Federal Law Requirements for the Federal-State Unemployment Compensation System: Interpretation and Application

Gerard Hildebrand
United States Department of Labor

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Labor and Employment Law Commons, Legislation Commons, and the Social Welfare Law Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjlr/vol29/iss1/17

This Symposium Article is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
FEDERAL LAW REQUIREMENTS FOR THE FEDERAL-STATE UNEMPLOYMENT COMPENSATION SYSTEM: INTERPRETATION AND APPLICATION

Gerard Hildebrand*

The benefits provided to states by federal unemployment compensation law are conditioned on meeting several requirements. This Article examines some of these requirements, how they came about, how the United States Department of Labor and the federal courts have interpreted them, and how conflicts between the states and the federal government have been resolved. The Article concludes that certain types of requirements work best within this federal-state system.

INTRODUCTION

The unemployment compensation (UC) system is a federal-state partnership based upon federal law but executed through state laws and by state employees: federal law defines requirements for the system while each state designs its own UC system within these requirements.¹ Since the creation of the UC system in 1935,² the desirability of federal requirements has been a subject of debate among experts in the field.³ This

* Chief, Legislative Review and Guidance Group, Unemployment Insurance Service, Employment & Training Administration, United States Department of Labor. B.A. 1975, University of Wisconsin-Madison. The views expressed in this Article are the author's and not necessarily those of the United States Department of Labor. The author extends his thanks to his colleagues at the Department who have offered encouragement and assistance during the writing of this Article.

debate will continue, as will attempts to add, delete, or amend the requirements.\textsuperscript{4}

Consideration of what is a desirable federal law requirement may benefit from an understanding of what has happened to some federal law requirements following their enactment. To this end, this Article examines federal law requirements to see how the United States Department of Labor (USDOL) has interpreted and applied them, how the courts have ruled on them, and how Congress occasionally has revisited them.

Part I provides a brief discussion of the federal-state relationship and how it works and then reviews how the USDOL has interpreted and applied several federal law requirements. The Article then divides the discussion of federal requirements into three basic types: Part II considers the "methods of administration" requirement, which provides the USDOL with the flexibility to establish almost any administrative requirement it chooses; Part III considers minimum requirements, which provide the states considerable flexibility; and Part IV considers absolute requirements, which, at least in theory, give no flexibility to either the USDOL or the states. Part IV also examines how the USDOL negotiated two recent conflicts with federal law without resorting to litigation to illustrate how conflicts are resolved by the USDOL as well as to introduce some problems concerning conflict resolution. The Article concludes that (1) the USDOL attempts to interpret federal law in such a way to leave discretion to the states while reasonably effectuating the statute; (2) although the USDOL regularly raises issues with problems in state law, the attendant performance issues are frequently left unresolved; and (3) the requirements that work best within the federal-state UC system are those creating minimum standards that call for specific criteria in state law.

This Article deals with only a few federal law requirements and, in some cases, only a few aspects of these requirements.\(^5\) This Article may invite questions as to whether some of these requirements are appropriate for the federal-state relationship, whether they are desirable as public policy, and whether the USDOL's interpretations have always been optimal. These questions are not within this Article's scope, although it has been necessary to outline briefly why Congress thought it necessary to establish the requirements.

I. BACKGROUND: THE FEDERAL-STATE RELATIONSHIP

When Congress first considered unemployment insurance,\(^6\) there was considerable debate concerning what type of UC system should be created.\(^7\) Three options were discussed: leave the matter entirely to the states, create a totally federal system, or develop a federal-state system.\(^8\) In the end the current federal-state system was chosen for the following reasons:

1. "[A]n exclusively Federal system would be cumbersome and would result in centralization of administrative functions and bureaucratic methods which might paralyze action."\(^9\)
2. The federal government "would assume the leadership by removing the disadvantages in interstate competition that are always raised against purely State legislation involving costs to industry"\(^10\) while allowing wide latitude for experimentation which would provide "uniformity where essential and diversity where necessary."\(^11\)
3. A purely federal system "would necessitate decisions at the very outset on all points which could not be left to

---

5. One of the requirements not discussed here, experience rating, is discussed in a somewhat similar context by Theodore D. Wagman in *The Mythology of Experience Rating in Unemployment Compensation*, 59 U. DET. J. URB. L. 631 (1982).
6. UC is also known as unemployment insurance.
8. RUBIN, supra note 3, at 11–12.
10. *Id.*
11. *Id.*
administrative discretion." As a result, mistakes in a federal plan would have wider repercussions than mistakes under a federal-state plan.

Dr. Edwin Witte, who was deeply involved with the creation of the program, provided more pragmatic reasons. For example, he explained that President Franklin D. Roosevelt "expressed decided preferences for state administration of unemployment insurance" but felt that the funds used to pay UC benefits "must be handled by the federal government." Further, a federal-state system would be more likely to survive a constitutional challenge.

Under the federal-state system, the states must meet two basic sets of requirements. The first set must be met for employers in a state to receive credit against the federal unemployment tax. Currently, employers receiving the full credit may have their federal unemployment tax reduced from 6.2% percent of wages to 0.8%. A second set of requirements

12. Id. at 94.
13. Id.
14. Dr. Witte was Executive Director of the Committee on Economic Security created by President Roosevelt. HABER & MURRAY, supra note 3, at 77.
15. Id. at 78 (quoting EDWIN E. WITTE, THE DEVELOPMENT OF THE SOCIAL SECURITY ACT 18 (1962)) (internal quotation marks omitted).
16. Edwin E. Witte, Development of Unemployment Compensation, 55 YALE L.J. 21, 30 (1945). Dr. Witte concluded that the federal-state system "was developed as an expedient to get the states to enact unemployment compensation laws, with but little thought as to how the plan would work out once this primary purpose was realized." Id. at 32.
17. FEDERAL-STATE PARTNERSHIP, supra note 1, at 3–7.
18. See id. at 3. The tax is established by 26 U.S.C. § 3301 (1994). The credit scheme is described in § 3302. To be certified for the "normal" credit available under § 3302(a), state law must meet the requirements of § 3304(a). States certified for the "normal" credit also will be certified for the "additional" credit if state law meets the experience-rating requirements of § 3303(a). Although employers in a state may obtain the full available credit using only the normal credit, currently all states also obtain credit using the additional credit because this reduces the overall tax burden on employers. See Federal-State Unemployment Compensation Program: Certifications Under the Federal Unemployment Tax Act of 1995, 60 Fed. Reg. 56,174 (1995). The Secretary of Labor issues certifications with respect to the normal and additional credits each October 31. 26 U.S.C. §§ 3303(b), 3304(c). The amount of credit available may be reduced if the state does not operate a Trade Readjustment Assistance Program under § 3302(c)(3) or if the state has an outstanding advance—i.e., a loan—for the payment of unemployment compensation under Title XII of the Social Security Act. Id. § 3302(c)(2).
19. See FEDERAL-STATE PARTNERSHIP, supra note 1, at 3.
must be met for a state to receive administrative funding for its UC program from the USDOL.\textsuperscript{20}

The Senate Finance Committee’s report on the legislation establishing the UC program in 1935 emphasized that the legislation “does not set up a Federal unemployment compensation system” and that, “[e]xcept for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, the States are left free to set up any unemployment compensation system they wish, without dictation from Washington.”\textsuperscript{21} Consistent with this statement, the original legislation contained twelve broad requirements for receipt of tax credit or administrative grants.\textsuperscript{22} Currently, although the states are still free to set up their own UC systems, a significant number of requirements have been added.\textsuperscript{23}

If the USDOL believes that the state is not meeting a federal law requirement, it will raise either a “conformity” or a “compliance” issue,\textsuperscript{24} or both. A conformity issue exists when the state law does not agree with federal law.\textsuperscript{25} This may occur either because the state law contains a provision inconsistent with federal law or because state law omits a provision

\begin{footnotesize}
\begin{enumerate}
\item Id. at 5–7. The requirements are found at 42 U.S.C. § 503 (1994). Certifications of administrative grants are made “from time to time.” Id. § 502(a).
\item S. REP. No. 628, 74th Cong., 1st Sess. 12–13 (1935).
\item There were originally six requirements for receipt of the normal credit, one requirement for the additional credit, and eight requirements for the receipt of the administrative grants; but because three of the normal credit requirements were the same as three of the grant requirements, there were really only twelve requirements. See Social Security Act of 1935, ch. 531, §§ 903(a), 910(a), 49 Stat. 620, 640–41.
\item The requirements added since 1935 are found at 42 U.S.C. §§ 503(a)(7)–(9), 503(c)–(j) (1994), and 26 U.S.C. § 3304(a)(6)–(18) (1994). A precise count of requirements is no longer as easy as counting the number of paragraphs in the law. One reason is that exceptions to the requirements often have restrictions. For example, a state may withdraw certain moneys from its unemployment fund for administrative purposes but only under certain conditions. See 42 U.S.C. § 1103(c)(2). The exception allowing a state the option to make withdrawals from its unemployment fund for the payment of self-employment assistance allowances contains 11 restrictions. 26 U.S.C. § 3306(t).
\item The Secretary has delegated most matters for the administration of UC to the Assistant Secretary for Employment and Training; an exception is the authority to determine conformity and compliance. See Secretary’s Order No. 4-75, 40 Fed. Reg. 18,515 (1975) [hereinafter Secretary’s Order]. Therefore, the USDOL “raises issues” while the Secretary determines conformity and compliance. Regulations addressing conformity and compliance procedures are found at 20 C.F.R. § 601.5 (1995).
\item Post-Hearing Brief for the United States Department of Labor at 27, United States Dep't of Labor v. Pennsylvania Dep't of Labor and Indus. (1979) (on file with the University of Michigan Journal of Law Reform).
\end{enumerate}
\end{footnotesize}
required by federal law. The conflict may be created by the law itself or by administrative or judicial interpretation. A compliance issue exists when actual state administration conflicts with federal law by failing to keep mistakes at a minimum. Thus, conformity is directed at state law while compliance is directed at the proper administration of the state law.

The USDOL uses a variety of methods, including the review of state enactments, rules, and court cases, in order to determine if conformity or compliance issues exist. The USDOL’s main effort is, however, to prevent issues from developing by commenting on state legislative proposals or draft rules and by promoting a general understanding of federal requirements. The focus of departmental review tends to be linked to conformity, because all that is needed to raise a conformity issue is evidence of the meaning of state law. For the USDOL to raise a compliance issue, on the other hand, it is necessary to obtain evidence that the state deviated from principles of

---

26. *Id.*
27. *Id.*
28. *Id.* at 28.
29. The term “conformity” is not found in federal law. For purposes of certification for tax credit, federal law does, however, make a distinction between law—i.e., conformity—and compliance. See 26 U.S.C. § 3304(c) (1994) (providing that the Secretary shall not certify a state for normal tax credit if the Secretary “finds [that the state] has amended its law so that it no longer contains the [required] provisions” or that it has “failed to comply substantially” with the required provisions). For purposes of withholding administrative grants, the Social Security Act refers only to “a failure to comply substantially.” 42 U.S.C. § 503(b) (1994). The USDOL still applies the same distinction, however, between law and practice. 20 C.F.R. §§ 640.2, 650.4 (1995). A more thorough discussion of conformity and compliance is found in Theodore D. Wagman, Certification for Administrative Grants and Tax Credits Under Federal Unemployment Compensation Laws: A Case Study of the 1978 and 1979 New Hampshire Proceedings and Their Settlements 13–21 (1982) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*).

According to Wagman, “Substantiality relates to the measure, degree, or quality of carrying out the Federal law’s principles and purposes. Substantiality relates to compliance, not to non-compliance or to conformity.” *Id.* at 13.

30. See *EMPLOYMENT AND TRAINING ADMIN., U.S. DEP’T OF LABOR, THE EMPLOYMENT SECURITY MANUAL* § 1215(B) (1991) [hereinafter *EMPLOYMENT SECURITY MANUAL*] (describing the materials that states are to provide for review).

31. See, e.g., Field Memorandum No. 59-93 from Barbara Ann Farmer, Administrator for Regional Management, Employment and Training Administration, United States Department of Labor, to All Regional Administrators (June 14, 1993) (on file with the *University of Michigan Journal of Law Reform*) (announcing legislative seminars “to improve States’ understanding of the Federal legislative review process and improve communications between State agencies and the Department of Labor”).

federal law.\textsuperscript{33} Even when the USDOL raises an issue based on compliance, it also raises a conformity issue because a question exists as to whether state law authorizes noncompliance.\textsuperscript{34}

If the USDOL identifies an issue, it will attempt informal resolution through correspondence and meetings. If these informal attempts fail, the matter will be elevated to the Assistant Secretary for Employment and Training, who may send a "gauntlet" letter to the head of the state agency offering a last chance to resolve the issue informally. If the state does not satisfactorily respond to the gauntlet letter, the Assistant Secretary may refer the matter to the Secretary for the commencement of administrative proceedings concerning whether certification should be withheld for tax credits or administrative grants.\textsuperscript{35} Notice of a hearing, which may consist only of an exchange of briefs, is published in the Federal Register. The current practice is to have an administrative law judge in the USDOL preside and issue a recommended decision, which is then sustained, modified, or reversed by the Secretary.\textsuperscript{36} Formal notification of a hearing does not preclude further informal discussions or resolution.\textsuperscript{37} A state may appeal the Secretary's decision to the United States court of appeals for the circuit in which the state is located or to the United States Court of Appeals for the District of Columbia.\textsuperscript{38}

\begin{itemize}
  \item\textsuperscript{33} Id. at 16–17.
  \item\textsuperscript{34} For example, when the USDOL raised a compliance issue with Michigan's failure to operate a satisfactory quality control program, it also raised a conformity issue as to whether Michigan's law required the state to operate a satisfactory quality control program. Letter from Roberts T. Jones, Assistant Secretary of Labor, United States Department of Labor, to F. Robert Edwards, Director, Michigan Employment Security Commission (Jan. 19, 1993) (on file with the University of Michigan Journal of Law Reform). The federal law requirements relating to the quality control program are found at 20 C.F.R. \textsection{602.10} (1995).
  \item\textsuperscript{35} Because the Secretary has not delegated the authority to determine conformity and compliance, the matter must be referred to the Secretary. \textit{See} Secretary's Order, \textit{supra} note 24.
  \item\textsuperscript{36} \textit{See}, \textit{e.g.}, \textit{In re} Minnesota Conformity, No. 88-UIA-9, transmitted by Unemployment Insurance Program Letter No. 25-89, 54 Fed. Reg. 22,973 (1989) (upholding an administrative law judge's decision); United States Dep't of Labor v. Washington Employment Sec. Dep't, No. 86-CCP-1, transmitted by Unemployment Insurance Program Letter No. 15-87 (Mar. 30, 1987) (modifying an administrative law judge's decision); \textit{In re} District of Columbia Dep't of Employment Servs., No. 84-CCP-2, transmitted by Unemployment Insurance Program Letter No. 18-86 (Mar. 6, 1986) (reversing an administrative law judge's decision).
  \item\textsuperscript{37} Notice of hearing is addressed in 20 C.F.R. \textsection{601.5(d)} (1995). Informal resolution is addressed in 20 C.F.R. \textsection{601.5(b)} (1995).
  \item\textsuperscript{38} 26 U.S.C. \textsection{3310(a)} (1994); 42 U.S.C. \textsection{504(a)} (1994).
\end{itemize}
Withholding certification likely will not occur until the appeals process has been exhausted.\textsuperscript{39}

Although there are always a number of issues pending within the USDOL, hearings do not occur frequently because the USDOL and the states all prefer informal negotiations.\textsuperscript{40} From 1992 through 1994, eighty-three issues were resolved informally. The last hearing occurred in 1989.\textsuperscript{41} Only twice have cases gone to the United States courts of appeals.\textsuperscript{42} As of January 1, 1995, there were fifty-two issues pending in the USDOL.\textsuperscript{43}

The USDOL is also responsible for interpreting federal law and for conveying these interpretations to the states. The USDOL serves notice of its interpretations of the federal law by several means, including USDOL manuals and draft legislation with commentary. Currently, almost all interpretations are issued to the states through Unemployment Insurance Program Letters, which are sent by the USDOL to the states and published in the Federal Register.

