

DEPARTMENT OF LABOR**Employment and Training Administration****20 CFR Part 625**

RIN 1205-AB31

Disaster Unemployment Assistance Program; Interim Final Rule; Request for Comments**AGENCY:** Employment and Training Administration, Department of Labor.**ACTION:** Interim final rule; request for comments.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (Department) is issuing this interim final rule, effective upon publication, to clarify eligibility for disaster unemployment assistance (DUA) in the wake of the major disasters declared as a result of the terrorist attacks of September 11, 2001. To provide an opportunity for public participation in this emergency rulemaking, this interim final rule includes a post-publication comment period. The Department will publish a final rule after taking into account any comments that are received.

DATES: This interim final rule is effective November 13, 2001. Written comments must be received in the Department on or before December 13, 2001.

ADDRESSES: Written comments on this interim final rule may be mailed or delivered to Grace A. Kilbane, Director, Office of Workforce Security, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-4231, Washington, DC 20210.

All comments received will be available for public inspection during normal business hours in Room S-4231 at the above address.

FOR FURTHER INFORMATION CONTACT: Betty Castillo, Division Chief, Division of Unemployment Insurance Operations, Office of Workforce Security, Employment and Training Administration (ETA), U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-4231, Washington, DC 20210. Telephone: (202) 693-3209 (this is not a toll-free number); facsimile: (202) 693-3229; E-mail: bcastillo@doleta.gov.

SUPPLEMENTARY INFORMATION:**I. The Disaster Unemployment Assistance Program**

Section 410(a) of the Robert T. Stafford Disaster Relief and Emergency

Assistance Act (Stafford Act) (42 U.S.C 5177(a)) sets forth the framework of the Disaster Unemployment Assistance (DUA) Program. The President is authorized by section 410(a) of the Stafford Act to provide to any individual unemployed as a result of a major disaster declared by the President under the Stafford Act "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 * * * or waiting period credit." Section 410(a) provides that DUA is to be furnished to individuals for no longer than 26 weeks after the major disaster is declared. Further, for any week of unemployment, a DUA payment (a type of unemployment compensation (UC)) is not to exceed the maximum weekly benefit amount authorized under the applicable UC state law, as specified in the Department's DUA regulations implementing section 410(a) of the Act.

The Department operates the DUA program under a delegation of authority (51 FR 4988, February 10, 1986) to the Secretary of Labor from the Director of the Federal Emergency Management Agency (FEMA). The Secretary of Labor has promulgated and published regulations for the DUA program at part 625 of title 20 of the Code of Federal Regulations. The DUA Program is administered by the states in accordance with an agreement each state has signed with the Secretary of Labor.

II. Explanation of the Interim Final Rule

The Department is adding, at § 625.5(c), a definition of the phrase "unemployment is a direct result of the major disaster," used in §§ 625.5(a)(1) and (b)(1) for determining if a worker or self-employed individual's unemployment is caused by a major disaster. Section 410(a) of the Stafford Act provides, in pertinent part, that the President is authorized to provide benefit assistance to any individual "unemployed as a result of a major disaster." The Department has consistently interpreted this phrase in its regulations as requiring, for DUA eligibility, that the individual's "unemployment is a direct result of the major disaster." However, the phrase has never been defined in the Department's regulations. (Note that paragraphs (a)(2)-(a)(5) and (b)(2)-(b)(4) of § 625.5 also provide for other circumstances where an individual's unemployment is caused by a major disaster. However, these provisions are not involved here.)

The recent terrorist attacks of September 11, 2001, resulting in declarations of major disasters in New York City and Arlington County, Virginia, were of catastrophic proportions. They presented a number of situations the regulations did not contemplate, such as the extended closure of Reagan National Airport. In order to address these types of situations, the Department is now defining the phrase "unemployment is a direct result of the major disaster" to clarify eligibility. The Department has received many inquiries regarding whether an individual's unemployment was a direct result of either the New York or Arlington disasters. By defining the phrase "unemployment is a direct result of the major disaster," the Department will ensure greater uniformity. This is consistent with the first and second rules of construction of §§ 625.1(b) and (c) of the DUA regulations, which provide that sections 410 and 423 of the Stafford Act and the implementing regulations must be construed liberally to carry out the purposes of the Act and to assure, insofar as possible, the uniform interpretation and application of the DUA provisions of the Act throughout the United States.

Definition of "Unemployment is a Direct Result of the Major Disaster"

The Department interprets the phrase "unemployment is a direct result of the major disaster" under paragraphs (a)(1) and (b)(1) of § 625.5 to mean that an individual's unemployment must be an immediate result of the disaster itself, and not the result of a longer chain of events precipitated or exacerbated by the major disaster. This rule seeks to clarify that an individual's unemployment is a direct result of the major disaster if the unemployment resulted from: the physical damage or destruction of the work site; the physical inaccessibility of the work site due to a federal government closure of the work site, in immediate response to the major disaster; or lack of work, or loss of revenues, provided that the employer, or the business in the case of a self-employed individual, prior to the disaster, received at least a majority of its revenue or income from either an entity damaged or destroyed in the disaster, or an entity closed by the federal government in immediate response to the disaster. This rule simply sets forth whose unemployment is a direct result of a major disaster. Once that determination is made, however, claimants covered under this new definition must still meet the same

eligibility criteria as all other claimants in order to receive DUA.

