

RULES AND REGULATIONS

Title 34—LABOR AND INDUSTRY

DEPARTMENT OF LABOR AND INDUSTRY

[34 PA. CODE CH 65]

Unemployment Compensation; Active Search for Work

The Department of Labor and Industry (Department) amends § 65.11 (relating to active search for work) to read as set forth in Annex A.

A. *Statutory Authority*

This final-form rulemaking is promulgated under section 201(a) of the Unemployment Compensation Law (law) (43 P.S. § 761(a)), which authorizes the Department to promulgate and amend rules and regulations necessary to administer the law, and section 401(b) of the law (43 P.S. § 801(b)), which directs the Department to establish the requirements a claimant shall meet to make an active search for suitable employment.

B. *Procedural History*

The proposed rulemaking was submitted to the House Labor and Industry Committee and the Senate Labor and Industry Committee (Committees) and the Independent Regulatory Review Commission (IRRC) on April 19, 2012. The proposed rulemaking was published at 42 Pa.B. 2378 (May 5, 2012). The Department submitted the final-form rulemaking to IRRC and the Committees on November 5, 2012. The final-form rulemaking was deemed approved by the Committees on November 30, 2012. At a public meeting on December 13, 2012, IRRC disapproved the final-form rulemaking. IRRC issued its disapproval order to the Department and the Committees on February 15, 2013. On March 26, 2013, the Department submitted a revised final-form rulemaking to IRRC and the Committees to respond to the objections raised by IRRC in its disapproval order. At a public meeting on April 18, 2013, IRRC approved the revised final-form rulemaking. The revised final-form rulemaking was deemed approved by the Committees on May 2, 2013.

C. *Background and Description*

Section 401(b) of the law

Section 401 of the law contains various eligibility criteria for unemployment compensation (UC) benefits. As amended by the act of June 17, 2011 (P. L. 16, No. 6) (Act 6), section 401(b) of the law provides as follows:

- (b)(1) Is making an active search for suitable employment. The requirements for “active search” shall be established by the department and shall include, at a minimum, all of the following:
 - (i) Registration by a claimant for employment search services offered by the Pennsylvania CareerLink system or its successor agency within thirty (30) days after initial application for benefits.
 - (ii) Posting a resume on the system’s database, unless the claimant is seeking work in an employment sector in which resumes are not commonly used.
 - (iii) Applying for positions that offer employment and wages similar to those the claimant had prior to his

unemployment and which are within a forty-five (45) minute commuting distance.

(2) The Pennsylvania CareerLink system or its successor agency shall provide documentation, on a quarterly basis or more frequently, as the secretary deems appropriate, to the Pennsylvania Unemployment Compensation Service Center system so the system can conduct the necessary cross reference checks.

(3) For the purposes of paragraph (1), the department may determine that a claimant has made an active search for suitable work if the claimant’s efforts include actions comparable to those traditional actions in their trade or occupation by which jobs have been found by others in the community and labor market in which the claimant is seeking employment.

(4) The requirements of this subsection do not apply to any week in which the claimant is in training approved under section 236(a)(1) of the Trade Act of 1974 (Public Law 93-618, 19 U.S.C. § 2101 et seq.) or any week in which the claimant is required to participate in reemployment services under section 402(j) of this act.

(5) The requirements of this subsection shall not apply to a claimant who is laid off for lack of work and advised by the employer of the date on which the claimant will return to work.

(6) The department may waive or alter the requirements of this subsection in cases or situations with respect to which the secretary finds that compliance with such requirements would be oppressive or which would be inconsistent with the purposes of this act.

The requirement in section 401(b) of the law that a claimant make an active search for suitable employment took effect on January 1, 2012, and applies to benefit years that begin on or after that date. See sections 9 and 11 of Act 6.

This final-form rulemaking amends § 65.11 to state the requirements that a claimant shall meet to be eligible for benefits under section 401(b) of the law. This final-form rulemaking is undertaken in accordance with the General Assembly’s directive in section 401(b) of the law that “[t]he requirements for ‘active search’ shall be established by the department. . . .”

Work registration

Under subsection (c), a claimant’s initial active search requirement is to register for employment search services in the Pennsylvania CareerLink® system within 30 days after the claimant files his application for benefits. Section 401(b)(1) of the law provides that this requirement must be part of the Department’s overall work search requirements. If the claimant fails to register within the 30-day period, he is ineligible for benefits for each week that ends beyond that 30-day period unless the claimant registers no later than Sunday of the week.

Weekly job applications

In addition to the initial requirement to register for employment search services, generally a claimant shall satisfy the weekly job application requirements of subsection (e)(1).

Proposed rulemaking. The proposed rulemaking contained a two-tiered job applications requirement. From the third consecutive week of the benefit year through the eighth consecutive week of the benefit year, the proposed rulemaking required a claimant to apply for at least two positions each week, within the scope of “suitable work” as defined in section 4(t) of the law (43 P. S. § 753(t)). However, the claimant was allowed to limit his applications to positions that would provide employment and wages similar to those the claimant had prior to his unemployment and were within a 45-minute commute or a commuting distance that is generally accepted in the claimant’s labor market, whichever is greater. The claimant could adhere to this limitation even if doing so resulted in less than two job applications during a week. During the ninth consecutive week of the benefit year and thereafter, the claimant was required to apply for at least three positions each week. The claimant could continue to limit his job search to similar positions within a 45-minute or generally accepted commuting distance as long as that limitation would not result in fewer than three applications per week. The claimant was required to expand the scope of his job search to include other positions that would provide suitable employment if, and to the extent that, doing so was necessary to apply for at least three positions each week.