\section*{II. THE "METHODS OF ADMINISTRATION" REQUIREMENT}

As a condition of receiving administrative grants, state law must provide for "[s]uch methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when

\begin{itemize}
\item \textsuperscript{39} The appeal provisions stay the Secretary's action for 60 days from the date the Secretary notifies the governor of an unfavorable decision and for 30 days following the commencement of judicial proceedings; the court may issue a further stay. 26 U.S.C. \S 3310(a); 42 U.S.C. \S 504(a).
\item \textsuperscript{40} \textsc{Rubin, supra} note 3, at 140. "It is rare for an issue even to go to a hearing, as evidenced by a history of only about a dozen conformity hearings since 1937." \textit{Id.} at 139.
\item \textsuperscript{41} These figures are based on an informal survey taken twice yearly by the Legislative Review and Guidance Group at the USDOL.
\item \textsuperscript{42} In 1980, addressing a Tenth Amendment argument, the United States Court of Appeals for the First Circuit decided in favor of the USDOL in \textit{New Hampshire Dept'f of Employment Sec. v. Marshall}, 616 F.2d 240 (1st Cir. 1980). In the same year, the United States Court of Appeals for the Fifth Circuit decided in favor of Alabama and Nevada in \textit{Alabama v. Marshall}, 626 F.2d 366 (5th Cir. 1980), \textit{cert. denied}, 452 U.S. 905 (1981). See \textit{infra} notes 206--11 and accompanying text for a discussion of this case. For a discussion of conformity hearings up to 1982 and of both court cases, see \textsc{Rubin, supra} note 3, at 171--229.
\item \textsuperscript{43} \textit{See supra} note 41.
\end{itemize}
This requirement merits discussion because it is entirely discretionary on the part of the USDOL. It is "sufficiently broad to permit virtually any federal control over administration" the USDOL sees fit to impose. The broadness of the requirement has led to litigation with the result that it is perhaps the best known federal requirement. Within the USDOL, this requirement is often called the "methods of administration" requirement; outside the USDOL, it is usually called the "when due" requirement.

The traditional view is that the methods of administration required of states are limited to administrative and operational, as opposed to eligibility, considerations. The new view is that the provision has a far broader scope that includes eligibility requirements. Although one federal court has questioned the appropriateness of a challenge to the "methods of administration" requirement in the courts, it noted that the issue is "too well settled to be questioned."

Prior to the "methods of administration" requirement becoming a matter of litigation, the USDOL primarily used three "Secretary's standards" that required specific actions by the

45. RUBIN, supra note 3, at 42; see infra note 94 and accompanying text.
46. RUBIN, supra note 3, at 222–24.
47. For example, the Secretary's three standards discussed below, infra text accompanying notes 52–62, all require "methods of administration" of the states. The use of "when due" probably arises from the Supreme Court's decision in California Department of Human Resources Development v. Java, 402 U.S. 121 (1971), which specifically focused on the meaning of "due."
48. See RUBIN, supra note 3, at 42 (noting that "[f]ederal influence is applied . . . through development and enforcement of detailed operating and performance standards").
49. See infra text accompanying notes 87–94.
50. In Jenkins v. Bowling, 691 F.2d 1225 (1982), the United States Court of Appeals for the Seventh Circuit reasoned that

[one might wonder how a state statute could be challenged as inconsistent with section 303(a) of the Social Security Act [codified at 42 U.S.C. § 503(a)], and hence as invalid under the supremacy clause, when section 303(a) does not purport to require anything of the states. A state can have any kind of unemployment compensation scheme it wants, at least so far as the Social Security Act is concerned, provided it does not insist on receiving federal money. Since the Act is addressed not to the state but to the Secretary of Labor, one might think the appropriate remedy for a violation was an order forbidding the Secretary to pay money to the noncomplying state for its unemployment-compensation program.

Id. at 1228.
51. Id.
As will be discussed below, the USDOL used the "methods of administration" provision to operationalize, through fairly specific procedures, other provisions of federal law relating to withdrawals from state unemployment funds, fair hearings, and payment through public employment offices. First, the Standard for Claims Filing, Claimant Reporting, Job Finding and Employment Services requires state law to provide for sufficient contact with "public employment offices or claims office or both . . . as will reasonably insure the payment of unemployment compensation only to individuals who are unemployed and who are able to work and available for work." Second, the Standard for Claim Determination requires that the state agency: (1) furnish such information to individuals as will reasonably afford an opportunity to establish and protect their rights to UC; and (2) obtain, promptly and prior to determination, facts pertaining to the individual's eligibility. Finally, the Standard for Fraud and Overpayment Detection requires that the state law include methods for detecting benefits already paid through error or willful misrepresentation and for deterring individuals from obtaining future benefits through misrepresentation. All three standards contain specific requirements designed to meet the standard and at the same time provide for the evaluation of alternative state provisions. All three standards were first issued between 1947 and 1950.

52. See 42 U.S.C. § 503(a)(1) (1994) (requiring "methods of administration . . . as are found by the Secretary" to be likely to ensure payment).
56. EMPLOYMENT SECURITY MANUAL, supra note 30, §§ 5000–5004.
57. Id. § 5000(B)(2). The USDOL has recently encouraged states to "move toward fully implementing telephone claimstalking or other electronic methods of filing." Unemployment Insurance Program Letter No. 35-95, 60 Fed. Reg. 55,604 (1995). Therefore, requirements related to physically reporting to offices appear to be obsolete; however, the basic standard remains in effect.
58. EMPLOYMENT SECURITY MANUAL, supra note 30, §§ 6000–6015.
59. Id. § 6011.
60. Id. §§ 7500–7519.
61. Id. § 7511.
62. The Standard for Claim Determination dates from 1946. See Unemployment Insurance Program Letter No. 115 (Apr. 29, 1946). It was revised to its current form in 1968 by Manual Transmittal Letter No. 1159 (Oct. 28, 1968). I have not been able to establish exact dates for the creation of the remaining two standards. Both were part of the EMPLOYMENT SECURITY MANUAL, which was apparently issued in 1950. See EMPLOYMENT SECURITY MANUAL, supra note 30. The Standard for Fraud and Overpayment Detection has never been revised, and the Standard for Claims Filing,
The USDOL also has created methods of administration that are aimed at creating a UC program that functions effectively. A 1955 internal document lists thirteen methods of administration that the USDOL expected to find in state law, including provisions for adequate staffing and procedures for prompt determination of claims and appeals; methods for collecting contributions and provisions for enforcement thereof, including provisions relating to interest or penalties on delinquent payments; provisions requiring employing units to keep records containing prescribed information; provisions concerning safeguards for information obtained by the state in the administration of its UC law; and penalties for failure to comply with the UC law. Unlike the three standards already discussed, the USDOL has not published specific criteria for meeting these requirements. The USDOL has, however, stated its position on the collection of contributions in regulations, and its position on disclosure of UC information maintained by the states was the subject of a draft regulation.

Under the traditional view of the "methods of administration" requirement, payment "when due" meant payment "when due under State law." The USDOL was also wary of allowing any payment while a question of eligibility remained. As a result, the USDOL approved state laws that delayed payment

---


64. It has, however, provided draft legislative language for use in implementing these requirements in state law. BUREAU OF EMPLOYMENT SEC., U.S. DEP'T OF LABOR, MANUAL OF STATE EMPLOYMENT SECURITY LEGISLATION (1950).

65. 20 C.F.R. § 602.11(a) (1995) (establishing a basis for a quality control program and requiring the states to collect and handle income for the state's unemployment fund with the greatest accuracy feasible). The section serves, in part, as the basis for the quality control program itself. See id.

66. Confidentiality and Disclosure of State Records, 57 Fed. Reg. 10,064 (1992). The basis for restricting UC information is that its disclosure may deter individuals from filing and employers from providing information and may impede the administration of the UC program generally. Id. The proposed regulations have, however, been taken off the USDOL's regulatory agenda. See Confidentiality and Disclosure of State Records, 59 Fed. Reg. 20,623 (1994).


68. Id. at 51–52.
to individuals who initially had been determined eligible until the expiration of the appeals period when facts indicated that an eligibility issue existed or until the disposition of any appeal. 69 What was required of a state was that its law contain methods of administration that reasonably insured the payment of UC only to eligible individuals under state law.

The State of California was one state that suspended payment when an appeal had been made following an initial determination of eligibility. 70 The case of California Department of Human Resources Development v. Java71 arose when two claimants were separated from employment; California initially determined that the claimants were eligible for UC and began payments. 72 In each individual's case, when the former employer filed an appeal, the state automatically stopped payments pending hearing and decision of appeal.73 The claimants filed a class action suit which eventually was decided by the United States Supreme Court. Instead of focusing on the words, "methods of administration," the Supreme Court emphasized the use of the word "due":

We conclude the word "due" in § 303(a)(1) [codified at 42 U.S.C. § 503(a)(1)], when construed in light of the purposes of the [Social Security] Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment. Paying

69. Id. at 50. Appendix A listed the states whose laws had been approved. In fact, Congress itself included a provision requiring that UC be withheld pending the outcome of an appeal in the original District of Columbia Unemployment Compensation Act, Pub. L. No. 74-386, § 12(a), 49 Stat. 946, 951–52 (1935). Congress then repealed this requirement in the District of Columbia Unemployment Compensation Act Amendments of 1971, Pub. L. No. 92-211, § 2(40)(A), 85 Stat. 756, 771, following the Supreme Court's decision in California Department of Human Resources Development v. Java, 402 U.S. 121 (1971). See infra notes 71–74 and accompanying text. Additionally, the President's Committee on Economic Security, which had prepared the original Social Security Act, had provided Congress with two drafts of state UC laws designed to help the states meet federal requirements, and both drafts contained such provisions. See Economic Security Act: Hearings on S. 1130 Before the Senate Comm. on Fin., 74th Cong., 1st Sess. 592 (1935) (explaining the purposes of the two drafts, which follow).

70. CAL. UNEMP. INS. CODE § 1335 (West 1986).
72. Id. at 123.
73. Id.
compensation to an unemployed worker promptly after an initial determination of eligibility accomplishes the congressional purposes of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes.\textsuperscript{74}

\textit{Java} and its principal offspring\textsuperscript{75} resulted in several actions by the USDOL. First, states were required to modify their laws to remove provisions inconsistent with \textit{Java}.

Although initially this effort was limited to the provisions similar to or more stringent than the one at issue in \textit{Java} itself, the USDOL would eventually raise issues with at least one other state law provision.\textsuperscript{77} Second, the USDOL created specific methods of administration for the "hearing" required by \textit{Java}.\textsuperscript{78} Third, in conjunction with concerns that courts might define adequate performance levels if the USDOL did not, the USDOL created a variety of bench marks to assure claims were processed promptly.\textsuperscript{79} Other bench marks are expressed as "Desired Levels of Achievement."\textsuperscript{80} Even though such bench marks are "[d]esired" rather than required of the states, the \textit{Java} definition of "due" serves as the basis for all bench marks related to prompt processing of claims, and states that do not meet these bench marks must submit corrective action plans as a condition of receiving the following year's UC grant.\textsuperscript{81}

\begin{footnotes}
\item[74] Id. at 133.
\item[75] See Fusari v. Steinberg, 419 U.S. 379, 389 (1975) (considering the prompt disposition of an appeal of an initial determination of ineligibility and concluding that "the rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process"); Burton v. Johnson, 538 F.2d 765 (7th Cir. 1976) (involving Illinois' failure to make payment promptly after the individual first files a claim for UC).
\item[76] See Unemployment Insurance Program Letter No. 1126 (June 14, 1971).
\item[77] See \textit{infra} notes 95--107 and accompanying text.
\item[78] See Unemployment Insurance Program Letter No. 1145 (Nov. 12, 1971) [hereinafter UIPL No. 1145]. The \textit{Java} hearing is designed to provide reasonable notice and opportunity to be heard and to result in the prompt payment of UC benefits. Id. at 3. A full evidentiary hearing is available to individuals and employers who appeal the decision resulting from the \textit{Java} hearing. Id. at 3--4.
\item[80] \textit{Appraisal Results}, supra note 79, at 5.
\end{footnotes}
This bench marking did not prescribe specific methods of administration as did the Secretary's earlier standards; instead, it measured the outcomes of methods used by the state. In the case of first payments and for the disposition of appeals, a standard requires action from the state "with the greatest promptness that is administratively feasible." The benchmark is the criterion against which compliance with this standard is measured. Despite some states' continued failure to meet these regulatory benchmarks, no conformity or compliance proceedings have ever been commenced due to such failure, nor does it appear that a "gauntlet" letter has ever been sent due to such failure.