The Department recognizes that the terrorist attacks of September 11 had a "ripple effect" throughout the economy, and that many businesses nationwide suffered serious declines due to the effect these disasters had on commerce. However, individuals who became unemployed as the result of a general decline in commerce in response to the major disasters are not unemployed as a "direct result" of the major disasters and thus are not eligible for DUA.

The above considerations apply equally to any major disaster. They lead the Department to conclude that workers and self-employed individuals whose work site, for example, is outside a major disaster area, and who no longer have a job because the federal government either closed or took over the job site in response to the major disaster, are potentially eligible for DUA. This includes only employees and self-employed individuals at facilities closed by the federal government. Examples of eligible individuals in the case of an airport shutdown might include airport employees, owners and employees of restaurants and shops located in airport terminal buildings, and workers or service providers for these and other facilities where the above conditions are met. However, workers at other airports not closed by the federal government would not be eligible for DUA. Individuals potentially eligible for DUA would also include employees and self-employed individuals who could not perform services or get to their workplace because a federal agency, such as FEMA, took over such site for disaster administration purposes. Similarly, the federal government may, as an immediate emergency response to the major disaster, close certain facilities such as bridges or tunnels. Employees of those facilities could, therefore, be potentially eligible for DUA.

As noted above, an employee or self-employed individual may be eligible for DUA if the major disaster caused physical damage or destruction of an entity which, before the major disaster, provided at least a majority of the employer's or self-employed individual's revenue or income. Where less than a majority of the employer's or self-employed individual's revenue or income came from that entity, the link to the unemployment is too tenuous to be considered direct under the regulations. Just as this test may be employed to determine whether employees of suppliers of goods or services to facilities physically damaged by the major disaster may be eligible for

DUA, so too would that analysis be applicable to employees of suppliers of goods or services to other facilities closed or taken over by the federal government in immediate response to the major disaster. Thus, if one of those facilities provided at least a majority of the revenue or income of that employer or self-employed individual, the employees of that business or that self-employed individual may be eligible for DUA.

Where it cannot be established that at least a majority of the revenue or income of a business or self-employed individual was dependent upon providing goods or services to the businesses at these facilities, DUA eligibility must be denied. For example, a taxicab driver would be potentially eligible for DUA where a majority of his or her business depended on providing transportation services between points which include areas cordoned off because of the physical damage of the major disaster or because facilities were closed or commandeered by the federal government. On the other hand, DUA eligibility must be denied a taxicab driver who cannot establish that a majority of his or her livelihood depended on providing transportation services between points which include areas cordoned off because of either the physical damage of the major disaster or the closing or commandeering of the facilities by the federal government.

Further, DUA is payable only for those weeks of unemployment during the disaster assistance period that continues to be the direct result of the major disaster. Therefore, if the state agency finds that an eligible DUA applicant's unemployment can no longer be directly attributed to the major disaster, the applicant is no longer unemployed as a direct result of the disaster and is no longer eligible for DUA.

Publication of Interim Final Rule

This rule interprets the statutory term in section 410(a) of the Stafford Act requiring, as a condition of DUA eligibility, that an individual be unemployed as a "result" of a major disaster. The Department has determined that the new § 625.5(c) defining this statutory term, should be added immediately to clarify eligibility and assure uniform interpretation and application nationwide. Notice-and-comment rulemaking is not required under 5 U.S.C. 553(b)(A) because the rule is interpretative. However, because of the public interest in this program, the Department has included a post-publication comment period in this interim final rule. Any comments

received on the interim final rule adding § 625.5(c) will be considered before a final rule is issued.

Even were this not an interpretative rule, good cause, under 5 U.S.C. 553(b)(B), exists for adding § 625.5(c) in an interim final rule with a post-publication comment period because a pre-publication comment period is impracticable and contrary to the public interest. Communities are still recovering and individuals are filing claims due to the major disasters arising from the terrorist attacks of September 11, 2001. To not have the regulations in place at this time would be contrary to the public interest, especially under the current exigencies. Because of the scope of the effects of this disaster, this clarification will effect claims made through many States. In order to assure that all States will be able to respond as promptly and accurately as possible to this disaster, this regulation must be effective immediately.

Effective Date

The Department has determined that this interim final rule will be effective on publication. This rule clarifies which unemployed workers about whom eligibility questions have arisen are potentially eligible for DUA benefits. The exception to a 30-day delay in the effective date at 5 U.S.C. 553(d)(1) applies because the rule clarifies a statutory term which has the effect of relieving a restriction on the eligibility of individuals to receive benefits under the DUA Program.

Moreover, this rule interprets the statutory term unemployed as a "result" of a major disaster in section 410(a) of the Stafford Act. Therefore, under 5 U.S.C. 553(d)(2), a 30-day waiting period for the rule to become effective is not required because this is an interpretative rule.