Final-form rulemaking. The final-form rulemaking contained the same two-tiered job applications provision as the proposed rulemaking with certain modifications. The first tier requirements applied to the third week through the eighth week of the benefit year for which a claim for compensation is filed, rather than the third through the eighth consecutive weeks. Similarly, the second tier requirements began with the ninth week for which a claim is filed, rather than the ninth consecutive week of the benefit year. During the third through the eighth weeks for which a claim is filed, the claimant could limit his applications to positions within a 45-minute commute. He was not required to apply for positions within a generally accepted commuting distance if doing that would require more than a 45-minute commute.

Revised final-form rulemaking. The two-tiered structure in the final-form rulemaking was the primary objection expressed by IRRC in its disapproval order. The Department omitted the two-tiered structure from this revised final-form rulemaking. Instead of increasing the required number of job applications per week from two to three at the ninth week for which a claim for compensation is filed, revised final-form subsection (e)(1) requires only two applications per week for the entire UC claim beginning with the third week for which a claim is filed. Also, the single-tiered job applications provision in the revised final-form rulemaking does not require a claimant to apply for dissimilar positions or positions beyond a 45-minute commuting distance at any time during the benefit year. In addition, the Department added a definition of “similar positions” in the revised final-form rulemaking which mirrors section 401(b)(1)(iii) of the law.

If a claimant chooses to limit his job applications to similar positions within a 45-minute commute, and as a result of that limitation the claimant determines that he would be unable to apply for at least two positions during a week, the revised final-form rulemaking provides an alternative requirement. The claimant may apply for positions offering “suitable work” or he may substitute work search activities listed in subsection (e)(4) for job applications. During the week the claimant may apply for one position and engage in one work search activity, or engage in two work search activities. A claimant is not

required to expand his search to “suitable work” under section 4(t) of the law if he does not desire to do so.

However, there may be claimants who would not want to limit their job applications to similar positions, such as a claimant who desires a career change or a claimant who is willing to accept a lower salary to be re-employed sooner. For that reason, subsection (e)(1)(ii) states that a claimant may apply for positions that would provide “suitable work” under section 4(t) of the law.

Work search activities

Subsection (e)(4) enumerates seven types of work search activities other than applying directly to an employer for a position. Generally, a claimant shall engage in at least one of these activities during each week. If a claimant makes more than the minimum number of job applications required for a week under subsection (e)(1), under subsection (e)(5) the additional application may substitute for a work search activity otherwise required under subsection (e)(4). If a claimant engages in one or two work search activities instead of one or two job applications, respectively, to satisfy the requirements of subsection (e)(1), the claimant shall still engage in an additional work search activity under subsection (e)(4).

Exceptions and alternative requirements

There are certain exceptions and alternative requirements under subsection (f). Notwithstanding the registration requirement in subsection (c) and the weekly requirements in subsection (e), the Department may determine that a claimant has satisfied the active search provision in section 401(b) of the law if the claimant engages in work search efforts that are comparable to the way in which jobs in the claimant’s trade or occupation are found in the claimant’s community and labor market. Job applications and work search activities under subsection (e) are not required for a week if the claimant is a member of a union that has a hiring hall or the claimant is registered with a hiring hall, the claimant is required to obtain employment through the hiring hall and the claimant fulfills the requirements to maintain eligibility for referral by the hiring hall during the week. Job applications and work search activities under subsection (e) also are not required for a week if the claimant actively participates during the week in a program or activity that is approved by the Department as an acceptable work search alternative. If the claimant works part time during a week and earns in excess of the partial benefit credit under section 4(m.3) of the law, the claimant will satisfy subsection (e)(1) by applying for one position and the claimant is not required to satisfy subsection (e)(4) for the week. If a claimant is interviewed for a position, the interview may substitute for an application for a position for purposes of subsection (e)(1) or may substitute for a work search activity for purposes of subsection (e)(4). If a claimant’s labor market is located outside of this Commonwealth, the claimant shall register for employment search services with the employment service that serves the claimant’s labor market in addition to registering with the Pennsylvania CareerLink® system.

Under subsection (g), the active search requirement does not apply to a week in which the claimant is in training with the approval of the Secretary of Labor and Industry or a week in which the claimant is participating in work sharing. The exception for weeks in which the claimant is in approved training is required under section 3304(a)(8) of the Federal Unemployment Tax Act (26 U.S.C.A. § 3304(a)(8)).

Section 401(b)(5) of the law provides that the active search requirement is not applicable to a claimant who is laid off for lack of work and is advised by his employer of the date when he will return to work. Subsection (g)(2) articulates certain criteria to determine if a claimant has been given a return-to-work date for purposes of section 401(b)(5) of the law and specifies certain circumstances when section 401(b)(5) of the law does not apply.

For purposes of eligibility for extended benefits, subsection (h) states that a claimant shall satisfy work search requirements for extended benefits in addition to meeting the requirements of section 401(b) of the law and the regulation.

C. Comments

In response to the proposed rulemaking, the Department received comments from IRRC, Representative William F. Keller (Representative Keller), Community Legal Services (CLS), the Pennsylvania Chamber of Business and Industry (Chamber), the Pennsylvania State Association of Township Supervisors (PSATS) and the Manufacturers' Association of South Central Pennsylvania (MASCP). Comments regarding the final-form rulemaking were submitted to IRRC by Representative Keller, the Pennsylvania AFL-CIO, the Chamber, CLS and PSATS. IRRC objected to the final-form rulemaking for the reasons indicated in its disapproval order. Comments regarding the revised final-form rulemaking were submitted to IRRC by Representative Keller and the Chamber.

Comment: Representative Keller commented that the regulation should provide instructions on the process to register for employment search services with the Pennsylvania CareerLink®, and provide that the claimant will receive a confirmation when the registration is completed.

