thus, explicit statutory authority was necessary to permit payment to disabled individuals from state unemployment funds.

(8) Supreme Court Decisions

Two commenters cited *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 537 (1979). One commenter noted that "[i]t is unclear whether states have authority to use UI [that is, UC] funds to provide family leave absent a Department of Labor regulation" and then cited *New York Tel. Co.* for the proposition that "states have broad discretion to legislate in the area of UI." The other commenter citing *New York Tel. Co.* noted that the U.S. Supreme Court has treated the absence of "explicit prerequisites" for UC eligibility "as a strong indication that Congress did not intend to restrict the States' freedom to legislate in this area" and that "as the Supreme Court has noted, 'when Congress wished to impose or forbid a condition for compensation, it did so explicitly.'" Therefore, this commenter argues, the omission of a specific availability requirement in FUTA or SSA "reflects

the absence of any congressional intent to condition eligibility for regular UI benefits on claimants' availability for work, as a matter of federal law."

As a general rule, we agree that where Congress has not imposed specific requirements related to FUTA or SSA, states are free to operate and determine whether to impose their own requirements. However, the principle that Congress intended to grant states freedom to design their UC systems in areas in which it did not impose explicit requirements does not mean that the Department is precluded from making reasonable interpretations of the specific requirements of FUTA and SSA. We note that (1) the interpretation of an "able and available" requirement was made contemporaneously with the passage of SSA by the first agency with responsibility for interpreting SSA; (2) the Department has consistently interpreted FUTA and SSA to include a federal A&A requirement; and (3) *New York Tel. Co.* does not discuss either a specific federal A&A requirement or its absence. Therefore, the conclusion that the second commenter draws that the general language of *New York Tel. Co.* means that there is no federal A&A requirement or that it is beyond the authority of the Department to construe such a requirement is not a persuasive position.

The language in *New York Tel. Co.*, cited by the second commenter, was used by the Court to discuss its prior holding in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 482-483 (1977). In *Hodory*, the Court affirmed Ohio's denial of benefits to workers unemployed by labor disputes even if the unemployed workers were not strikers themselves. (*Hodory*, 431 U.S. at 482-83.) *Hodory* held that benefits could thus be denied under certain circumstances even when a worker is *involuntarily* unemployed. (*Id.*) *New York Tel. Co.* also involved the issue of workers involved in labor disputes. Unlike Ohio, New York permitted strikers to obtain UC after a certain period of time had elapsed. 440 U.S. at 523. The Court recognized that New York's law required all individuals seeking UC to be A&A, including strikers, as demonstrated by the Court's quote of that law, which required an individual's "capability and readiness, but inability to gain work." (*Id.* at 523, n.2, emphasis added.) Thus, although the striking individual's initial separation may be voluntary, his/her continued unemployment is involuntary, unlike BAA-UC where the individual is not available for any work.

In the course of its discussion of *Hodory*, the Court in *New York Tel. Co.*