82. The criteria for first payment time lapse and first-level appeals disposition promptness simply require that the states meet a numeric benchmark. For example, for first-level appeals, states must dispose of 60% of all appeals within 30 days of the date of appeal and 80% of all appeals within 45 days. 20 C.F.R. § 650.4 (1995). This implies that the remaining 20% of appeals do not need to be disposed of within any timeframe. The problems with this approach are discussed in Sharon M. Dietrich & Cynthia L. Rice, Timeliness in the Unemployment Compensation Appeals Process: The Need for Increased Federal Oversight, 29 U. MICH. J.L. REF. 235, 252-54 (1996). In the other instance, the Standard for Claim Determination, supra note 62 and accompanying text, requires the states to take specific actions in determining a claim.

84. Id. §§ 640.5, 650.4.
85. Dietrich & Rice, supra note 82, at 280–81 app. 1.
86. There are several reasons for not taking action. First, withholding a state's administrative grants may be too extreme as a mechanism for assuring adequate performance. However, the USDOL regularly threatens withholdings for conformity failures. A draft paper notes that a more moderate mechanism might not work: "If the sanctions had less effect on the program, State officials might be tempted to disregard Federal standards completely." Bureau of Employment Sec., U.S. Dep't of Labor, Sanctions in Unemployment Insurance: A Staff Report 30 (Draft, Mar. 13, 1956) (on file with the University of Michigan Journal of Law Reform). Conversely, the NCUC REPORT, supra note 3, was in favor of the current system because the existing mechanisms "exert more influence for cooperative action than would occur with lesser sanctions" and because "Federal officials are more likely to be inclined to impose more detailed requirements on the States since the consequences of State violation would be less catastrophic," id. at 149. Second, the USDOL may not want to be confronted with arguments that it does not adequately fund a state's program. Louisiana recently requested a hearing before the Secretary on this point. Letter from Gayle F. Truly, Secretary, State of Louisiana Department of Labor, to Robert B. Reich, Secretary, United States Department of Labor (Aug. 9, 1995) (on file with the University of Michigan Journal of Law Reform). Even if the USDOL conceded that the amounts appropriated by Congress were inadequate, a state must still meet certain federal law requirements to receive what amounts are available. See 42 U.S.C. 503(a) (1994). Third, if performance is improving, a state may eventually meet the performance levels. Fourth, there is either a reluctance to devote resources or a lack of resources to devote to the preliminaries necessary to establish that a state has failed to take all administratively feasible actions as well as a reluctance to devote resources to the hearing process itself. This raises a fifth point: in my view, the test of what is administratively feasible is erroneously applied to what is feasible within
Following *Java*, the debate concerning the extent of the "methods of administration" requirement continued in the courts. In *Pennington v. Didrickson*, the issue was whether Illinois' base period was subject to the "methods of administration" requirement. In Illinois, as in all states, employment performed during the base period determines whether the individual has sufficient attachment to the labor force to qualify for UC. Illinois' base period was the first four of the five most recently completed calendar quarters. Employment during the "lag" quarter between the end of the base period and the filing of the claim is not used, even if its use would qualify the individual.

Under the traditional view, although the determination of a base period may be based in part upon administrative considerations, it is first and foremost an eligibility provision and therefore not subject to the "methods of administration" requirement. In other words, the reason the base-period provision law exists is to determine whether the individual qualifies for UC. The opposing view, accepted by the United States Court of Appeals for the Seventh Circuit in *Pennington*, is that, because the base period may be dependent on administrative considerations related to the state's method of obtaining employment history, it is a "method of administration."

---

87. 22 F.3d 1376 (7th Cir.), cert. denied, 115 U.S. 613 (1994).
88. Id. at 1378.
90. Id. at 3-23 tbl. 300. Forty-six other states have similar base periods. Id. Illinois' provision is found at ILL. ANN. STAT. ch. 48, para. 347 (Smith-Hurd Supp. 1992).
91. COMPARISON, supra note 89, at 3-23 tbl. 300.
92. Pennington, 22 F.3d at 1382–84.
93. Id. at 1387. The court gave weight to the fact that the lag period was a method of accommodating a system where employers report wages at the end of each calendar quarter for purposes of determining the individual's attachment to the labor force. Id. The lag occurs because employers do not immediately report the wages and because the states do not immediately place the wages in a database. See id. The case was reversed and remanded to the district court for a determination as to whether the Illinois base period is consistent with the "methods of administration" requirement. Id. at 1388.
The debate in Pennington revolved around the same basic issue as the issue in Java: whether a state has erected an administrative barrier to eligibility. Pennington will likely not resolve this debate because it did not resolve an issue crucial to the federal-state system, namely, the tension between administrative and eligibility provisions. Pennington seems to say that, if an eligibility provision has any administrative consideration, then it is subject to the "methods of administration" requirement and the Secretary or the courts may, in effect, federalize that requirement.94 The case would appear to alter radically the premise noted above that, except for a few standards, states are free to operate their own UC programs without dictation from the USDOL.

One of the results of Java was that the USDOL would now scrutinize provisions of state law that were previously deemed eligibility provisions, and therefore left to the state, in order to determine whether they were administrative barriers to the payment of UC. In the late 1980s, the USDOL challenged New York's law that withheld payment of UC "during the pendency of criminal proceedings following an indictment against the claimant" until any criminal charges were resolved.95 The USDOL raised a "methods of administration" issue, pointing to the Java Court's interpretation of "due" and the requirement in its Standard for Claim Determination96 that the state agency gather such facts pertaining to the individual's eligibility as will be reasonably sufficient to insure the payment of UC when due.97 In the USDOL's view, New York's UC laws were passing that responsibility to another party and, in doing so, introducing a procedure that had no result other than to delay the state's determination.98 Furthermore, the USDOL believed that, when a determination was issued to an

94. Eligibility provisions that include administrative considerations and, therefore, could be affected include the definition of "base period," which has a cutoff date; the use of wages—which must be reported for tax purposes—instead of hours of work for determining an individual's attachment to the labor force; and limiting an examination of earnings only to quarters—because that is how the wages are reported—which results in some individuals being determined ineligible simply because of the way their wages are distributed between quarters.

95. N.Y. LAB. LAW § 593.4 (McKinney 1988).

96. See supra notes 58-59 and accompanying text.


98. Id. at 2.
individual under a "hold in abeyance" provision, the determination would simply be to withhold UC that may have been due based on the facts currently available to the state UC agency.99

When New York's law was challenged, the state objected to the USDOL's position, citing Jenkins v. Bowling,100 in which the United States Court of Appeals for the Seventh Circuit addressed an Illinois statute with identical effect.101

If Illinois had good reason to postpone the payment of benefits to these people, then, bearing in mind that the state has a legitimate interest in enforcing its valid eligibility criteria and minimizing its administrative expenses, we would not regard § 303(a)(1) [codified at 42 U.S.C. § 503(a)(1)]—which only requires administrative methods "reasonably calculated" to ensure prompt payment—as a bar to postponement. But postponement must not be unreasonable.102

In remanding the case to the district court, the court of appeals stated that “[t]he goal of the decree in this case should be a procedure that will substantially reduce the 40 percent error rate and 448-day average delay of the current procedure” and directed the district court to issue an order that enjoined Illinois from "enforcing the held in abeyance proviso as currently written and enforced but that does not specify the exact measures that the state must take to bring itself into compliance with the law."103 Some lesser, unspecified delay appeared to be acceptable.104

99. Id.
100. 691 F.2d 1225 (7th Cir. 1982), cited in Letter from Barbara C. Deinhardt, Deputy Commissioner of Labor for Legal Affairs and Counsel, New York State Department of Labor, to Thomas E. Hill, Regional Administrator, Employment and Training Administration, United States Department of Labor (Mar. 14, 1990) (on file with the University of Michigan Journal of Law Reform). The USDOL appears to have been unaware of the Jenkins case prior to the decision by the court of appeals.
101. Illinois law provides that, if an individual "is in legal custody, held on bail or is a fugitive from justice, the determination of his benefit rights shall be held in abeyance pending the result of any legal proceedings arising therefrom." ILL. ANN. STAT. ch. 48, para. 432.B (Smith-Hurd Supp. 1992).
102. Jenkins, 691 F.2d at 1229.
103. Id. at 1234.
104. The "hold in abeyance" provision is still in Illinois law, ILL. ANN. STAT. ch. 48, para. 432.B (Smith-Hurd Supp. 1992), but the Illinois Department of Labor did advise the State UC staff that the provision was no longer in effect. See Division of Unemployment Ins., Illinois Dep't of Labor, Benefit Section Bulletin No. 1513 and
The USDOL did not accept New York's argument that there could be an acceptable delay. In the USDOL's view, what mattered was that the state had introduced an administrative procedure—the awaiting of a court decision—which had the sole effect of delaying a determination of whether UC was due. New York eventually did accept the USDOL's position. Because Jenkins provided an alternative view, it weakened the USDOL's position by encouraging state dispute.

The distinctions between the lag period in Pennington and the "hold in abeyance" provision in Jenkins may not appear obvious because both affect when, if ever, the individual will receive UC. In the USDOL's view there is a major distinction. Eligibility is left to the states; however, once a state chooses its eligibility requirements, it must adhere to methods of administration guaranteeing payment as soon as administratively feasible under those requirements. Therefore, a provision of state law that may result in a determination that the individual does not have sufficient wages in the base period is an eligibility provision not subject to the "methods of administration" requirement. Conversely, the determination under a "hold in abeyance" provision is simply that the state will make no determination or, alternatively, ignore a determination that may already have been made. Thus, similar to other "methods of administration" requirements imposed by the USDOL, the issue is not the state's basic eligibility provision, but how the states operationalize it. States are free to

Appeals Section Bulletin No. 117 (June 7, 1982) (on file with the University of Michigan Journal of Law Reform).

105. Letter from Thomas E. Hill to Thomas F. Hartnet, supra note 97, at 1. The USDOL also objected to the provision because it had the effect of surrendering UC responsibilities to another public body. Id. at 2.

106. See id. at 1–2.

107. The "hold in abeyance" provision was amended. See N.Y. LAB. LAW § 593(4) (McKinney 1991).


109. See 20 C.F.R. § 640.1(a) (1995) (calling for "methods of administration of the law that are reasonably calculated to insure the full payment of unemployment compensation when determined under the State law to be due to claimants"); id. § 640.3(a) (calling for state law to include provision for "such methods of administration as will reasonably insures the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible").

110. Brief for the United States as Amicus Curiae at 8–10, Pennington (No. 92-3725).
deny UC to individuals who have been convicted of a crime. 111 What the states may not do is delay a determination of eligibility pending the outcome of a criminal proceeding.

Even if one takes the traditional view of the "methods of administration" requirement, 112 it is remarkable how infrequently the reviewing authority granted by the "methods of administration" requirement has been used. As noted above, the USDOL's energies in interpreting and applying the provision have been mainly limited to the three standards issued between 1947 and 1950, 113 some general requirements for administering a UC program, 114 and the interpretations caused by Java. 115

Two examples may be helpful in examining the extent of departmental restraint. First, the USDOL was aware that, especially during periods of high unemployment, staff members normally assigned to following-up with employers who are late paying UC taxes were transferred to claims functions, with the result that the delinquencies increased. 116 This consequence did not, however, occur in states using automated delinquency systems. 117 To remedy the problem relating to increased delinquencies, the USDOL could have created a method of administration requiring that states maximize use of automated delinquency systems by a certain date. This would appear to have been a noncontroversial requirement because, given the almost universal conversion to automated systems for routine tasks, states would likely have done this anyway. The USDOL, however, did not create such a requirement. 118

112. See supra text accompanying note 48.
113. See supra notes 56–62 and accompanying text.
114. See supra notes 63–66 and accompanying text.
115. See supra notes 76–86 and accompanying text.
117. Id. at 32. Although the report clearly established the advantage of an automated delinquency system over a manual system in this and other regards, it did not actually recommend an increased level of automation.
118. The report suggests two reasons. First, "[a]lthough [the USDOL] monitors states' performance in collecting [UC] revenues, it has chosen to take a passive oversight role." Id. at 15. Second, "[the USDOL] stated [in meetings with the General Accounting Office] that the focus of federal oversight has shifted from concern with process to an emphasis on program outcomes." Id. at 22.
The second example involves statewide hiring freezes, furloughs, shutdowns, or other personnel practices that are imposed during recessions when state tax revenues drop. During recessions, UC workload increases and the USDOL may increase its funding to the states to accommodate this workload.\(^\text{119}\) The result of statewide hiring freezes and other personnel practices is that the state UC agency is denied the flexibility to hire or otherwise use its personnel resources when that flexibility is most needed.\(^\text{120}\) The USDOL could interpret the "methods of administration" requirement to prohibit the imposition of such statewide personnel practices on state UC agencies on the ground that these practices are unrelated to the workload needs of the UC program and, therefore, not a "method of administration" reasonably calculated to insure full payment when due.\(^\text{121}\) The USDOL has not done so, even though it has not been disputed that these personnel practices have affected services, especially the timely determination of eligibility issues and the timely disposition of appeals.\(^\text{122}\)

To summarize, the history of the "methods of administration" requirement is that of a tension between two extremes. On the one hand, states are generally left free to operate their UC programs without dictation from the USDOL.\(^\text{123}\) On the...
other, the "methods of administration" requirement gives the USDOL such broad authority that the USDOL could, in effect, federalize substantial parts of the UC program. This tension has acted to limit the administrative methods that have been required of the states by the USDOL, with the result that the primary thrust in interpreting the "methods of administration" requirement has, since the Java decision, come from the courts.\textsuperscript{124}

III. MINIMUM REQUIREMENTS

The federal law requirements discussed in this section are minimums that grant the states considerable flexibility. As noted in Part II, the notion that states are generally free to operate their UC programs without direction from the USDOL has influenced the USDOL's application of federal law. As a result, when a new requirement is placed on the states, the USDOL generally has appeared to follow two rules of construction. First, because such a requirement infringes on areas otherwise left to the states, it is construed as narrowly as possible while reasonably effectuating its purpose. Second, any language that may be construed as leaving discretion to the states is broadly construed unless there are compelling reasons for a narrow construction. I will give four examples of how these rules of construction have been applied.