Response: It would not be advisable to include instructions on the current registration process in the regulation. Information technology is evolving continuously and the systems and methods used to register for employment search services may change over time. When changes occur, instructions on the current process would be obsolete. However, the Department amended the final-form regulation to state that the Department will provide instructions on the process when a claimant files an application for benefits. This language remains in the revised final-form regulation.

The Department recently implemented a new Internet registration system, "JobGatewaySM," which provides a printable confirmation screen to the claimant when the registration for employment search services is completed.

Comment: Representative Keller stated that the regulation should indicate that the Department will advise claimants of the recommended work search record form and provide the form to claimants. IRRC recommended that the regulation identify how claimants can access the form.

Response: The Department incorporated these suggestions into the final-form regulation and they continue to be implemented in the revised final-form regulation.

Comment: Representative Keller stated that the regulation should indicate that use of the recommended work search record form is not mandatory.

Response: The Department incorporated this suggestion into the final-form regulation and it continues to be reflected in the revised final-form regulation. The regulation provides that a claimant may use the work search record form recommended by the Department or use another format as long as the same information is recorded.

Comment: IRRC stated that the regulation should indicate under what circumstances, and in what format, the Department would request a claimant's work search record.

Response: The burden to prove that a claimant has met the eligibility requirements of the law rests with the claimant. See *Schaal v. Unemployment Compensation Board of Review*, 870 A.2d 952 (Pa.Cmwlth. 2005). Therefore, a claimant must be able to establish that he searched for work while claiming UC benefits. Moreover, section 501(c)(1) of the law (43 P. S. § 821(c)(1)) requires the Department to examine each claim for compensation to determine if the claimant is eligible for benefits. The Department does not agree that the regulation should enumerate the circumstances in which it would request a claimant's work search record. This enumeration could be interpreted as a limitation on the claimant's responsibility to establish eligibility or the Department's authority to examine claims, or both. Moreover, the circumstances in which the Department would seek a claimant's work search record likely will change over time, based on the Department's experience administering the work search requirement and technological changes to the way UC claims are submitted.

Comment: The effective date of an application for UC benefits begins a 52-week period known as the "benefit year" as defined in section 4(b) of the law. The regulation would require a claimant to retain his work search records for the 2-year period beginning on the effective date of the application. In other words, work search records shall be retained for the duration of the benefit year plus the 1-year period following the benefit year. Representative Keller stated that the retention period should be limited to the benefit year. IRRC stated that the Department should explain why the 2-year retention period is appropriate.

Response: A requirement that work search records be retained only until the end of the benefit year would be inadequate. Work search records would be needed in connection with a review of the claimant's compliance with the work search requirements, or if an issue arose regarding the claimant's eligibility for benefits in relation to those requirements. The need to review work search records in these circumstances could occur beyond the end of the benefit year. Similarly, if a claim for compensation is included among sample claims reviewed under the Benefit Accuracy Measurement program, work search records could be needed after the benefit year has ended. During periods of high unemployment when Extended Benefits or Federal benefit programs are in effect, compensation may be paid for weeks subsequent to the benefit year. The requirement to retain work search records should be no less applicable to these weeks. Lastly, a requirement to maintain records for as much as 2 years is not unusual. Records relating to Federal Income Tax, for example, shall be retained for a minimum of 3 years after the tax return is filed. See IRS Publication 17, <http://www.irs.gov/pub/irs-pdf/p17.pdf>.

Comment: Under the proposed regulation, first tier job application requirements applied to the third consecutive week of the benefit year through the eighth consecutive week of the benefit year. The second tier requirements began with the ninth consecutive week of the benefit year. CLS commented that the transition from the first tier requirements to the second tier requirements should occur after 8 consecutive weeks of unemployment, and that the count of weeks should be reset at zero if the claimant returns to work during the benefit year. IRRC

asked the Department to clarify why the transition from the first tier requirements to the second tier requirements was based on consecutive weeks of the benefit year rather than the number of consecutive weeks the claimant is unemployed.

Response: In the final-form regulation the Department accepted CLS' suggestion in part. The first tier job application requirements applied to the "third week of the benefit year for which a claim for compensation is filed through the eighth week of the benefit year for which a claim for compensation is filed." The second tier requirements began with the "ninth week of the benefit year for which a claim for compensation is filed." The Department could not use the number of weeks a claimant has been unemployed to determine when the first tier requirements began and when the transition to the second tier requirements occurred, as advocated by CLS, because the Department is aware only of weeks of unemployment for which claims are filed. Also, in the final-form regulation the count of weeks for which claims were filed was not reset at zero if the claimant returns to work. This approach could cause claimants to switch back and forth between the different requirements throughout the benefit year. As a result, the requirements would be difficult to administer and could be confusing to claimants.

In the revised final-form regulation, there is only one tier of job application requirements for the entire benefit year. Accordingly, concerns of CLS and IRRC that the number of weeks in the most recent period of unemployment should determine the transition from first tier to second tier requirements are resolved. Moreover, the revised final-form regulation, like the final-form regulation, begins the job application requirements with the third week for which a claim is filed rather than the third consecutive week of the benefit year, which is partly responsive to CLS' suggestion.

Comment: Section 401(b)(1)(iii) of the law provides that:

(b)(1) Is making an active search for suitable employment. The requirements for "active search" shall be established by the department and shall include, at a minimum, all of the following:

* * * * *

(iii) Applying for positions that offer employment and wages similar to those the claimant had prior to his unemployment and which are within a forty-five (45) minute commuting distance.

