

# Reissued Labor Department Rule Tests Congressional Review Act Ban on Promulgating "Substantially the Same" Rules

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## Related Author

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- [Maeve P. Carey](#)
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Maeve P. Carey, Specialist in Government Organization and Management ([mcarey@crs.loc.gov](mailto:mcarey@crs.loc.gov), 7-7775)

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On October 4, 2019, the Department of Labor (DOL) [published a final rule](#) in the *Federal Register* on the states' ability to drug test certain unemployment compensation (UC) applicants. The UC drug testing rule is a reissued version of an [Obama Administration rule](#) that was disapproved in the 115<sup>th</sup> Congress under the Congressional Review Act (CRA; [P.L. 115-17](#)). DOL had previously published a [proposed version of the rule](#) on November 5, 2018. The rule is set to take effect on November 4, 2019.

Notably, this is the first time an agency has reissued a rule after the original version was disapproved under the CRA. No Administration appears to have seriously considered reissuing the [one rule that was disapproved](#) prior to the 115<sup>th</sup> Congress, and none of the other 15 rules that were disapproved in the 115<sup>th</sup> Congress have been reissued thus far.

When a rule is disapproved under the CRA, the [rule may not take effect or continue in effect](#), and the [agency may not issue](#) "a new rule that is substantially the same" as the disapproved rule unless Congress provides subsequent statutory authorization. Since the UC drug testing rule was disapproved, Congress has not provided DOL with additional authority to regulate in this area. Thus, DOL reissued the rule under the same authority as the disapproved rule, Section 2105 of [P.L. 112-96](#), the Middle Class Tax Relief and Job Creation Act of 2012.

In the [preamble to the rule](#), the agency made clear that in its view, the reissued rule is sufficiently different from the disapproved rule so as not to violate the CRA. DOL stated that the rule's "substantially different scope and fundamentally different approach satisfies the requirements of the CRA, while still meeting the requirement of 42 U.S.C. 503(l)(1)(A)(ii) to issue regulations addressing what occupations regularly conduct drug testing."

The CRA does not define *substantially the same*. Whether a reissued rule is "[substantially the same](#)" as the disapproved rule is likely to depend upon the specific circumstances surrounding the rule in question. During [floor consideration of the disapproval measure](#) for the UC drug testing rule, then-House Ways and Means Committee Chairman Kevin Brady, who was the sponsor of the joint resolution of disapproval, stated that the Obama Administration's UC drug testing rule had been inconsistent with congressional intent because the rule was written too narrowly, impairing the ability of states to implement their own requirements for drug testing. In the preamble to the newly reissued rule, DOL stated that the new rule had a "substantially different and more flexible approach to the statutory requirements than the rescinded final rule, enabling States to enact legislation to require drug testing for a larger group of UC applicants than the previous

final rule permitted."

During the comment period, [a commenter raised](#) the "substantially the same" prohibition. [DOL's response](#) was that "it is clear from a plain reading of [the CRA] that a reissued or new rule on the same subject is permitted provided that it is not substantially the same." DOL also pointed to the legislative history for the joint resolution of disapproval, asserting that Congress intended for the department to issue a new, broader rule.

The CRA does not specify who is to decide whether a reissued rule is "substantially the same." It is possible that Congress might be ultimately responsible for making that determination rather than a court: The CRA states that "no determination, finding, action, or omission under this chapter shall be subject to judicial review." Courts have generally—but [not universally](#)—[interpreted](#) this provision to mean that they may not consider any claims alleging that an agency has failed to comply with the CRA. However, whether the "substantially the same" prohibition itself could be subject to judicial review has not been tested in a court. If a court also believed that the CRA barred judicial review of whether a rule is "substantially the same," it would be unlikely to strike down the reissued UC drug testing rule on this basis. A [number of commentators](#) have argued, however, that the CRA's judicial review provision would not necessarily bar a court from reviewing whether a rule is "substantially the same" as a disapproved rule.

If courts continue to bar all judicial challenges under the CRA, Congress would arguably be the sole arbiter of the "substantially the same" standard. Now that the rule has been finalized, Congress will be able to use the CRA on the reissued version. If Congress does not disapprove the rule, and if the prevailing interpretation of the CRA's prohibition of judicial review holds, the rule will likely take effect—arguably indicating Congress's implicit acceptance of the reissued rule.

As a practical matter, however, enactment of a resolution of disapproval requires passage by both chambers of Congress and the signature of the President or an override of the President's veto, which would require a two-thirds majority in both chambers. The President may be unwilling to sign a resolution of disapproval overturning a rule issued by his own Administration. Thus, Congress would likely need to override a presidential veto to disapprove the reissued rule, necessitating a supermajority vote in both houses.

For more information on the CRA, see CRS Report R43992, [The Congressional Review Act \(CRA\): Frequently Asked Questions](#). For a policy discussion of the UC drug testing rule, see CRS Report R45889, [Unemployment Compensation \(UC\): Issues Related to Drug Testing](#).

*A previous version of this CRS Insight was published on November 19, 2018, after DOL published the [proposed rule](#).*