A. The Double Dip

According to a Senate Finance Committee report, there was "a much criticized and illogical aspect of some State benefit formulas" caused by lags between the end of the base period\textsuperscript{125} "and the period during which rights based on such wages credits may be used—called the 'benefit year.'"\textsuperscript{126} Depending on the state's law, an individual could qualify for a second

\textsuperscript{124} See supra notes 71–111 and accompanying text.
\textsuperscript{125} For a discussion of the "base period," see supra note 87–91 and accompanying text.
\textsuperscript{126} S. REP. NO. 752, 91st Cong., 2d Sess. 21 (1970).
benefit year—or "double dip" on the same period of employment—without any subsequent work.

To resolve this "double dipping" issue, Congress amended federal law to provide that "an individual who has received compensation during his benefit year is required to have had work since the beginning of such year in order to qualify for compensation in his next benefit year." The Senate report accompanying the bill made it clear that considerable discretion was left to the states: "The bill does not specify how much work would be required or whether it need be in covered employment. The committee believes that these matters should be left to the judgment of the individual States...." Thus, states could require as little as one hour of work in the benefit year. Although Congress indicated that the term, "work," need not be limited to covered employment, it did not indicate how broadly the term should be construed.

Under the rules of construction followed by the USDOL, there was, for purposes of effectuating the statute, a compelling reason for defining "work." For example, allowing unremerated services such as household chores or volunteer activities to be included in the term "work" would render the requirement meaningless because every individual likely would meet the "work" test. In addition, these types of activities do not measure the individual's attachment to the labor force, which is the basic test of eligibility for the UC system.

128. S. REP. No. 752, supra note 126, at 21.
129. See id.
130. The legislative history indicates concern that the double dip was caused "by a single separation." Id. The suggestion that Congress required a second separation from work would appear to preclude the use of routine nonremunerative services to meet the requalifying requirement.
131. See COMPARISON, supra note 89, at 4-1; see also S. REP. No. 628, supra note 21, at 11 ("Payment of compensation is conditioned upon continued involuntary unemployment."); Gladys Harrison, Forenote: Statutory Purpose and "Involuntary Unemployment," 55 YALE L.J. 117, 119 (1946) ("In the case of unemployment compensation laws the concept of the involuntary character of the unemployment which is to be compensated is pegged by the condition, found in all laws, that the worker to be eligible must be 'available for work.'... [T]he worker must want employment, not unemployment, and must signify his desire at the point where its authenticity may be put to realistic test.").
Based on these concerns, the USDOL defined "work" as "the performance of services for which remuneration is payable." On the other hand, "work" does not include disability pay, vacation pay, separation pay, or sick pay, because these payments do not represent remuneration for services. Whether an individual on "on-call" status is working depends on whether the individual is unable to use the time effectively for his own purposes, or whether the time belongs to and is controlled by the employer.

Thus, in construing a statute that was extremely broad, the USDOL added a definition that limited state discretion. This limitation appears not to have created any problems for the states, as departmental records do not identify any case where the USDOL raised a conformity issue with a state based on the state's definition of work.

**B. Approved Training**

In 1976, Congress took action to "remove the impediments to training which remain in our unemployment insurance system." Federal law was amended to provide that

compensation shall not be denied to an individual for any week because he is in training with the approval of the State agency (or because of the application, to any such week in training, of State law provisions relating to availability for work, active search for work, or refusal to accept work).

---


133. See 1970 Draft Legislation, supra note 132, at 47.

134. Id.

135. Id.


Congress did not provide any guidance as to what constituted "training with the approval of the State agency." The USDOL had to decide whether to provide any guidance with regard to this change in the law.

The first question is whether the statute gives the USDOL the authority to establish a minimum requirement—it did, after all, apply to "training with the approval of the State agency." Under the USDOL's rules of construction, the language concerning state approval would appear to leave the matter to the states. There was, however, a compelling reason for establishing a minimum requirement because states could simply refuse to approve any training or set prohibitive conditions on approval. The USDOL could argue that the language referring to state approval only acknowledged the fact that it was the state, not the individual, who determined whether the training would be approved. Therefore, a minimum requirement could be established governing the conditions under which the state could approve the training.

In the end, the USDOL decided that,

[under the Federal requirements, each State is free to determine what training is appropriate for a claimant, what criteria are established for approval of training for an individual, and what safeguards are established to assure that the claimant for whom the training has been approved is actually attending such training.]

Four years later, the USDOL directed states to apply reasonable criteria for approval of training. Although the USDOL provided examples of reasonable criteria, it established no definitive test. The USDOL did state, however, that approval could not be withheld or the payment of UC reduced where the individual was receiving payments to offset the direct cost of training. Further, approval of training could not be withheld because the individual was residing in or filing from another state.

138. Id.
139. 1970 DRAFT LEGISLATION, supra note 132, at 62.
140. See Unemployment Insurance Program Letter No. 1276 (July 22, 1974).
141. Id. at 4.
The change requiring unspecified "reasonable criteria" was significant in that it prohibited states from establishing criteria so rigorous that individuals would never receive approval and from denying approval in certain instances. However, consistent with the USDOL's first rule of construction, this change was not so intrusive that states that had approved training provisions prior to the enactment of the federal law provision would be required to make substantive changes.

The reasonableness requirement avoids a situation where the USDOL may have second-guessed any denial of approval. Instead, the USDOL limited its ability to object only to particular situations. As will be discussed further below, the USDOL avoids interjecting itself into situations involving specific determinations of eligibility. Finally, flexibility at the state level allows states to avoid absurd situations. Subsequent events show why the final point has merit. Eligible dislocated workers participating in training under the Jobs Training Partnership Act (JTPA) must be considered to be in approved training for UC purposes. One state asked the USDOL about the unequal application created when the JTPA approved training that the state UC agency would not have approved. The agency attached approvals, including two where all that had been required of the individuals were three-hour-per-week JTPA courses; one was for art appreciation and the other was for computer training. In one case, art appreciation, it was not clear how the course would improve the individual's chances of finding work. Another concern the state may have had was that the training was not full-time. Individuals who work part-time during a week must still be available for, search for, and accept work for periods of

143. See infra Part IV.B.  
145. See id. § 1661(c)(2).  
146. Letter from Keith W. Ahue, Director, State of Hawaii Department of Labor and Industrial Relations, to Don A. Balcer, Regional Administrator, Employment and Training Administration, United States Department of Labor (Jan. 13, 1993) (on file with the University of Michigan Journal of Law Reform).  
147. Id.  
148. The USDOL has stated that "State regulations should assure . . . that the training course is consistent with objectives of the unemployment insurance program, e.g., reemployment of the individual in stable employment." 1970 DRAFT LEGISLATION, supra note 132, at 63. Hawaii law provides for approval of training if the "course relates to an occupation or skill for which there are, or are expected to be in the immediate future, reasonable employment opportunities in the locality." HAW. REV. STAT. § 383-29(e)(2) (1995).
unemployment during the week. Therefore, it would seem appropriate to require the same of individuals in training only a few hours each week. The USDOL advised that JTPA law plainly required the training to be approved for UC purposes and that the normal UC eligibility requirements could not be applied to the claimant. Even though JTPA approval may have been proper—for example, the individual needed the course to complete a degree—the effect on the UC program appears illogical because the individual could have sought and obtained part-time work without harming the chances of completing the course.

In summary, with regard to approved training, states were required to enact a provision of state law, and, except for the JTPA requirement, proceed as they chose. Except for those issues relating to JTPA flexibility, I have not seen an approved training question, much less a conformity issue, raised in the ten years that I have worked with conformity requirements.

C. Aliens

In 1976, Congress became concerned with the payment of UC to illegal aliens. As a result, in 1976 Congress amended federal law to require, among other things, that UC shall not be payable on the basis of services performed by an alien unless the alien was in one of two categories when the services were performed: either the alien was lawfully admitted for permanent residence, or she was permanently residing in the United States under color of law (commonly abbreviated as

149. All states provide for the payment of UC when underemployment reaches a certain stage. COMPARISON, supra note 89, at 3-7. Unavailability for work may be indicated by substantial restrictions upon the conditions of work. Id. at 4-1. The period of availability measured is the period for which UC is claimed. Id.

150. Letter from Don A. Balcer, Regional Administrator, Employment and Training Administration, United States Department of Labor, to Keith W. Ahue, Director, State of Hawaii Department of Labor and Industrial Relations 2-3 (Jan. 29, 1993) (on file with the University of Michigan Journal of Law Reform).

151. See, e.g., 122 CONG. REC. 22,524 (1976) (statement of Rep. Biaggi) ("Passage of this amendment is essential if we are to put an end to the abuses in the unemployment benefit system which have allowed illegal aliens to collect millions of dollars in benefits at the expense of the American taxpayers.").
In 1977, a third category was added to allow the use of services performed by aliens lawfully present for performing such services, meaning that the alien had work authorization when the services were performed. In addition, amendatory language made clear that, in order to be used for UC purposes, services had to be performed by aliens during periods in which they were in any of the three categories.

The first issue facing the USDOL was the extent to which the states had to adopt the provision. Because the USDOL broadly construes language, which may be interpreted as leaving discretion to the states, the USDOL interpreted the provision to require only that state law provide for a denial to aliens. Whether the state chose to pay any aliens by including any of the three exceptions found in federal law was for the state to decide.

The next issue for the USDOL to decide was whether to provide specific guidance on the three categories of eligible aliens. Similar to the approved training provision, there were compelling reasons for providing an interpretation: through liberal interpretation of the categories, the requirement could be rendered meaningless because no aliens would be denied UC. Unlike the approved training provision, there was no language that would indicate that the matter should be left to the states. Also, the determination of which individuals shall be admitted to the United States and for what purposes are peculiarly questions of federal law, so the USDOL could

---

154. Id.
155. The clearest statement of this position is in Unemployment Insurance Program Letter No. 1-86, Change 1, 56 Fed. Reg. 29,719 (1991) [hereinafter UIPL No. 1-86, Change 1]. It is not clear when the USDOL adopted this position. Because all state laws contain the original exceptions, the "lawfully admitted for permanent residence" and PRUCOL categories, the USDOL apparently assumed at first that the categories had to be included in state law. Not all state laws, however, contain the "lawfully present for performing services" category, which was added to 26 U.S.C. § 3304(a)(14)(A) by the Emergency Unemployment Compensation Extension Act of 1977, 91 Stat. at 44. See, e.g., ILL. ANN. STAT. ch. 48, para. 444 (Smith-Hurd 1986). Thus, it appears that the USDOL adopted its current position around the same time as the "lawfully present for performing services" category was added to federal law.
156. UIPL No. 1-86, Change 1, supra note 155, at 29,720.
have deemed it inappropriate to turn the matter entirely over to the states. The USDOL provided extensive guidance in 1977.\(^{159}\) When further questions arose concerning the application of the three categories, and amid concerns that applications by the states were not uniform, the USDOL issued further guidance in 1986 and 1989.\(^{160}\)

Although states could not be more liberal than the USDOL in their definitions of the categories, they could be more restrictive.\(^{161}\) Thus, at least at one time, some states construed the "lawfully present for performing services" category to pertain only to aliens who crossed the border each day to work in the United States and then returned, whereas the USDOL construed the category to pertain to any alien with work authorization.\(^{162}\) In addition, some states' current statutory definitions of PRUCOL are narrower than the USDOL's.\(^{163}\)

---


\(^{161}\) UIPL No. 1-86, Change 1, supra note 155, at 29,720.

\(^{162}\) See id. (describing the USDOL's interpretation). Although I have discussed this interpretation with states that followed it, I am unaware of any state statute actually containing it. Apparently, states adopted this restrictive interpretation at the urging of the Immigration and Naturalization Service (INS), which objected to the USDOL's broad reading of the "lawfully present for performing such services" requirement when Unemployment Insurance Program Letter No. 1-86 was created. Letter from Maurice C. Inman, Jr., General Counsel, Immigration and Naturalization Service, to William H. DuRoss III, Assistant Solicitor for Employment and Training, United States Department of Labor 2 (Nov. 2, 1984) (on file with the University of Michigan Journal of Law Reform). The INS based its position on the legislative history, which references only Canadian and Mexican residents who cross the border to work during the day and who return home at night. Id.; S. REP. No. 95-67, 95th Cong., 1st Sess. 14 (1977). The USDOL felt that, notwithstanding this intent, the provision itself was broadly written to include all aliens with work authorization. See UIPL No. 1-86, Change 1, supra note 165, at 29,720. Colorado, which used the more restrictive interpretation, found that courts would turn to the more inclusive interpretation as a basis of resolving PRUCOL cases. See Esparza v. Valdez, 862 F.2d 788, 793 (10th Cir. 1988), cert. denied, 492 U.S. 905 (1989); Bushehri v. Industrial Claim Appeals Office, 749 P.2d 439, 440 (Colo. Ct. App. 1987). The INS's interest in UC matters is illustrated by the fact that the brief for the United States in Esparza was prepared by the Office of Immigration Litigation in the Department of Justice. 862 F.2d at 791. In contrast, the Department of Labor was silent in that case. See id.

\(^{163}\) For example, Colorado law contains a limited list of aliens in PRUCOL status. COLO. REV. STAT. § 8-73-107(a) (Supp. 1995). New Jersey law requires aliens
Since PRUCOL exists in other federal statutes\(^{164}\) and the burden of interpretation rests heavily on administrative agencies and courts, it is not surprising that different interpretations have arisen.\(^{165}\) The USDOL has been criticized for not adopting the liberal interpretations and because there has been a considerable amount of litigation concerning PRUCOL in the UC context.\(^{166}\) The complaint that Congress itself did not know what was intended by the term is often heard in the USDOL. Notably, the PRUCOL provision is confusingly written because it applies the concept of "color of law" to aliens who are residing under statutory authority.\(^{167}\)

In sum, with the alien provision, the USDOL has interpreted a provision to place minimum requirements on the states while allowing the states to be more restrictive. The USDOL's current position, however, which is not universally accepted, was arrived at only after some time. This delay was caused by the fact that the USDOL has been required to interpret a vague provision—at least as regards PRUCOL—and to become involved in an area previously unrelated to the UC program—alien status. From the states' perspective, it was probably not always clear what the requirements were, because two of the USDOL's principal issuances on alien status were not issued until ten and thirteen years after the provision's enactment.\(^{168}\)

---


\(^{165}\) Cf., e.g., Berger v. Heckler, 771 F.2d 1556 (2d Cir. 1985) (involving Supplemental Security Income payments and recognizing many more groups of aliens as being PRUCOL than does the USDOL).