Because Representative Keller, CLS and IRRC interpret section 401(b)(1)(iii) of the law to require only that a claimant apply for positions that offer similar employment and wages and are within a 45-minute commute throughout the entire benefit year, they questioned the Department's authority to promulgate the job application provisions in the proposed and final-form regulations. The first tier job applications provision in the proposed rule-making could have required a claimant to apply for positions within a "generally accepted" commuting distance, which could be a commuting distance over 45 minutes. In the proposed and final-form regulations, the second tier job applications provision could have required a claimant to apply for positions that involved more than a 45-minute commute or were not similar positions.

Response: The revised final-form regulation is responsive to the objections of Representative Keller, CLS and IRRC. The revised final-form regulation does not require

a claimant to apply for dissimilar positions or positions beyond a 45-minute commuting distance at any time in the benefit year.

Comment: Various comments and objections were made in response to the two-tiered structure of the job applications provision in the proposed and final-form regulations. Representative Keller, CLS and the Pennsylvania AFL-CIO asserted that the transition to the second tier requirements should not occur between weeks 8 and 9 for all claimants. Rather, these commentators advocated that each claimant's individual circumstances and labor market should be considered. IRRC questioned whether the time period when the first tier requirements are in effect is sufficient to allow a claimant to search for work within his field before the second tier requirements become applicable. IRRC asked the Department to explain how it determined that 9 weeks is the appropriate benchmark for expanding the job application requirements. IRRC also indicated that the law does not state that the job application requirements should change based on the number of weeks for which an individual has claimed compensation. IRRC asked for certain statistics and for more information justifying and explaining the regulation. CLS stated that the second tier requirements could compel a union member who is not associated with a hiring hall to apply for nonunion jobs. Representative Keller indicated that a claimant could be confused about whether he had transitioned to second tier requirements. The first tier provision in the proposed regulation required a claimant to apply for jobs within a 45-minute commute or a "commuting distance that is generally accepted in the claimant's labor market, whichever is greater." IRRC asked how a claimant would know what is a generally accepted commuting distance. The Chamber stated that a requirement to apply for positions within a "generally accepted" commuting distance is unclear and could be circumvented.

Response: Because the revised final-form regulation contains a single-tiered job applications provision that does not require a claimant to apply for dissimilar positions or positions beyond a 45-minute commute, these concerns are resolved.

Comment: Section 401(b)(6) of the law provides that "[t]he department may waive or alter the requirements of this subsection in cases or situations with respect to which the secretary finds that compliance with such requirements would be oppressive or which would be inconsistent with the purposes of this act." Representative Keller, CLS and IRRC stated that this waiver provision should be integrated into the regulation. Representative Keller and IRRC indicated that the regulation should include the criteria to qualify for a waiver. Representative Keller stated that the regulation should include the process to request a waiver.

Response: The Department incorporated the waiver provision into the final-form regulation and it remains in the revised final-form regulation.

Section 401(b)(6) of the law specifies the criteria for a waiver: if "compliance with [the active search] requirements would be oppressive or . . . inconsistent with the purposes of this act." By incorporating the waiver provision into the regulation, the criteria for a waiver also have been included.

Determining whether a given claimant's compliance with the work search requirement would be oppressive or inconsistent with the law will be based on the facts and circumstances surrounding that particular claimant and,

possibly, particular weeks for which claims are filed. It is a fact specific and claimant specific determination. For this reason, it is not possible to include in the regulation a definitive list of "cases or situations" when the waiver provision would apply. Moreover, a list could be interpreted to limit the circumstances when the Department may grant a waiver.

The Department implemented Representative Keller's suggestion. The final-form regulation included a reference to the process to request a waiver, and this reference remains in the revised final-form regulation.

Comment: Representative Keller stated that the regulation should provide an exception to the work search requirements or provide modified requirements for claimants with a disability or work limitation. To the extent that the requirements of the regulation might result in unreasonable or impractical consequences, IRRC indicated that the regulation should clarify how these situations would be addressed.

Response: The circumstances described in these comments can be addressed through the waiver provision in the law and the regulation.

Comment: CLS stated that the regulation should include a definition of "suitable work."

Response: The proposed and final-form regulations could have required a claimant to expand the scope of his job applications beyond positions providing similar work to include positions that would provide suitable work. Under the revised final-form regulation, a claimant is not required to expand his job applications beyond similar positions. Moreover, to the extent that a claimant chooses to apply for positions within the broader scope of "suitable work," that term is defined in section 4(t) of the law. The current definition of "suitable work" has been in the law since 1945. See the act of May 29, 1945 (P. L. 1145, No. 408). There has been case law applying the current definition of suitable work since 1948.

Including a definition of "suitable work" in the regulation would not be advisable. A new definition could be disruptive to the meaning of suitable work as supplied by the statutory definition and over 60 years of case law. Moreover, to the extent that a regulatory definition would be construed by the courts as inconsistent with the statutory definition, it would be invalid.

Comment: Section 401(b)(1)(iii) of the law provides that the work search requirements established by the Department shall include "[a]pplying for positions that offer employment and wages similar to those the claimant had prior to his unemployment. . . ." The first tier job applications requirement in the proposed and final-form regulations allowed a claimant to limit his applications to positions that meet this description. The revised final-form regulation uses this statutory language to define "similar positions" and allows a claimant to limit his job applications to similar positions throughout the benefit year. The Chamber commented that "similar" is ambiguous and could allow claimants to withhold applications for jobs that pay only nominally less than the claimant's prior employment. IRRC recommended that the Department indicate how a claimant can determine if potential employment and wages are similar.

Response: To determine whether the employment associated with a prospective position is similar to the claimant's prior employment, the Department expects that a claimant will make a common sense and straightforward comparison between the job duties and skills associated with the prospective position and the job

duties and the skills used by the claimant in his prior employment. With regard to wages, the Department anticipates that a claimant would compare his prior wages or salary to the wages or salary associated with a prospective position and, in good faith, not withhold an application for the job because of a nominal difference in wages or salary.