Lastly, the Department has determined, under 5 U.S.C. 553(d)(3), that good cause exists for making the addition of § 625.5(c) effective upon publication in the **Federal Register**. As explained above, due to the exigencies arising from the events of September 11, 2001, the Department believes it contrary to the public interest and harmful to potential beneficiaries not to have the changes in place while so many individuals are recovering from those major disasters. Therefore, these amendments are effective immediately.

Executive Order 12866

This interim final rule is a "significant regulatory action" within the meaning of Executive Order 12866 because it meets the criteria of section 3(f)(4) of that Order in that it raises

novel or legal policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Accordingly, this rule was submitted to, and reviewed by, the Office of Management and Budget. It is not "economically significant" within the meaning of section 3(f)(1) of that Executive Order because it will not have an annual effect on the economy of \$100 million or more. Rather, the Department estimates the cost of benefits under this rule for the major disasters of September 11, 2001, to be \$1.47 million and, therefore, projects that the annual cost of benefits under this rule will be far less than \$100 million.

The Department has evaluated the rule and finds it consistent with the regulatory philosophy and principles set forth in Executive Order 12866, which governs agency rulemaking. The rule will not impact states and state agencies in a material way because it would not impose any new requirements on states. Instead, the rule simply clarifies the rules states use to determine the eligibility of individuals affected by these new types of disasters now affecting the nation, such as the terrorist attacks of September 11, 2001, and the benefits are financed by the federal government.

Paperwork Reduction Act

The Department has determined that this interim final rule contains no new information collection requirements. The existing information collection requirements are approved under Office of Management and Budget control number 1205-0051.

Executive Order 13132

The Department has reviewed this interim final rule in accordance with Executive Order 13132 regarding federalism. The order requires that agencies, to the extent possible, refrain from limiting state policy options, consult with states prior to taking any actions which would restrict states' policy options, and take such action only when there is clear constitutional authority and the presence of a problem of national scope. Because this is a federal benefit program, the Department has determined that the rule does not have federalism implications.

Executive Order 12988

The Department drafted and reviewed this rule in accordance with Executive Order 12988, Civil Justice Reform, and will not unduly burden the federal court system. The rule has been written to

minimize litigation and provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

Unfunded Mandates Reform Act of 1995 and Executive Order 12875

The Department has reviewed this interim final rule in accordance with 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 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.

Regulatory Flexibility Act

The Department has determined that this interim final rule will not have a significant economic impact on a substantial number of small entities. The rule sets forth the terms under which states and state agencies, which are not within the definition of "small entity" under 5 U.S.C. 601(6), will pay federal benefits. Under 5 U.S.C. 605(b), the Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect. Accordingly, no regulatory flexibility analysis is required.

Effect on Family Life

The Department certifies that this interim final rule has been assessed in accordance with section 654 of Pub. L. 105-277, 112 Stat. 2681, for its effect on family well-being. The Department concludes that the rule will not adversely affect the well-being of the nation's families. Rather, it should have a positive effect on family well-being by providing benefits to more individuals whose households have been affected by major disasters.

Congressional Review Act

This interim final rule is not a major rule for purposes of the Congressional Review Act.

Catalogue of Federal Domestic Assistance Number

This program is listed in the Catalogue of Federal Domestic Assistance at No. 17.225, "Disaster Unemployment Assistance (DUA)."

List of Subjects in 20 CFR Part 625

Disaster assistance, Labor, and Unemployment compensation.

Words of Issuance

For the reasons set forth in this preamble, part 625 of chapter V of title 20, Code of Federal Regulations, is amended as follows:

PART 625—DISASTER UNEMPLOYMENT ASSISTANCE

1. The authority for part 625 continues to read as follows:

Authority: 42 U.S.C. 1302; 42 U.S.C. 5164; 42 U.S.C. 5189a(c); 42 U.S.C. 5201(a); Executive Order 12673 of March 23, 1989 (54 FR 12571); delegation of authority from the Director of the Federal Emergency Management Agency to the Secretary of Labor, effective December 1, 1985 (51 FR 4988); Secretary's Order No. 4-75 (40 FR 18515).

2. Section 625.5 is amended by adding a new paragraph (c) to read as follows:

§ 625.5 Unemployment caused by a major disaster.

* * * * *

(c) *Unemployment is a direct result of the major disaster.* For the purposes of paragraphs (a)(1) and (b)(1) of this section, a worker's or self-employed individual's unemployment is a direct result of the major disaster where the unemployment is an immediate result of the major disaster itself, and not the result of a longer chain of events precipitated or exacerbated by the disaster. Such an individual's unemployment is a direct result of the major disaster if the unemployment resulted from:

- (1) the physical damage or destruction of the place of employment;
- (2) the physical inaccessibility of the place of employment due to its closure by the federal government, in immediate response to the disaster; or
- (3) lack of work, or loss of revenues, provided that, 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 that was either damaged or destroyed in the disaster, or an entity closed by the federal government in immediate response to the disaster.

Signed at Washington, D.C. on November 7, 2001.

Elaine L. Chao,
Secretary of Labor.

Emily S. DeRocco,
Assistant Secretary of Labor.

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