\(^{166}\) Irene Scharf, Preemption by Fiat: The Department of Labor's Usurpation of Power over Noncitizen Workers' Rights to Unemployment Benefits, 56 ALB. L. REV. 561 (1993). Scharf's article cites court cases disagreeing with the USDOL's position, id. at 567-77, and argues that, rather than providing a definition, the USDOL should have let a common law definition of PRUCOL develop, id. at 607-08.


\(^{168}\) See supra notes 159–60 and accompanying text.
D. Retirement Pay

As an increasing number of older workers began receiving retirement pay, the relationship of UC to that retirement pay came under discussion.\(^{169}\) One theory for requiring the deduction of retirement payments from UC is that no individual should receive duplicate payments for not working, especially when the same employer finances both payments.\(^{170}\) Another is that receipt of retirement pay indicates that the individual is no longer attached to the labor force.\(^{171}\) When first considering this issue, Congress noted that a number of people receiving retirement payments "ha[d] actually withdrawn from the labor force [and were] being paid unemployment compensation."\(^{172}\) Therefore, "a uniform rule [was] required."\(^{173}\) Accordingly, federal law was amended in 1976 to require that UC be reduced by any amount that the individual is receiving as "a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual."\(^{174}\)

Even in 1976, it was widely anticipated that Congress would revisit this "uniform rule."\(^{175}\) In 1976, the USDOL notified states that they should consider enacting a broad state-law provision that would automatically incorporate any later federal requirement related to retirement payments.\(^{176}\) Although Congress extended the original effective date, which applied to weeks beginning after September 30, 1979, to weeks beginning after March 31, 1980,\(^{177}\) it was not until 1981 that

---

169. HABER & MURRAY, supra note 3, at 309–11.
170. RUBIN, supra note 3, at 91.
171. HABER & MURRAY, supra note 3, at 311. The theories against requiring a reduction from UC are that pensions are payments for past services and that individuals who continue to seek work do so because their retirement payments are insufficient. Id. at 310–11.
173. Id.
175. See H.R. REP. NO. 1745, 94th Cong., 2d Sess. 16 (1976) (demonstrating an intent to permit "the National Commission on Unemployment Compensation an opportunity for a thorough study of this issue and the Congress to act in light of its findings and recommendations").
the final requirement, which by then was no longer a "uniform rule," was established.\textsuperscript{178} States were now required to deduct retirement pay "if and only if": (1) the plan was maintained or contributed to by a base period or chargeable employer; and (2) the services performed for this employer affected the individual's eligibility for the retirement payment or increased the amount of the retirement payment.\textsuperscript{179} More importantly, states were allowed to "take into account" contributions made by the individual to the retirement plan for purposes of determining the amount of the reduction.\textsuperscript{180} Under these amendments, Congress appeared less interested in the retirement payment as a test of availability than with preventing duplicate payments attributable to the same employer.

The requirements discussed above suggest several contradictions. On the one hand, the provision concerning the types of payments affecting UC was written very broadly; not only did it list several types of payments, but it also required deduction of all similar periodic payments.\textsuperscript{181} Thus, all these types of payments were required to be deducted, even though identifying every similar periodic payment has been a problem.\textsuperscript{182} On the other hand, the reduction in UC is required "if and only if" the retirement payments are attributable to base period or chargeable employers,\textsuperscript{183} or if such payments increased the amounts or affected eligibility for the retirement payment.\textsuperscript{184} Given its rule of construction leaving discretion to the states, the USDOL determined that states had the latitude to implement


\textsuperscript{180} Id. § 3304(a)(15)(B). This "take into account" language is so broad that it had the effect of nullifying the exception to the retirement pay provision. See id. § 3304(a)(15)(A)(ii). That section provides that the deduction from UC is not required when base-period services affect neither the individual's eligibility for the retirement payment nor the amount of the payment. Id. However, the section clearly provided that payments made under the Social Security Act and the Railroad Retirement Act of 1974 were not part of the exception. Id. Because both Social Security and Railroad Retirement payments are contributed to by the individual, see 42 U.S.C. § 401 (1994); 26 U.S.C. §§ 3301, 3307 (1994) (Social Security); 26 U.S.C. § 3201 (1994) (Railroad Retirement), the "take into account" language means that such amounts need not be deducted.

\textsuperscript{181} 26 U.S.C. § 3304(a)(15).

\textsuperscript{182} See Unemployment Insurance Program Letter No. 22-87, 52 Fed. Reg. 22,546 (1987) [hereinafter UIPL No. 22-87] ("No exhaustive list of all the kinds of payments that are deductible is available.").

\textsuperscript{183} 26 U.S.C. § 3304(a)(15).

\textsuperscript{184} Id. § 3304(a)(15)(A).
these exceptions either in their entirety or piecemeal. Further, although the "take into account" provision could be added to state law at the state's option, the exact meaning of "take into account," and therefore the extent of the state's latitude, would be determined only through litigation.

Following the 1980 amendment, the USDOL originally indicated that the states had broad latitude concerning the "take into account" provision, up to the point of entirely eliminating the reduction if an individual contributed any amount to the plan. As the result of criticism from congressional staff, however, the USDOL reversed itself and provided a restrictive interpretation limiting state latitude: the percentage of the retirement payment disregarded could not exceed the percentage that the individual contributed to the retirement plan.

The new interpretation was challenged in federal court. The United States Court of Appeals for the District of Columbia ruled that the part of the USDOL's issuance relating to the percentage of the retirement payment disregarded under the "take into account" provision was "subject to the [rulemaking] procedures of the Administrative Procedures Act and the Secretary [could] be enjoined from using them in assessing the appropriateness of certifying a state under the Federal Act." The court also indicated a dim view of the USDOL's new interpretation, noting that the "take into account" provision was "very broad and Congress obviously intended to permit the

185. See UIPL No. 22-87, supra note 182, at 22,547.
190. Id. at 239. In fact, many of the USDOL's interpretations of the pension provision were challenged on the ground that the USDOL's issuances constituted substantive rulemaking which did not follow the required rulemaking procedures of the Administrative Procedures Act. Id. at 237–38. Except for the "take into account" provision, the court found that the other positions taken by the USDOL were "interpretative rules" authorized under the Administrative Procedure Act because they did not create law but were merely statements as to how the agency interprets the statute. Id. at 238–39. The court in Rivera v. Becerra, 714 F.2d 887 (9th Cir. 1983), cert. denied, 465 U.S. 1099 (1984), also found that the USDOL's issuances on the pension provision constituted interpretive rules, id. at 891, but the "take into account" provision was not challenged in that case.
states wide latitude for its implementation." The USDOL issued a directive reverting to its original position. Thus, using its normal rules of construction, the USDOL was right the first time: because the "take into account" provision did not specify an offset, the matter was properly left to the states.

In part because of this reversal of positions, the reduction requirement may not be understood completely by the states to this day, even though clarifying guidance was issued to the states in 1987. Despite the requirement's apparent broadness, states must reduce UC for the receipt of only a few types of retirement payments. First, only retirement payments based on the individual's previous work cause a reduction in UC. Thus, disability retirement and survivors' benefits are not included in its scope, and the states are free to decide how to treat these amounts. Second, given the "take into account" provision, only entirely employer-financed retirement payments are required to be reduced. Contributions to these entirely employer-financed payments must be made by base-period or chargeable employers and the services for the employer must affect eligibility for or increase the amount of the retirement payment. Thus, the provision only requires receipt of a very limited group of payments to cause a reduction in UC.

The requirement that UC be reduced due to retirement pay demonstrates how the USDOL and the courts interpret the statute to place the least possible burden on the states to the point where only a few types of pension payments must cause a reduction in UC. This result has occurred because Congress revisited and, perhaps without intending it, eviscerated its own requirement.

IV. ABSOLUTE REQUIREMENTS

The federal requirements discussed so far have left considerable discretion to the USDOL. Although these requirements by
their very existence limit state discretion, the states still have flexibility to work within these requirements. As discussed in this Part, "absolute" requirements are different in that federal and state discretion are, in theory at least, nonexistent. The absolute character of these requirements is derived from the law itself, which gives the USDOL no authority to apply the rules of construction that it uses for minimum requirements. Because states have no latitude under federal "absolute" requirements, each state, given the same set of facts, should make the same determination regarding eligibility.

A. Mandatory Coverage, Equal Treatment, and the Between and Within Terms Denial

State coverage of services is encouraged by the federal tax offset scheme. If services are not covered, then the employer will not be eligible for the federal tax credit against these services, and the individual who performed the services will not be eligible for UC. Because some services were excluded from the federal tax, states had no incentive to cover these services. As a result, Congress took action to require all states to pay compensation based on two types of excluded services: those performed for certain nonprofit organizations and those performed for state and local governmental entities. Not only must the states cover these services, but, with specified exceptions, UC is to be paid "in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law." This "equal treatment" requirement assures that the coverage

199. "The coverage provisions of State unemployment insurance laws determine the employers who are liable for contributions and the workers who accrue rights under the laws." COMPARISON, supra note 89, at 1-1.

200. See supra notes 18–19 and accompanying text.


202. See The Employment Security Amendments of 1970, Pub. L. No. 91-373, § 104(a), 84 Stat. 695, 697 (codified as amended at 26 U.S.C. § 3304(a)(6)(A) (1994)). The basic requirement is that states must extend coverage to those services excluded from the definition of "employment" found in 26 U.S.C. § 3306(c)(7) or (8). 26 U.S.C. § 3309(a). Subparts (7) and (8) of § 3306(c) exclude from the term "employment" those services performed for state and local governmental entities and religious, charitable, or educational organizations exempt from income tax by reason of § 501(c)(3). The remaining paragraphs of § 3306(c) and § 3309(b) provide exceptions to this required coverage provision.

203. Id. § 3304(a)(6)(A).
requirement is not circumvented through the establishment of prohibitive eligibility requirements. 204

The required coverage and equal treatment provisions are absolute. They give states no choice but to cover certain services and no choice but to pay UC under the equal treatment rule. 205 From a conformity standpoint, these provisions should be fairly easy to administer: either state law covers the services and provides for equal treatment or it does not.

This apparent ease of administration did not, however, prevent litigation involving two states, Alabama and Nevada. 206 When Congress modified the required coverage provisions in 1976, it deleted language authorizing an exception for services performed in the employ of a school that was not an institution of higher education. 207 Language permitting the states to exclude services performed for churches, however, was not amended. 208 The USDOL believed that Congress intended to extend coverage to all nonprofit schools and that the church exclusion applied only to church, as opposed to school, duties, and thus it advised states that their laws must extend coverage to church-related elementary and secondary schools. 209 After a hearing was held on the failure of Alabama and Nevada to extend this coverage, the Secretary found that such services were required to be covered and that the two states had consequently failed to conform to federal law requirements. 210 The states appealed, and the United States Court of Appeals for the Fifth Circuit ruled against the Secretary. 211 At about the same time, the South Dakota Supreme Court found that

---

204. See Rubin, supra note 3, at 101-02.
205. In re The Question of Whether the State of New York's Unemployment Insurance Law Conforms with the Requirements of the Federal Unemployment Tax Act 7-11 (June 6, 1975), transmitted by Unemployment Insurance Program Letter No. 24-75 (July 9, 1975) [hereinafter UIPL No. 24-75].
206. See Alabama v. Marshall, 626 F.2d 366 (5th Cir. 1980). An administrative law judge made an earlier conformity decision involving New York's exclusion of certain services from the coverage required under 26 U.S.C. § 3304(a)(6)(A). See UIPL No. 24-75, supra note 205. This conformity decision eventually became a 1975 Secretary's decision involving the conformity of New York's exclusion of certain services from the coverage required under § 3304(a)(6)(A). See id.
211. Alabama v. Marshall, 626 F.2d 366, 368-69 (5th Cir. 1980).
a provision of state law paralleling federal law required coverage of church schools. In that case eventually reached the United States Supreme Court, which ruled that federal law did not require coverage. In his concurring opinion, Justice Stevens summed up the dilemma that the USDOL faced: "Although Congress' intention to cover such [church school] employees was, in my judgment, clear, the 1976 Amendments simply failed to give effect to that intention. . . . Congress removed only one of the two statutory exemptions that, by their terms, applied to employees of parochial elementary and secondary schools."

The "between and within terms denial" provisions are exceptions to the equal treatment requirement. They address the eligibility of certain individuals who worked for or provided services to or on behalf of an educational institution or an educational service agency. States are required, or in some cases authorized, to deny UC based on such educational employment between academic years or terms and during vacation periods and holiday recesses within a term if the individual has a contract or "reasonable assurance" of performing services in such educational employment in the following year, term, or remainder of a term. Federal law requires state laws to contain the "between and within terms denial" provisions for instructional, research, and principal administrative services for educational institutions and educational service agencies, but the provisions are optional for all other services performed for such entities as well as for services provided to or on behalf of such entities.

The denial provision seems to be based on two principles. First, it was intended to prevent double dipping against the employer. According to a Senate Finance Committee Report,

---

214. Id. at 790.
216. See id.
217. See id.
218. Id. § 3304(a)(6)(A)(iii)–(iv). An educational service agency is defined as a "governmental agency or governmental entity which is established and operated exclusively for the purpose of providing" services to one or more educational institutions. Id. § 3304(a)(6)(A)(iv).
Federal Law Requirements

It is common for faculty and other professional employees of a college or university to be employed pursuant to an annual contract at an annual salary, but for a work period of less than 12 months. The annual salaries are intended to cover the entire year, including the summer periods, a semester break, a sabbatical period or similar nonwork periods during which the employment relationship continues. 220

Second, Congress seemed concerned about whether state availability provisions would operate to limit UC to teachers and other individuals genuinely willing to work between or within terms. 221 In this regard, the "between and within terms denial" is a statutory presumption of unavailability.