Although the revised final-form regulation allows a claimant to restrict job applications to similar positions, that restriction is not required. If a claimant applies for at least two positions each week that would provide suitable work under section 4(t) of the law the claimant will satisfy subsection (e)(1). The claimant will not risk ineligibility for benefits if he applies for positions he mistakenly believes are similar or he simply applies for positions offering suitable work without regard to their similarity to his prior work.

If a claimant chooses to limit his job applications to similar positions, and declines to submit an application for a particular position because he mistakenly believes it is not similar, he can apply for other positions he believes are similar to satisfy subsection (e)(1). If the claimant determines that he is unable to apply for at least two similar positions during a week, he can satisfy the alternative requirements available under subsection (e)(1)(i).

Comment: The proposed and final-form regulations allowed a claimant to limit his job applications to similar positions within a certain commuting distance during weeks when the first tier requirements were in effect. When the second tier requirements were in effect, a claimant could not exercise this limitation if doing so would result in less than the required number of job applications per week. The proposed and final-form regulations did not authorize a claimant to "bank" excess applications made during first tier weeks and apply those applications to second tier weeks. IRRC asked if a claimant who applies for all potential similar positions by the end of the first tier period is unfairly penalized for his efforts to find similar work. CLS made a similar comment. The Pennsylvania AFL-CIO stated that the absence of a banking provision will encourage a claimant to make only the required amount of applications for similar positions during first tier weeks for fear he will not be able to make the required amount of applications during second tier weeks without expanding his applications to suitable work.

Response: The revised final-form regulation eliminates the basis for the concerns of IRRC, CLS and the Pennsylvania AFL-CIO about the absence of a banking provision. Under the one-tiered structure of the revised final-form regulation, the job applications requirement is limited to similar jobs within a 45-minute commute throughout the UC claim. In the absence of a second tier provision that could require a claimant to apply for dissimilar jobs or jobs beyond a 45-minute commute after a certain period of time, there is no motivation to withhold applications for similar jobs in early weeks to "save" those applications for later weeks.

It is important to note that a "banking" provision would be difficult to administer. If the Department is reviewing a claimant's compliance with the job applications requirement for a given week, and the claimant's work search record indicates that he applied one or more "banked" applications to that week, the Department would be required to ask the claimant to submit his work search records for all prior weeks to verify that the banked applications were made. This expanded review process

would be burdensome for both claimants and the Department. Moreover, the requirement to apply for jobs is a weekly requirement. It would not be met if a claimant could suspend job applications for a given week because he had made more than the minimum number of applications in one or more earlier weeks.

Comment: Subsection (f)(1)(i) provides that a claimant is not required to apply for positions under subsection (e)(1) and perform work search activities under subsection (e)(4) during a week if the claimant: (A) is a member of a union that has a hiring hall or the claimant is registered with a hiring hall; (B) is required to obtain employment through the hiring hall; and (C) fulfills the requirements to maintain eligibility for referral by the hiring hall during the week. The Chamber and MASCP suggested that this subparagraph be deleted from the regulation. These organizations stated that the work search requirements of the law and the regulation should apply consistently to all workers, union and nonunion.

Response: This provision is narrowly drafted and requires a claimant to maintain eligibility for referral by the hiring hall. This type of provision is a common feature among state work search requirements. It recognizes that a claimant who is a hiring hall member may be subject to union or hiring hall discipline if he applies directly to an employer for work, rather than follow hiring hall procedures. It is authorized by section 401(b)(3) of the law, which allows the Department to recognize work search efforts that are traditional in a claimant's trade or occupation.

Comment: Subsection (f)(1)(ii) provides that a claimant is not required to apply for positions under subsection (e)(1) and perform work search activities under subsection (e)(4) during a week if the claimant "actively participates during the week in a program or activity approved by the Department as an acceptable work search alternative." IRRC suggested that the regulation identify the types of programs or activities that would be acceptable work search alternatives and where a claimant could locate a list of the alternatives.

Response: To date, the Department has not designated programs or activities as acceptable work search alternatives. The Department will limit approved work search alternatives to robust and worthwhile programs likely to lead to reemployment. The Keystone Works Program established by the act of July 5, 2012 (P. L. 970, No. 107) is an example of the type of program or activity that may be approved under this subparagraph. The Department will list the approved programs on its web site.

Comment: Subsection (e)(4) requires a claimant to do at least one of the listed work search activities each week, in addition to the job applications required under paragraph (1). Representative Keller recommended that a claimant be allowed to use the work search activities under paragraph (4) as alternatives to job applications under paragraph (1).

Response: The Department incorporated this suggestion into the revised final-form regulation. Under subsection (e)(1)(i), if a claimant chooses to limit his applications to similar positions within a 45-minute commute, and the claimant determines that he would be unable to apply for at least two positions in that category during a week, the claimant may substitute work search activities under subsection (e)(4) for job applications. During the week the claimant may apply for one position and engage in one work search activity or engage in two work search activities in addition to the work search activity otherwise required under subsection (e)(4).

Comment: Section 401(b)(3) of the law allows the Department to determine that a claimant is meeting the work search requirements of that section "if the claimant's efforts include actions comparable to those traditional actions in their trade or occupation by which jobs have been found by others in the community and labor market in which the claimant is seeking employment." A similar provision is in subsection (f)(5) of the regulation. Representative Keller suggested that the regulation indicate the process by which a claimant would have his work search efforts approved under this provision.