The necessity of developing federal interpretations in many areas of the "between and within terms denial" has been noted elsewhere. 222 The USDOL has had to define terms such as "educational institution," "reasonable assurance," "principal administrative capacity," and "term." The USDOL has answered the following questions: (1) whether the denial applies to a school principal who has reasonable assurance of a teaching job for the coming term; (2) whether the between terms denial applies if the offer of employment for the second year is refused; (3) whether reasonable assurance exists when, for example, 200 individuals are told that they will have employment but budget cuts permit only 150 jobs to be filled during the next year or term; (4) how the denial applies to individuals who worked full-time in the first academic year but were offered reduced employment for the second year; (5) what effect the denial has on substitute teachers; (6) whether there is reasonable assurance when only the possibility of employment exists; (7) whether UC must be paid.

220. S. REP. No. 752, supra note 126, at 16.
221. See RUBIN, supra note 3, at 103.
222. E.g., id. at 105.
223. The following list builds on Rubin's list. See id.
225. 1976 DRAFT LANGUAGE, supra note 159, at 54; Unemployment Insurance Program Letter No. 4-87, 52 Fed. Reg. 3889 (1987) [hereinafter UIPL No. 4-87].
226. 1976 DRAFT LANGUAGE, supra note 159, at 38.
228. UIPL No. 4-87, supra note 225, at 3890.
229. Id. at 3890; see also 1976 DRAFT LANGUAGE, supra note 159, Supp. 1 at 18–19.
retroactively if there is no job available during the succeeding term;\textsuperscript{230} (8) how an individual who “crosses over” from one type of employer to another or from one type of service to another should be treated;\textsuperscript{231} (9) whether the denial applies to an individual who worked for two educational institutions in the first academic year but who only has a reasonable assurance of employment from one of the educational institutions for the second academic year; and (10) whether the denial applies to an individual who normally works during the summer vacation on a “year-round” contract but who is offered no work during the summer.\textsuperscript{232}

Determining conformity with the “between and within terms denial” provisions created problems for the USDOL. Because the requirements are the same for each state, all states would, in theory, reach the same conclusion given the same set of facts, but because of the complexity of the statute, the reality is that this result does not always occur. In fact, my experience has been that even officials within a state have reportedly disagreed with one another. Because states must determine claims in a timely manner, they have not had the luxury of awaiting federal guidance when novel situations arise.\textsuperscript{233} Thus, determinations were made before the USDOL even became aware that an area required its attention.\textsuperscript{234} Congress seems


\textsuperscript{232} The answers to these last two questions have not been distributed to the states.

\textsuperscript{233} Once an inquiry on an original matter is received in writing, the USDOL may take two or more months to respond. States, however, must make payment with “the greatest promptness that is administratively feasible.” 20 C.F.R. § 640.3(a) (1995).

\textsuperscript{234} Some determinations even took place at the state court level, see, e.g., Mallon v. Employment Div., 599 P.2d 1164 (Or. Ct. App. 1979) (holding that individuals who had two instructional jobs in the first academic period only had reasonable assurance of employment in one of the positions in the second period), and did not come to the USDOL’s attention until another state made a query, see, e.g., Letter from Charles W. McGlew, Assistant Unemployment Compensation Director, State of Connecticut Department of Labor, to Walter Baran, Unemployment Insurance Program Specialist, Boston Regional Office, United States Department of Labor (Nov. 6, 1986) (on file with the \textit{University of Michigan Journal of Law Reform}). The response to this inquiry raised no issue and indicated that the USDOL had needed to study this case. See Letter from Robert J. Semler, Acting Regional Administrator, Employment and Training Administration, United States Department of Labor, to Eleanor H. Smarz,
to have had a similar problem concerning areas requiring its attention—it has amended the “between and within terms denial” six times since it was created in 1970, often to capture situations not originally contemplated in the original provision.235

Thus, the USDOL had two problems: policing state implementation of the requirements and providing guidance for every conceivable situation. In some cases, guidance has not been provided.236 Even when the USDOL provides guidance to individual states, this guidance does not always develop into an official statement of the USDOL’s position through program letters issued to all states.

The USDOL has dealt with this in part by establishing a framework for states to handle at least one matter on their own: whether a reasonable assurance exists where the


235. The Employment Security Amendments of 1970, Pub. L. No. 91-373, § 104(a), 84 Stat. 695, 697 (codified as amended at 26 U.S.C. § 3304(a)(6) (1994)), added the original “between terms” denial as a conformity requirement. It applied only to the period between academic years, only to individuals with a contract, and only to services performed in a professional, research, or principal administrative capacity. Id. The Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 115(c), 90 Stat. 2667, 2670, amended 26 U.S.C. § 3304(a)(6)(A) by adding language relating to a “reasonable assurance” and by adding clause (ii), which authorized, but did not require, the application of the denial between terms to all other services performed by an educational institution, that is, those not performed in a professional, research, or principal administrative capacity. The Emergency Unemployment Compensation Extension Act of 1977, Pub. L. No. 95-19, § 302(c), 91 Stat. 39, 44, amended clause (i) to clarify that the denial applied between terms as well as between academic years and added clause (iii) to authorize, but not require, the denial for vacation and holiday periods within terms or academic years. Pub. L. No. 95-171, § 2, 91 Stat. 1353, 1353 (1977), added clause (iv) to authorize, but not require, the “between and within terms” denial for services performed for governmental agencies or entities, called educational service agencies, established and operated exclusively for the purposes of providing services to one or more educational institutions. The Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 193, 96 Stat. 324, 408, added subclause (II) to clause (ii) to provide for the retroactive payment of compensation in certain cases where the individual is not offered an opportunity to perform such services in the second academic year or term. The Social Security Amendments of 1983, Pub. L. No. 98-21, § 521, 97 Stat. 65, 147, required state law to include the previously optional clauses (ii)(I), (iii), and (iv) and added clause (v) authorizing, but not requiring, the denial when services were provided to or on behalf of an educational institution by any governmental entity or nonprofit organization. The Emergency Unemployment Compensation Act of 1991, Pub. L. No. 102-164, § 302(a), 105 Stat. 1049, 1059, made the denial optional for those services not performed in an instructional, research, or principal administrative capacity. This, in effect, repealed significant parts of the 1983 amendments.

236. See supra note 232 and accompanying text.
individual worked a certain number of hours in the first academic period and has been advised that the number of hours to be worked in the second academic year would be substantially lower. The USDOL was concerned that, in this instance, the "between and within terms denial" was producing absurd results. Therefore, providing the states some flexibility might be desirable. After studying the issue, the USDOL provided guidance, stating that

[r]easonable assurance exists only if the economic terms and conditions of the job offered in the second period are not substantially less (as determined under State law) than the terms and conditions for the job in the first period. This position modifies that stated on page 23 of Supplement 5, of the Draft Legislation.

The position that was modified was that the suitability of the work—in other words, the economic terms and conditions—could not be considered in determining whether a reasonable assurance existed. Under the new position, the

---

237. See UIPL No. 4-87, supra note 225, at 3890.
238. See Leissring v. Department of Indus., Labor and Human Relations, 340 N.W.2d 533 (Wis. 1983). The case provides an example of two similar situations leading to different results. One involved a full-time teacher who was laid off following the academic year and told that she would be placed on the substitute teaching list for the following year; however, she was not told how often, if ever, she could be expected to be called on to substitute. Id. at 534–35. She was originally denied benefits. Id. at 535. The second situation involved a teacher who was employed full-time and who also taught driver education for an additional hour each day. Id. This teacher also was laid off and then offered a one-hour-per-day job from the same school teaching driver education. Id. He was found eligible for benefits. Id. at 535–36. The Leissring court concluded that UC was due to both individuals. Id. at 541. The USDOL agreed with the court’s decision. See UIPL No. 4-87, supra note 225, at 3890. The Leissring court noted that the plaintiffs were in a far different situation than the teacher who can look forward to resuming his or her full-time employment in the fall.... [Each plaintiff is] not seeking benefits simply because he or she wants a subsidized summer vacation. Such benefits would likely be needed to meet current and future living expenses and to defray the expenses of seeking new employment. These are precisely the type of circumstances for which unemployment compensation has traditionally been intended.

340 N.W.2d at 540.
239. UIPL No. 4-87, supra note 225, at 3890. The reference to the "Draft Legislation" is to the 1976 DRAFT LANGUAGE, supra note 159, Supp. 5 at 23. The "economic terms and conditions" test was based on a similar test found in Paynes v. Detroit Board of Education, 388 N.W.2d 358, 366 (Mich. Ct. App. 1986).
240. See 1976 DRAFT LANGUAGE, supra note 159, Supp. 5 at 23.
economic terms and conditions had to be considered and would be "determined under state law."\textsuperscript{241} Thus, under this "absolute" federal requirement, the USDOL established a framework that, in its view, reasonably effectuated the purpose of the between and within terms denial by allowing states to reach different conclusions given the same set of facts. Ironically, this was done by placing a requirement, not plainly evident in federal law, on the states.\textsuperscript{242}

In summary, the required coverage and equal treatment provisions should, notwithstanding a matter ultimately resolved by the United States Supreme Court, be administered fairly easily at the federal level. The "between and within terms denial," however, assumes a level of federal involvement that is difficult to maintain because the USDOL would be required to provide guidance on every between and within terms situation so that every state, given the same set of facts, would reach the same conclusions. The USDOL has, therefore, in one case established a framework with which states may make determinations under state law.

\subsection*{B. The Extended Benefit Work Search}

During periods of high unemployment, states are required to pay extended benefits (EB) to individuals who have exhausted regular UC.\textsuperscript{243} Because the federal government shares the cost of EB,\textsuperscript{244} it has a more active interest in EB eligibility, with the result that federal law contains special eligibility requirements that states must require individuals to meet.\textsuperscript{245} Some of these requirements are minimums; some are absolutes.

\begin{flushleft}
\textsuperscript{241} UIPL No. 4-87, \textit{supra} note 225, at 3890.
\textsuperscript{242} See \textit{26 U.S.C. § 3304(a)(6)(A)(i)} (1994). The provision applies only "if there is a contract or reasonable assurance" of performing services in the second academic period. \textit{Id.} Section 3304(a)(6)(A) makes no mention of "economic terms and conditions."
Federal law requires that, to be eligible for EB, an individual must have twenty weeks of “full-time” insured employment in the base period or the equivalent. The equivalent was defined by law as insured wages that exceed forty times the individual’s most recent weekly benefit amount or one and one-half times the individual’s insured wages in the calendar quarter of the base period in which the individual’s insured wages were the highest. The USDOL, providing a very liberal interpretation, accepted “full time” as meaning “the meaning provided by the State law.”

The asserted theory behind this earnings requirement is that individuals employed for fewer than twenty weeks should not collect UC beyond twenty-six weeks. In fact, it appears to have been based more on federal budgetary considerations. From the federal perspective, this provision is relatively easy to administer: either state laws contain the appropriate qualifying requirement or they do not.

Another EB requirement is a special work search requirement, which was apparently added to federal law on the premise that individuals who do not look for work will not find work. Again, the real reason seems to have been budget considerations. Under the work search requirement, an individual shall be treated as actively engaged in seeking work only if the individual has engaged in a “systematic and sustained effort” to obtain work during the week claimed.

247. Id.
251. Rubin, supra note 3, at 115. Supporters of the amendment argued that “the claimants affected were long term unemployed and, therefore, lacking in initiative.” Id.
252. See id.
The USDOL's regulations use almost an entire column in the Code of Federal Regulations to define "a systematic and sustained effort."\(^{254}\) In part, the regulations require "[a] high level of job search activity throughout the given week, compatible with the number of employers and employment opportunities in the labor market reasonably applicable to the individual,"\(^{255}\) "[a] plan of search for work . . . which results in contacts with persons who have the authority to hire or which follows whatever hiring procedure is required by a prospective employer,"\(^{256}\) "[actions by the individual comparable to those actions by which jobs are being found by people in the community and labor market],"\(^{257}\) and "[a] search not limited to classes of work or rates of pay to which the individual is accustomed."\(^{258}\)

All states should, in theory, reach the same conclusion as to whether an individual meets the "systematic and sustained effort" requirement when presented with the same set of facts. Given this reasoning, it is notable that the regulations do not give any clear guidance as to what action must be taken in a specific situation. For example, given the same set of facts in different states, it might be expected that the same minimum number of work search contacts would be required, but the USDOL has never said what this number is. What is an adequate plan for the search of work? Again, the USDOL has never said. The regulation's focus on the local labor market gives the states great latitude. Each local labor market is unique, and, in order to challenge a specific determination successfully, the USDOL would have to become at least as expert in the local labor market as the state. This is highly unlikely. What is required of the states is that they determine whether an individual is conducting a "systematic and sustained effort" within a framework established by the USDOL.\(^{259}\) The result is that the actual application may be expected to vary widely from state to state.

Such treatment of this type of "absolute" requirement is probably inevitable. The USDOL has neither the resources nor the expertise to provide guidance on every situation or monitor

---

255. Id. § 615.2(o)(8)(i).
256. Id. § 615.2(o)(8)(ii).
257. Id. § 615.2(o)(8)(iii).
258. Id. § 615.2(o)(8)(iv).
259. 20 C.F.R. §§ 615.2(o), 615.8(g)(1) (1995).
every determination. Furthermore, because the determinations are made by the state under state law, the only way for the states to correct problems is to ignore their own precedents consistently or to amend their laws to reverse the precedents. Therefore, an accommodation is made which, in the USDOL's view, reasonably effectuates the federal requirement. That accommodation is to require the states to work within a framework that, although supposedly absolute, actually gives them considerable latitude.

C. The Deposit and Withdrawal Standards

The UC system is a trust system in which the trustee—the Secretary of the Treasury—holds moneys in trust for the beneficiaries, the state agencies administering the state UC laws. This trust relationship is a curious one in that the beneficiaries actually collect and disburse the funds. The trustee's role, at least concerning the actual handling of the funds, is merely to invest and hold the funds until such time as they are needed.

The deposit and withdrawal standards, which were part of the original Social Security Act of 1935, impose restrictions on the beneficiaries concerning the use of the trust's moneys to assure that the purpose of the trust—relief against the hazards of unemployment—is accomplished. They do this by governing the treatment of trust moneys while in the hands of the beneficiary. The deposit standard requires that "all money received in the unemployment fund shall . . . immediately upon

260. S. REP. No. 628, supra note 21, at 47. Congress instituted federal rather than state trusteeship so that, "when depression set[] in, the funds [could] be liquidated without actual sale of the securities on the markets, and . . . the net effect [would] be to maintain purchasing power without any offsetting effects toward deflation." Id. at 15. The report itself refers to the state agencies as "the beneficiaries." Id. at 47.

261. NCUC REPORT, supra note 3, at 18 (noting that "[s]tate taxes finance the full cost of regular [UC] benefits").


263. "The essential idea in unemployment compensation is the creation of reserves during periods of employment from which compensation is paid to workmen who lose their positions when employment slackens and who cannot find other work." S. REP. No. 628, supra note 21, at 11. Limitations on fund moneys by the states assures that the funds will be there rather than siphoned off to some other purpose. The withdrawal standard is vital to maintaining the integrity of State unemployment funds. Since 1935 this provision has prevented the dispersion of this money for a variety of purpose other than to pay compensation.
such receipt be paid over to the [United States] Secretary of the Treasury to the credit of the Unemployment Trust Fund."\textsuperscript{264} The "withdrawal standard" requires, with specified exceptions, that "all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration."\textsuperscript{265}

The scope of the deposit and withdrawal standards is considerable. Together, they serve as the basis for timeliness requirements related to the length of time unemployment fund moneys are actually in the hands of the state.\textsuperscript{266} Also, together the provisions determine when moneys become and cease to be a part of the state's unemployment fund. By itself, the withdrawal standard limits withdrawals from the state's unemployment fund\textsuperscript{267} and has served as the basis for requiring or prohibiting certain eligibility requirements.\textsuperscript{268} Both provisions have been construed narrowly by the USDOL;\textsuperscript{269} exceptions are allowed only as required by law.\textsuperscript{270}

The deposit and withdrawal standards tend to be the federal requirements that the USDOL takes most seriously, as they are the most fundamental to the federal-state system. This section discusses how these provisions have been interpreted and applied, using two examples which illustrate how the USDOL negotiates and resolves issues of conformity and compliance.

\textsuperscript{265} 26 U.S.C. § 3304(a)(4). The same withdrawal requirement is found in 42 U.S.C. § 503(a)(5). "Compensation" is defined as "cash benefits payable to individuals with respect to their unemployment." 26 U.S.C. § 3306(h). "Unemployment fund" is defined, in part, as a "special fund, established under a State law and administered by a State agency, for the payment of compensation." Id. § 3306(f). Basically, the state's unemployment fund contains three identifiable components: (1) a clearing account for deposit of employer remittances, (2) the state's account in the Unemployment Trust Fund established by 42 U.S.C. § 1104, and (3) a benefit payment account for the payment of UC. See State Unemployment Fund Cash Management Program, 55 Fed. Reg. 20,404, 20,404 (1990).
\textsuperscript{269} See UIPL No. 45-89, supra note 268.
\textsuperscript{270} UIPL No. 11-92, supra note 267, at 7796.
1. Withdrawal for Health Care Purposes—On July 1, 1989, New Jersey enacted its annual appropriation bill for the 1990 fiscal year.\(^{277}\) Section 30 of the Act created a new state account called the "Uncompensated Care Offset Account" for purposes of paying certain health-related expenses.\(^{272}\) Section 30 also provided for an appropriation to the Uncompensated Care Offset Account from worker contributions in the clearing account, which was part of the state's unemployment fund.\(^{273}\)

On August 2, 1989, the USDOL notified New Jersey of its concerns that section 30 appeared on its face to conflict with the requirements of the deposit and withdrawal standards.\(^{274}\) The USDOL's position, which would be amplified in subsequent correspondence, was that under the deposit standard unemployment taxes are "received in" the state's unemployment fund at the instant of their receipt by the state or its agent and, therefore, were required to be deposited immediately in the state's account in the Unemployment Trust Fund.\(^{275}\) Thus, funds that are received by a state as unemployment taxes may not, consistent with the deposit or withdrawal standard, be diverted or reappropriated to some other purpose.

After New Jersey failed to respond, the USDOL sent a gauntlet letter\(^{276}\) on August 28, 1989.\(^{277}\) New Jersey responded

\(^{271}\) 1989 N.J. Laws 122.
\(^{272}\) Id.
\(^{273}\) Section 30 provided for an appropriation "from those proceeds that would otherwise be deposited in the clearing account established pursuant to [N.J. REV. STAT. §] 43:21-9(b), moneys in an amount equal to 40% of employee contributions received in this fiscal year pursuant to [N.J. REV. STAT. §] 43:21-1 et seq. or $100,000,000 whichever is greater, notwithstanding any other provisions of [N.J. REV. STAT. §] 43:21-1 et seq." Id. Section 43:21-9(b) addressed the administration of the unemployment fund by the State Treasurer, providing that "[a]ll moneys payable to the fund, upon receipt thereof by the [New Jersey] Department of Labor, shall be forwarded to the treasurer, who shall immediately deposit them in the clearing account." N.J. REV. STAT. § 43:21-9(b) (1994). Under the same section, the clearing account was a part of the State's unemployment fund. See id. New Jersey law also provided that "each worker shall contribute to the [unemployment] fund 1% of his wages." See id. § 43:21-7(d)(1)(A).
\(^{274}\) Letter from Thomas E. Hill, Regional Administrator, Employment and Training Administration, United States Department of Labor, to Charles Serraino, Commissioner, New Jersey Department of Labor 1 (Aug. 2, 1989) (on file with the University of Michigan Journal of Law Reform).
\(^{275}\) Id. The position is restated in a letter from Roberts T. Jones, Assistant Secretary of Labor, United States Department of Labor, to Charles Serraino, Commissioner, New Jersey Department of Labor 1–2 (Dec. 1, 1989) (on file with the University of Michigan Journal of Law Reform).
\(^{276}\) See supra note 34 and accompanying text.
\(^{277}\) Letter from Roberts T. Jones, Assistant Secretary of Labor, United States Department of Labor, to Charles Serraino, Commissioner, New Jersey Department
on September 12,\textsuperscript{278} and the parties met on September 21.\textsuperscript{279} As a result of the meeting, an October 25, 1989, letter from the USDOL offered New Jersey the opportunity to resolve the issue by issuing an Attorney General’s opinion stating that section 30 did not merely appropriate moneys—it also established a new tax on the worker payable to the Uncompensated Care Offset Account while the UC tax on the worker was reduced.\textsuperscript{280} If section 30 accomplished this purpose, then the moneys appropriated for health care purposes were never “received in” the state’s unemployment fund and federal requirements did not apply to these moneys.

The offer of resolution through an Attorney General’s opinion was based on the fact that conformity issues exist only if state law conflicts with federal requirements.\textsuperscript{281} Therefore, if a state interprets its law in such a way that no conflict exists, then there is no conformity issue. This approach is appropriate for ambiguous provisions of state law. Although reasonable people may differ as to what is an “ambiguous” provision of state law, section 30 on its face was an appropriation that did not establish a new tax.\textsuperscript{282} Further, the state’s constitution limited the purpose of a legislative enactment to a single purpose,\textsuperscript{283} which in this case was appropriation of funds, not the creation of a new tax. Thus, offering a state the opportunity to resolve the issue through an interpretation of its law
could be viewed as permitting the state to pay lip service to federal law while circumventing it.

New Jersey provided an opinion as requested by the USDOL. 284 New Jersey based its interpretation of its law on the theory that all funds from all sources arrive in the state general fund in an inchoate state and may be appropriated for whatever purposes the state legislature chooses. 285 Additionally, in New Jersey's view, there were no federal provisions relating to the allocation of tax proceeds prior to their deposit into a state's unemployment fund. 286 The New Jersey Attorney General stated that the moneys in question were not "received in" the fund as required by the deposit standard; therefore, no federal requirements applied. 287 In other words, moneys received as UC tax payments from employers did not become a part of the state's unemployment fund, and therefore subject to the deposit requirement, until some administrative action of the state placed them in a certain account.

In the USDOL's view, this interpretation would nullify the deposit requirement: instead of guaranteeing that moneys received by the state as unemployment contributions were used for the payment of UC in accordance with the trust, the use of the moneys would be entirely at the state's discretion. 288 The USDOL therefore raised a new conformity issue concerning when moneys became a part of the state's unemployment fund. 289 The issue was raised because, in New Jersey's view, its law did not consider amounts received as UC contributions automatically to be part of its unemployment fund. 290

Neither the New Jersey opinion letter nor its supplement provided the USDOL with an opinion unequivocally stating


286. Id. at 3.

287. Id. at 4.

288. It is important to note that nothing in federal law dictates the amounts the state requires employers and employees to pay into its unemployment fund. However, in the USDOL's view, amounts received as UC contributions are subject to the immediate deposit and withdrawal standards. Letter from Roberts T. Jones to Charles Serraino, supra, note 277, at 1-3.


290. See id.
that there was a change in the tax structure.²⁹¹ Instead, the language of the opinions appeared to apply to allocation of revenue.²⁹² Although New Jersey was given a third chance to provide an opinion,²⁹³ the issue was resolved when New Jersey and the USDOL entered into an agreement on July 20, 1990.²⁹⁴ Under the agreement, section 30 was deemed to be moot because it was applicable only with respect to the 1990 appropriation year, which had expired by the time the agreement was signed.²⁹⁵ Although this resolved the conformity issue created by section 30, the compliance issue remained because unemployment fund moneys remained outside the fund.²⁹⁶ Therefore, New Jersey agreed to pay an amount equal to the actual amount appropriated under section 30 plus interest at the rate earned by the Unemployment Trust Fund.²⁹⁷ Because the moneys had already been disbursed, New Jersey was allowed to pay the amounts over a period of time.²⁹⁸ The final payment was made on September 30, 1994. The end result was that one hundred million dollars was repaid to the state's unemployment fund along with nearly forty million dollars in interest.²⁹⁹ The agreement did not address the related conformity issue, raised by the Attorney General's opinions, of when moneys become part of the state's

²⁹¹ See supra note 284.
²⁹³ Id. at 3.
²⁹⁴ Agreement Between the United States Department of Labor and The State of New Jersey (July 20, 1990) (on file with the University of Michigan Journal of Law Reform) [hereinafter Agreement].
²⁹⁵ Id. art. 6(e).
²⁹⁶ See supra text accompanying notes 24–33 (distinguishing between conformity and compliance).
²⁹⁷ Agreement, supra note 294, art. 7(a).
²⁹⁸ Id. art. 6(d).
²⁹⁹ The payments were $37,512,183.77 and $101,756,061.53, for a total of $139,268,245.30. See Letter from Raymond L. Bramucci, Commissioner, New Jersey Department of Labor, to Thomas E. Hill, Regional Administrator, Employment and Training Administration, United States Department of Labor (Oct. 5, 1992) (on file with the University of Michigan Journal of Law Reform); Letter from Peter J. Calderone, Commissioner, New Jersey Department of Labor, to Thomas Hill, Regional Administrator, Employment and Training Administration, United States Department of Labor (Sept. 30, 1994) (on file with the University of Michigan Journal of Law Reform).
unemployment fund. This issue was resolved when the Attorney General’s opinions were withdrawn.

New Jersey was not listed on the October 31, 1989, certifications for tax credit. Because there had been no hearing or Secretary’s decision, and the appeals process had not been exhausted (much less begun), this did not constitute an actual withholding of certifications; instead, the Secretary described New Jersey as being omitted because of unresolved issues.

Under the agreement, New Jersey agreed to its continued omission from the annual certifications for tax credit until its obligations under the agreement were fulfilled, provided that no other issues existed with respect to such certification. Therefore, in addition to the 1989 omission, New Jersey was omitted from the certifications for tax credit from 1990 through 1993. Certification for 1989 was issued in 1992, certifications for the remaining years were issued in 1994.

2. Withdrawal for Administrative Purposes—In 1990, Colorado lowered UC taxes and established a separate Employment Support Fund to be used for funding administrative expenses. The legislation was retroactive: it was applicable with respect to all of calendar year 1990 even though it was not approved until June 8, 1990. The USDOL raised an issue with this retroactivity under the withdrawal standard stating that amounts properly paid into a state’s unemployment fund under provisions of law then in effect may not be transferred

300. Agreement, supra note 294, art. 6(e).
303. Id.
304. See Agreement, supra note 294, art. 7(d).
307. 59 Fed. Reg. 55,494 (1994). Because all amounts withdrawn to pay health costs during the 1989 certification period were repaid in 1992, under the Agreement, the certification with respect to that period was issued in 1992. See Agreement, supra note 294, at art. 7(a), (d). Amounts withdrawn to pay health costs during the 1990 certification period were not repaid until 1994, at which time the 1990 and subsequent certifications were made.
to another fund because of a retroactive amendment. As was the case in New Jersey, the USDOL argued that amounts were received in the state's unemployment fund at the instant of receipt by the state or its agent and could be used only for purposes authorized under federal law.

Colorado at first acknowledged that moneys received prior to June 8, 1990, were being used for administrative expenses and that such moneys would be restored to the unemployment fund. Thus, Colorado appeared to admit that unemployment funds had been used for an impermissible purpose, namely the payment of administrative costs. Colorado later resisted demands requiring repayment, arguing that, because the Colorado legislature has the authority to determine the effective date of legislation, the amounts were "erroneously paid into the unemployment fund." Colorado also argued that the amounts withdrawn were "from the clearing account . . . not . . . from the unemployment fund." The USDOL responded that retroactive amendments do not constitute "erroneous payments," as the amounts were paid into the state's unemployment fund in accordance with the law in effect at the time. The USDOL also stated that, as was the case in New

309. See Letter from Luis Sepulveda, Regional Administrator, Employment and Training Administration, United States Department of Labor, to John J. Donlon, Executive Director, Colorado Department of Labor and Employment 1 (Jan. 16, 1991) (on file with the University of Michigan Journal of Law Reform). An earlier memorandum from Donald J. Kulick, Administrator for Regional Management, United States Department of Labor, to Luis Sepulveda, Regional Administrator, Employment and Training Administration, United States Department of Labor 2 (July 23, 1990) (on file with the University of Michigan Journal of Law Reform), also made the same point. Although not transmitted in writing to Colorado, the memorandum was apparently shared with the Colorado agency, which responded to "national office questions" in a letter from John J. Donlon, Executive Director, Colorado Department of Labor and Employment, to Luis Sepulveda, Regional Administrator, Employment and Training Administration, United States Department of Labor (Sept. 19, 1990) (on file with the University of Michigan Journal of Law Reform).