Response: A separate procedure for purposes of subsection (f)(5) is not necessary. A claimant engaging in work search actions that are traditional to his trade or occupation would keep a record of his efforts as required under subsection (d)(2). To the extent that the claimant's recorded work search actions differ from what is required under subsections (e) and (f), the claimant may be asked to explain how his work search efforts are comparable to what is done in his trade or occupation to find work.

Comment: Section 401(b)(1)(ii) of the law provides that a claimant shall post a resume on the Pennsylvania CareerLink® system "unless the claimant is seeking work in an employment sector in which resumes are not commonly used." Representative Keller stated that the exception for employment sectors that do not use resumes should be included in the regulation.

Response: The Department incorporated this suggestion into the final-form regulation and it continues to be reflected in the revised final-form regulation.

Comment: Representative Keller and CLS commented that the regulation should provide that a claimant will not be disqualified from receiving benefits for failure to meet the requirements of the regulation, including the requirement to maintain work search records, if the claimant had "good cause" for failure.

Response: Although case law recognizes a "good cause" defense to an act of willful misconduct, the other "good cause" exceptions to UC disqualification provisions are statutory. For example, under section 402(a) of the law (43 P. S. § 802(a)), a claimant is not disqualified if he had "good cause" for refusing suitable work. Under section 402(b) of the law, a claimant is not disqualified if he had "cause of a necessitous and compelling nature" to voluntarily leave his job. Section 402(j) of the law provides that a claimant is not disqualified if he had "justifiable cause" for not participating in reemployment services. In the absence of a "good cause" provision in section 401(b) of the law, the Department is not including a similar clause in the regulation. However, if a claimant's "good cause" for noncompliance with the regulation also constitutes a reason why compliance "would be oppressive or . . . inconsistent with the purposes of" the law, the claimant's circumstances could be addressed under the waiver provision in section 401(b)(6) of the law and subsection (f)(6) of the regulation.

Comment: Section 401(b)(5) of the law provides that the work search requirement does not apply to a claimant who is "advised by the employer of the date on which the claimant will return to work." Subsection (g)(2)(i) requires the employer to notify the claimant of the recall date in writing. Representative Keller suggested that the regulation allow an employer to give verbal notice of a recall date to the claimant.

Response: Allowing verbal notice of a recall date would not be prudent. If an employer gives written notice of a recall date to the claimant, the claimant can provide a copy of the notice to the Department. If the employer communicates a recall date verbally, the Department would have to contact the employer to verify that a recall date had been designated. Because of the potential for abuse that would exist if the regulation recognized verbal recall dates, confirming the designated recall date with the employer would be essential. The need to verify a verbal recall date would impose an additional burden on both the Department and the employer. Moreover, the claimant's eligibility for benefits could be affected if the Department is unable to obtain confirmation of the verbal recall date from the employer.

Comment: The work search requirements in section 401(b) of the law were supplied by Act 6. Section 9(3) of Act 6 provides that "[t]he amendment of section 401(b) of the Act shall apply to benefit years that begin on or after January 1, 2012." Consistent with Act 6, the preamble to the proposed rulemaking stated that the regulation would "affect claimants who file an application for UC benefits that takes effect on or after January 1, 2012." IRRC stated that it is unclear how the regulation could affect claimants who file UC applications on and after January 1, 2012, but at the same time not be effective until it is promulgated, as advocated by CLS and Representative Keller. IRRC also stated it is unclear whether the January 1, 2012, applicability date would require claimants already receiving benefits to overhaul their existing job searches or reapply for benefits, and how the Department would notify them of potential changes to their eligibility. IRRC recommended that the regulation only apply to a claimant who files an application after the effective date of the final-form rulemaking.

Response: There is a difference between the universe of claimants to whom the requirements in section 401(b) of the law and the regulation may apply and the effective date of the regulation.

Subject to certain exceptions, an "application for benefits" takes effect on the first day of the calendar week in which it is filed under § 65.42 (relating to application for benefits—effective date). The effective date of an application for benefits begins a 52-week period known as the "benefit year." See section 4(b) of the law. Under Act 6, the work search requirements apply only to applications for benefits effective, and benefit years beginning, on or after January 1, 2012. (It is expected that all weeks of unemployment occurring on or after the date of publication of the revised final-form rulemaking in the *Pennsylvania Bulletin* will correspond to applications and benefit years to which the work search requirements apply.)

The requirements in the regulation are week-by-week eligibility criteria. Therefore, they would take effect beginning with the week following publication of the revised final-form rulemaking in the *Pennsylvania Bulletin*. The regulation would not retroactively affect a claimant's eligibility for prior weeks.

The Department intends to notify the claimant community when the revised final-form rulemaking is officially promulgated.

Comment: IRRC asked the Department to explain why the proposed regulation included certain provisions from section 401(b) of the law, but did not include other provisions from the law.

Response: The proposed regulation did not include the exception to the resume requirement in section

401(b)(1)(ii) of the law or the waiver provision in section 401(b)(6) of the law. Because these exceptions to the general work search rules were established by the law, the Department did not believe it was necessary to incorporate them into the regulation to give them a legal foundation. However, in response to the comments the Department received, these provisions were included in the final-form regulation and remain in the revised final-form regulation.

Comment: IRRC suggested that the Department include cross references to the law in the regulation, move the definitions to the beginning of the regulation and exclude a phrase from final-form subsection (e)(2).

Response: The Department incorporated these suggestions into the final-form regulation and they continue to be reflected in the revised final-form regulation.

Comment: Representative Keller suggested that the Department assist claimants to register for employment search services by telephone, and stated it was unclear whether Pennsylvania CareerLink® offices would register claimants. CLS stated that the Department should presume that the positions for which a claimant has applied would constitute suitable work for the claimant, and should provide information about the work search requirements in languages other than English.

Response: These comments do not address the content of the regulation. Rather, they are suggestions to the Department regarding the manner in which the Department will administer the work search requirements.

D. Affected Persons

Under section 9(3) of Act 6, this regulation applies to a claimant who files an application for UC benefits that takes effect on or after January 1, 2012, and who files claims for compensation for weeks beginning on or after publication of the revised final-form rulemaking in the *Pennsylvania Bulletin*. It will not apply to claimants who qualify for one or more of the exceptions in the regulation.

E. Fiscal Impact

The Department anticipates that a claimant will be able to meet the active work search requirement in section 401(b) of the law and the regulation at minimal or no cost.

The Department will integrate administration of the active work search requirement into its day-to-day administration of the eligibility provisions of the law. It is not possible to accurately isolate the cost to administer only the active search provision.

F. Paperwork Requirements

Section 65.11(d) requires a claimant to create a record of his work search activities that contains information required by the Department, retain the record for 2 years from the effective date of the application for benefits and produce the record for the Department's review at times and in a manner as the Department requires.

G. Sunset Date

The regulation will be monitored through practice and application. Therefore, a sunset date is not designated.

H. Effective Date

This regulation will be effective upon publication of the revised final-form rulemaking in the *Pennsylvania Bulletin*.

I. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on April 19, 2012, the Department submitted a copy of the notice of proposed rulemaking, published at 42 Pa.B. 2378, to IRRC and the Chairpersons of the Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC, the Committees and the public.

Under section 5.1(a) of the Regulatory Review Act (71 P. S. § 745.5a(a)), on November 5, 2012, the Department submitted the final-form rulemaking to IRRC and the Committees. Under section 5.1(j.2) of the Regulatory Review Act, on November 30, 2012, the final-form rulemaking was deemed approved by the Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on December 13, 2012, and disapproved the final-form regulation.

Under section 6(a) of the Regulatory Review Act (71 P. S. § 745.6(a)), IRRC issued its disapproval order to the Department and the Committees on February 15, 2013. Under section 7(c) of the Regulatory Review Act (71 P. S. § 745.7(c)), to respond to objections raised by IRRC, the Department submitted a report and a revised final-form rulemaking to IRRC and the Committees on March 26, 2013.

Under section 7(c.1) of the Regulatory Review Act, IRRC met on April 18, 2013, and approved the revised final-form rulemaking. On the same date, IRRC issued its approval order to the Committees. Neither Committee reported a concurrent resolution on or before May 2, 2013, as provided under section 7(d) of the Regulatory Review Act. Therefore, the Committees are deemed to have approved the revised final-form regulation on that date.

J. Findings

The Department finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.
- (2) The Department gave public notice of its intention to promulgate this rulemaking by publication of a proposed rulemaking at 42 Pa.B. 2378.
- (3) A public comment period was provided as required by law and the comments received were considered.
- (4) This revised final-form rulemaking does not enlarge the purpose of the proposed rulemaking published at 42 Pa.B. 2378.
- (5) This revised final-form rulemaking is necessary and suitable for the administration of the law.

K. Order

The Department, acting under the authority of the law, orders that:

- (a) The regulations of the Department, 34 Pa. Code Chapter 65, are amended by amending § 65.11 to read as set forth in Annex A.

(b) The Secretary of the Department shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval as to form and legality as required by law.

(c) The Secretary and the Department shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

JULIA K. HEARTHWAY,
Secretary

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 43 Pa.B. 2530 (May 4, 2013).)

Fiscal Note: Fiscal Note 12-96 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 34. LABOR AND INDUSTRY

PART II. BUREAU OF EMPLOYMENT SECURITY

Subpart A. UNEMPLOYMENT COMPENSATION

CHAPTER 65. EMPLOYEE PROVISIONS

Subchapter B. PREREQUISITES FOR ELIGIBILITY

ACTIVE SEARCH FOR WORK

§ 65.11. Active search for work.

(a) *Definitions.* For purposes of this section and section 401(b) of the law (43 P. S. § 801(b)), the following words and phrases have the following meanings, unless the context clearly indicates otherwise:

Employment service—The state employment service established under 20 CFR Part 652 (relating to establishment and functioning of state employment services).

Pennsylvania CareerLink® system—The system of offices, personnel and resources, including the Commonwealth Workforce Development System or successor electronic resources, through which the Department provides services under the Wagner-Peyser Act (29 U.S.C.A. §§ 49—49l-2) and the Workforce Investment Act of 1998 (29 U.S.C.A. §§ 2801—2945) or similar or successor statutes.

Register for employment search services—Provide information regarding education, work history and qualifications and other information required by the Department that is relevant to receipt of employment search services.

Similar positions—Positions that offer employment and wages similar to those the claimant had prior to his unemployment and which are within a 45-minute commuting distance.

(b) *Initial procedures.* When a claimant files an application for benefits in accordance with § 65.41 (relating to filing methods), the Department will:

(1) Provide instructions to the claimant regarding the process to register for employment search services and post a resume in the Pennsylvania CareerLink® system.

(2) Advise the claimant of services provided by the Department and the Pennsylvania CareerLink® system.

(3) Provide a copy of the recommended work search record form to the claimant and advise the claimant that the form is available on the Department's web site.

(c) *Work registration.* A claimant shall register for employment search services in the Pennsylvania

CareerLink® system within 30 days after the claimant files his application for benefits. See section 401(b)(1)(i) of the law. If a claimant does not register for employment search services in the Pennsylvania CareerLink® system within 30 days after the claimant files his application for benefits, the claimant will be ineligible for compensation for any week that ends more than 30 days after the claimant files his application for benefits unless the claimant registers by Sunday of that week.