310. See Letter from Luis Sepulveda to John J. Donlon, supra note 309, at 2; Memorandum from Donald J. Kulick to Luis Sepulveda, supra note 309, at 1.

311. See Letter from John J. Donlon to Luis Sepulveda, supra note 309, at 1.


313. Id.

314. Letter from Luis Sepulveda to John J. Donlon, supra note 309, at 1–2. The USDOL has since published a position concerning "sums erroneously paid into" a state's unemployment fund that is consistent with the position taken with Colorado. See UIPL No. 11-92, supra note 267, at 7796 ("Sums are 'erroneously paid' into the fund only if an error is made by the employer, his agent or the State agency which
Jersey, the amounts were received in the state’s unemployment fund at the instant of receipt by any agency or agent of the state and could only be used for purposes authorized under federal law.\textsuperscript{315} It was irrelevant that the withdrawal was made from the clearing account because “moneys in the clearing account [had] already been ‘received in’ the State’s unemployment fund.”\textsuperscript{316}

As the facts developed, the USDOL learned that Colorado had withdrawn about $1.95 million from its unemployment fund because of the retroactive application.\textsuperscript{317} In addition, another $2.1 million had been withdrawn to pay administrative expenses.\textsuperscript{318} By the time the USDOL learned of it, this latter amount had been repaid to the state’s unemployment fund. The USDOL demanded the payment of the $1.95 million “retroactive” amount with interest to the unemployment fund as well as interest on the $2.1 million “loan” amount.\textsuperscript{319} Colorado eventually complied with this demand.\textsuperscript{320}

Colorado’s use of the unemployment fund to pay administrative expenses gave rise to an additional issue concerning whether Colorado interpreted its law to permit the withdrawal of amounts from the state’s unemployment fund for administrative purposes. On its face, Colorado law did not appear to allow such a withdrawal;\textsuperscript{321} however, because the withdrawal had been made, a question arose concerning whether Colorado law meant what it seemed to say. The state was asked to provide an Attorney General’s opinion stating that such actions were not authorized by law.\textsuperscript{322} The state did not do so, saying that it did not interpret its law to permit withdrawals from the unemployment fund for purposes other than the payment results in an amount being paid into the fund which was not required by the State law in effect at the time the payment was made.”).

\begin{itemize}
\item \textsuperscript{315} Letter from Luis Sepulveda to John J. Donlon, \emph{supra} note 309, at 2.
\item \textsuperscript{316} \emph{Id.}
\item \textsuperscript{317} Letter from Luis Sepulveda, Regional Administrator, Employment and Training Administration, United States Department of Labor, to John J. Donlon, Executive Director, Colorado Department of Labor and Employment 1–2 (Apr. 24, 1991) (on file with the University of Michigan Journal of Law Reform).
\item \textsuperscript{318} \emph{Id.}
\item \textsuperscript{319} \emph{Id.} at 2–3.
\item \textsuperscript{320} \emph{See} Letter from John J. Donlon, Executive Director, Colorado Department of Labor and Employment, to Luis Sepulveda, Regional Administrator, Employment and Training Administration, United States Department of Labor (Sept. 24, 1991) (on file with the University of Michigan Journal of Law Reform).
\item \textsuperscript{321} \emph{See} COLO. REV. STAT. § 8-77-104(1) (1986) (“Expenditures from the benefit account shall be made by the division solely by the payment of benefits.”).
\item \textsuperscript{322} Letter from Luis Sepulveda to John J. Donlon, \emph{supra} note 317, at 3.
\end{itemize}
of UC and that the expense involved in acquiring the opinion was not justified.\textsuperscript{323} Thus, the contradiction remained; Colorado law did not permit a certain action, and yet the state had taken that action. For the USDOL, the question of conformity still was not resolved satisfactorily.

The matter finally came to closure on April 24, 1992, when the USDOL, by certified letter, advised the state that it accepted Colorado's statement that state law did not permit withdrawals for purposes other than the payment of compensation and that, therefore, the withdrawal was not authorized under state law.\textsuperscript{324} The letter also advised that, in the future, if the USDOL had any reason to believe that Colorado made any similar withdrawals, the matter would be referred directly to the Assistant Secretary,\textsuperscript{325} implying that immediate action would be taken to withhold certifications.

3. \textit{Summary}—These examples illustrate some common issues in conformity and compliance. From the federal perspective, the USDOL could claim that federal law had protected the states' unemployment funds because, in the end, both funds were made whole. Further, the operation of the UC programs in both states was not jeopardized by withholding certifications. By avoiding time-consuming and costly administrative and judicial proceedings, the USDOL was free to focus on other issues.\textsuperscript{326} On the other hand, both states temporarily obtained the use of state unemployment fund moneys, and neither state suffered for its actions. Therefore, it could be argued that the process of informal resolution and the lack of any withholding of grants or tax credits only serves as an incentive for states to ignore federal requirements temporarily or to enter into a process that serves to delay resolution. New Jersey, for example, used the unemployment fund moneys for about five years.\textsuperscript{327}

\textsuperscript{323} See Letter from John J. Donlon, Executive Director, Colorado Department of Labor and Employment, to Luis Sepulveda, Regional Administrator, Employment and Training Administration, United States Department of Labor (Jan. 14, 1992) (on file with the \textit{University of Michigan Journal of Law Reform}).

\textsuperscript{324} Letter from Luis Sepulveda, Regional Administrator, Employment and Training Administration, United States Department of Labor, to John J. Donlon, Executive Director, Colorado Department of Labor and Employment 1 (Apr. 24, 1992) (on file with the \textit{University of Michigan Journal of Law Reform}).

\textsuperscript{325} \textit{Id.} at 2.

\textsuperscript{326} Avoiding litigation also, of course, had the additional benefit of not placing the USDOL's interpretation at risk.

\textsuperscript{327} See supra Part IV.C.1.
From the states' point of view, the limitation imposed by the federal requirements appeared inappropriate. Both New Jersey and Colorado claimed that their legislatures possessed sole authority to take actions such as allocating resources or establishing effective dates. In the USDOL's view, this misses the point. In neither case was the state legislature's authority ever in question; the question was whether the legislatures' actions jeopardized the benefits available under the federal-state UC system.

Both examples are, in one regard, atypical. Of the eighty-three conformity issues resolved informally from 1992 through 1994, only these two required state action to correct retroactive compliance issues. Exceptions to federal law requirements often continue to be applied while the USDOL and the state negotiate resolution of the issue; this is generally a matter of a state being obliged to follow its law and courts. If the state is unwilling to change its position, the USDOL's failure to compel compliance solutions may encourage states to prolong negotiations.

There are at least two reasons for not requiring compliance solutions. First, resolving compliance issues involves identifying a compliance solution and monitoring its implementation. Resources are not always available for these activities. Second, compliance solutions may be difficult to identify and implement. The New Jersey and Colorado cases offered a comparatively easy solution: making states' unemployment funds whole. However, if a payment is properly made under a provision of state law that is inconsistent with federal law, the

328. See supra note 41 and accompanying text.
329. The use of administrative discretion in resolving issues is discussed by Wagman, supra note 29, at 57–61. It should be noted that, in some cases, there were no compliance issues to correct because the states had voluntarily administered their laws consistent with federal requirements once the USDOL raised an issue.
330. See id. at 33–55 (discussing a conformity/compliance proceeding which resulted in a state redetermining claims for individuals who were denied UC inconsistent with federal law).
331. RUBIN, supra note 3, at 30 (noting that the number of federal staff in Washington has declined even though the USDOL is responsible for administering more standards). Rubin also stated that, "[a]s of 1983, a staff of two or three skilled legislative analysts" was responsible for reviewing state legislation, negotiating the resolution of issues, and for "developing support for" the USDOL's position in a hearing. Id. at 130–31 (noting that the analysts are also responsible for issuing guidance to states concerning federal requirements). Although Rubin's comments were aimed at conformity, the analysts are also responsible for finding compliance solutions. I supervise the analysts responsible for these activities, and, as of 1996, the situation remains much the same as Rubin described it.
situation is different. The USDOL would not likely require the state to force the individual to pay back money properly received under the state's law.

The exercise of discretion in not resolving every compliance issue may be an operational necessity, but it does raise questions about the protection ostensibly offered by federal UC law. If UC has been denied under provisions of state law inconsistent with federal law, and the USDOL does not require correction of the compliance issue, then it would appear that a primary purpose of the federal law—the protection of those who look to it for such protection—is not fulfilled. Similarly, if an amount is properly paid under a state law provision inconsistent with federal law, then the unemployment fund and the employers and employees who finance the fund have not been protected from an expense that should not have been incurred.

CONCLUSION

When it can, the USDOL interprets federal law requirements to leave discretion to the states while still reasonably effectuating the statute. The USDOL follows this approach because it takes seriously the notion that states are free to operate their own UC programs without dictation from Washington.

What reasonably effectuates a statute will always be an area of dispute. Due to its relatively infrequent use by the USDOL, the meaning of the "methods of administration" requirement became a source of litigation. Departmental interpretations leaving considerable discretion to the states may be viewed as resulting either in no requirement at all or in the USDOL avoiding confrontation with the states. In other instances, such as the USDOL's interpretation of PRUCOL, what may be viewed by the USDOL as reasonably effectuating the statute may be viewed by others as inappropriately restrictive or intrusive. The primary exceptions to this general pattern of

332. See Steward Mach. Co. v. Davis, 301 U.S. 548, 593 (1937) (stating that federal requirements exist to assure that a state's unemployment law is one in fact as well as in name and that "[a]n unemployment law framed in such a way that the unemployed who look to it will be deprived of reasonable protection is one in name and nothing more").
leaving discretion to the states are the deposit and withdrawal standards, which create absolute limits to state law authority.

The most effective requirements, from the perspective of federal administration, allow a state to simply establish a specific criterion in its law. Examples include the “double dip” requirement, where state law simply establishes that work is necessary to establish a second benefit year, and the EB monetary qualifying requirements, where state law must assure that there is a specified amount of work, or the equivalent, in the state’s base period. These types of requirements are verified easily by reviewing state law and result in few conformity or compliance issues.

Problems arise, however, when federal law creates specific criteria in areas where reasonable people might disagree. This is especially the case for eligibility determinations, when federal law assumes that, given the same set of facts, all individuals in all states will receive the same determination. These requirements are difficult for the USDOL to monitor and, when unanticipated factual situations arise, the states are left to make determinations on their own. As a result, the USDOL has sometimes established a broad framework under which states may operate.

Where there is a need to address a specific matter, the federal requirement is better framed as a minimum requirement rather than as an absolute one. For example, the “between and within terms denial” provisions could be framed in such a way that states would have to create provisions providing for such a denial for individuals expected to return to educational employment while leaving it to the states to craft the specific provisions. The educational institutions, its employees, and the public sector would work jointly to develop equitable provisions. The USDOL’s role would be to assure that the state law contained some provision addressing between and within terms situations. This is not unlike the USDOL’s approach for availability provisions for the regular UC program: states must have them in their laws, but the states generally determine what constitutes availability without dictation from Washington. Of course, some requirements,

333. Haber & Murray, supra note 3, at 446 (emphasizing that specific standards that are easily verified for conformity purposes will not strain the federal-state relationship and that, conversely, those standards that are subject to different interpretations—or for which verifying for compliance is difficult—may strain the relationship).
such as the immediate deposit and withdrawal standards, would be difficult, if not impossible, to frame as minimums: moneys are either deposited immediately or they are not; moneys are either withdrawn for the payment of UC or they are withdrawn improperly. Transforming these requirements into minimums could lead to entirely meaningless provisions.

If federal legislation is any indicator, it appears that Congress is unlikely to take the approach of using minimum requirements. In 1935, very few requirements were placed on the states. When Congress created the double dip and approved training requirements in 1970, it still gave the states considerable flexibility. However, the 1970 amendments also created the between and within terms denial for certain services, which left the states little flexibility. In 1976, when requirements were added, the concept of flexibility disappeared as states were required to treat retirement payments and services performed by aliens in specific ways. Later amendments added the even more specific EB requirements. Although it may be difficult to return to a philosophy of trusting the states to work within minimum requirements to effectuate their purposes, this approach is undoubtedly the best for the federal-state relationship. This flexibility also gives states the opportunity to avoid absurd results.

Framing requirements as minimums will not resolve disputes on differing interpretations entirely because not all federal concerns may lend themselves to requiring the states simply to address the issue in some fashion in their laws. In some cases, such as the denial of UC to aliens, there may not be any public or private sector interest in a state for creating a meaningful provision of state law. If Congress perceives a need for such a provision, the test for conformity should be clear and simple to administer. A clear test for aliens is whether they had work authorization when the services were performed. An equally clear but easier to administer test is merely to require claimants to have work authorization at the time UC is claimed. The PRUCOL test, by its vagueness, introduced complexities and invited litigation. Also, any tests should be based on principles related to UC. For example, the work authorization tests seem appropriate because, like the UC program itself, they are inherently related to employment status. PRUCOL, however, is based on the alien’s legal status in the United States.
In the area of conformity, the USDOL regularly raises issues and requires the states to amend problem laws. In the area of compliance, however, the record is not impressive. When conformity issues are resolved, the attendant compliance issues are rarely resolved. When the issue is performance, for example, the USDOL has never taken a consistently poorly performing state to a conformity/compliance hearing. The result may very well be that some states do not take the USDOL seriously concerning performance matters.

The USDOL is not always aware of conformity or compliance issues, and we have seen how the deposit and withdrawal standards could be circumvented by states paying lip service. If new requirements are created for the states, they should, if possible, be fashioned in such a way that merely paying lip service may not happen. Although it is unlikely that states would approve of any provision that, in effect, allowed the USDOL to tell the state what its law means, it is possible to fashion requirements with which compliance is easily tested. The "double dip" provision is an example. Its requirement is so clear that a state could not argue that its law required work following the beginning of a benefit year without actually doing so.

No system is immune from problems, and the federal-state UC system has had its share. At the same time, it has effectively served its primary purpose—the payment of UC to unemployed individuals. The system will be strengthened if its limits are accepted and future requirements are fashioned with knowledge of those limits.