(d) *Weekly requirements.* To be eligible for compensation for the third week of the benefit year for which a claim for compensation is filed and each week thereafter for which a claim for compensation is filed, a claimant shall do the following:

(1) Engage in work search activities during the week in accordance with subsections (e) and (f).

(2) Complete the recommended work search record form for the week or create a record of his work search activities during the week that contains the same information that would be required to complete the recommended form.

(3) Retain the record for 2 years from the effective date of the application for benefits.

(4) Produce the record for the Department's review at the times and in a manner as required by the Department.

(e) *Weekly work search activities.*

(1) A claimant shall apply for at least two positions during the week as follows:

(i) The claimant may limit his applications to similar positions. See section 401(b)(1)(iii) of the law. If a claimant chooses to limit his applications to similar positions and as a result of that limitation the claimant determines that he would be unable to apply for at least two positions during the week, the claimant shall do one or a combination of the following:

(A) The claimant shall apply for positions that would provide suitable work under section 4(t) of the law (43 P. S. § 753(t)) in order to apply for at least two positions during the week.

(B) The claimant shall engage in a work search activity in paragraph (4) instead of an application for a position so that the combined number of applications and work search activities during the week is at least two, determined before the application of paragraph (4).

(ii) The claimant may apply for positions that would provide suitable work under section 4(t) of the law.

(2) For purposes of paragraph (1), a claimant may apply for a position in the following ways:

(i) In person.

(ii) By mail, phone or electronic transmission.

(iii) By submitting a job application or resume to the employer.

(iv) By following a hiring procedure established by the employer.

(3) A repeated application for the same position does not satisfy the requirements of paragraph (1) unless there is a reasonable basis to believe that the employer's hiring circumstances have changed.

(4) In addition to the requirements of paragraph (1), the claimant shall do at least one of the following during the week:

(i) Attend a job fair.

(ii) Search positions posted on the Pennsylvania CareerLink® system or Internet job banks.

(iii) Post a resume in the Pennsylvania CareerLink® system or other resume posting service.

(iv) Contact colleagues, former coworkers or other individuals in similar professions or occupations to make known the claimant's availability for employment or obtain information about available positions, prospective employers or other employment opportunities.

(v) Utilize an employment agency, employment registry or school placement service.

(vi) Take a civil service test or other pre-employment test.

(vii) Participate in a program or activity offered through the Pennsylvania CareerLink® system.

(5) If a claimant applies for more than the minimum number of positions under paragraph (1), the additional application may substitute for a work search activity under paragraph (4).

(f) *Alternative requirements and waiver.*

(1) Work search activities under subsection (e) are not required for a week if any of the following apply:

(i) The claimant meets all of the following:

(A) Is a member of a union that has a hiring hall or the claimant is registered with a hiring hall.

(B) Is required to obtain employment through the hiring hall.

(C) Fulfills the requirements to maintain eligibility for referral by the hiring hall during the week.

(ii) The claimant actively participates during the week in a program or activity approved by the Department as an acceptable work search alternative.

(2) If a claimant works part time during a week and earns in excess of the claimant's partial benefit credit as defined in section 4(m.3) of the law, the following apply:

(i) The claimant shall satisfy the requirements of subsection (e)(1) by applying for one position during the week.

(ii) The claimant will not be required to satisfy the requirements of subsection (e)(4) during the week.

(3) If a claimant is interviewed for a position by an employer or an employer representative, the interview may substitute for an application for a position for purposes of subsection (e)(1) or may substitute for a work search activity for purposes of subsection (e)(4) for the week in which the interview occurs.

(4) For purposes of subsection (c), if a claimant's labor market is located outside of this Commonwealth the claimant shall register for employment search services with the employment service that serves the claimant's labor market in addition to registering with the Pennsylvania CareerLink® system.

(5) Notwithstanding any other provision of this section, the Department may determine that a claimant has satisfied the requirements of section 401(b) of the law if the claimant's work search efforts include actions comparable to traditional actions in the claimant's trade or occupation by which jobs have been found by others in the community and labor market in which the claimant is seeking employment. See section 401(b)(3) of the law.

(6) The Department may waive or alter the requirements of this section or section 401(b) of the law in cases or situations with respect to which the Secretary finds that compliance with these requirements would be oppressive or which would be inconsistent with the purposes of the law. See section 401(b)(6) of the law. A claimant may submit a request to the Department to waive or alter the requirements of this section or section 401(b) of the law. The claimant may complete and submit the recommended waiver request form available on the Department's web site or submit a written request that contains the same information that would be required to complete the recommended form.

(g) *Applicability.*

(1) This section does not apply:

(i) As provided in section 401(b)(4) and (5) of the law.

(ii) To a week in which a claimant is in training with the approval of the Secretary.

(iii) To a week in which a claimant is participating in a work sharing plan under Article XIII of the law (43 P. S. §§ 916.1—916.13).

(2) For purposes of section 401(b)(5) of the law:

(i) A claimant is advised by the employer of the date on which he will return to work only if both of the following conditions are satisfied:

(A) The employer designates a specific recall date and notifies the claimant of the recall date in writing.

(B) The employer's designation of a recall date is bona fide.

(ii) Section 401(b)(5) of the law does not apply to a week following the week in which either of the following occur:

(A) The designated recall date is rescinded by the employer or is rescinded in fact.

(B) The designated recall date has passed.

(3) The requirement in section 401(b)(1)(ii) of the law does not apply to a claimant who is seeking work in an employment sector in which resumes are not commonly used.

(h) *Extended benefits.* For purposes of extended benefits under Article IV-A of the law (43 P. S. §§ 811—818), if the eligibility requirements for extended benefits include work search requirements in addition to the requirements of section 401(b) of the law and this section, the claimant also shall satisfy the additional work search requirements applicable to extended benefits.

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