

**SPEECH BY GEORGE WENTWORTH**  
**NATIONAL EMPLOYMENT LAW PROJECT**  
**BEFORE THE NATIONAL ASSOCIATION OF**  
**UNEMPLOYMENT INSURANCE APPELLATE BOARDS**  
**MYSTIC, CONNECTICUT**  
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It is a pleasure to be here with all of you today. I left government service last September after 35 years with the CT Department of Labor. For most of that time, I had the good fortune to work closely with Connecticut's Board of Review and Appeals Division – first under the leadership of Bennett Pudlin and then Lynne Knox. What I liked most about our system was that the Board always treated the Administrator (me) like a solicitor before an appellate court. And by keeping an open dialogue going with the front lines of the UI agency, the Board was able to make decisions that were informed by the practicalities of operating a major benefits program. A program that is subject not only to state law and federal regulation, but also to the countless arcane procedures, deficient automation and human foibles that animate most organizations. Like the best decision makers, Connecticut's Board of Review has always been open to exploring the competing policy interests around the big issues. But it also maintains an institutional viewpoint that is built on respect for precedent and commitment to the remedial purposes of the UI statutes. I was always glad to be a small part of that.

Anyway, I left government but I did not leave unemployment insurance. In what I can only describe as great dumb luck, nine months ago, I started work with an amazing organization – the National Employment Law Project, a national non-profit group that engages in research and advocates on behalf of unemployed and low-income workers before state legislatures, workforce agencies, Congress and the Administration. It is kind of like space camp for UI geeks.

For me personally, the transition from government to advocacy has been enlightening. As general counsel to a Labor Commissioner, I was accustomed to at least trying to look at both sides of an issue and to listening carefully to both parties before forming an opinion or making a decision. I imagine that is a perspective that most people in this room can appreciate. Whether you are an ALJ or a Board member, for the workers and employers that come before you, you *are* the law. The vast majority of parties who appear before you will not challenge your findings or contest your application of the law to the facts of their cases. It is a tremendous power, and as the saying goes, great power carries great responsibility. It is probably the benefit of a little perspective, but today I have more respect than ever for that power and responsibility.

This afternoon, I am here to speak to you on behalf of the workers whose rights you are called upon to adjudicate every day. And though I speak now as an advocate, I hope we share common ground as believers in a system that is critical to our economy – a system that helps our neighbors pay their mortgages and feed their kids, a system that help keeps middle class Americans from falling into poverty.

We are here – in this year marking the 75<sup>th</sup> anniversary of the UI program – at a time of unimaginable challenges. State UI agencies are processing record levels of claims and benefit payments. But backlogs are building and the system nationally is failing to honor its promise to pay benefits when due. Nearly 2/3 of state trust funds are insolvent and most will not likely get out of debt before the middle of the new decade. Nearly half the unemployed are out of work more than 6 months and nearly a quarter cannot find a job after being unemployed more than a year. Yet no economist foresees the nation’s unemployment rate dropping to the pre-recession levels of 2007 for at least another three years. And now unbelievably the UI system itself is under attack as the cause of long-term unemployment, instead of the remedy.

I want to take some time this afternoon to discuss these issues and how we should be thinking about them. I don’t think it is an overstatement to say that the UI program is facing a kind of perfect storm of economic, political, financial and operational crises. Each of these challenges influences the other, so while each needs its own set of solutions, the collective weight of the problems facing the UI program also requires us to all think more broadly.

### **Great Recession**

Let’s begin with the economy. Most economists say this recession began around December 2007 when the unemployment rate hit 5% where it essentially remained for the next five months. The meltdown of the financial industry accelerated job loss so dramatically in the second half of 2008 that

unemployment had climbed to 7.4% by December, and continued to over 10% by October 2009. In just 16 months, unemployment in this country doubled and now – eight months later with an unemployment rate of 9.7% - we are essentially in the same place.

By way of comparison, the last recession capped out at 6.3% In the summer of 2003 and going back to the recession of the early 1990's, the national rate hit a peak of 7.8% in June 1992. The only other time in the last 60 years that the national unemployment rate exceeded 10% was in the recession of the late 70's/ early 80's when it reached 10.8% in the winter of 1982.

The recession of the early 80's is instructive in a couple of ways. First, it is the only other national recession in which a large number of state trust funds – 16 – went broke. A conservative political climate and lack of organized support for strong UI programs then led to a wave benefit cuts and eligibility restrictions. The result was that the percentage of jobless workers collecting state benefits dropped from 50% in 1975 to 28% in 1983 and the program is still recovering. With more than twice as many trust funds forced to dig out of insolvency today, it is very clear that many state legislatures will be considering harmful benefit cuts in the next year, despite the fact that UI benefits only replace about 36% of the average worker's pre-layoff earnings.

There is, however, an important distinction between this recession and the early 1980's and that is the crisis of long-term unemployment. Even at the deepest point of the 80's recession, only about one in 4 unemployed workers met the definition of long-term unemployed – out of work more than 6 months. Today 7 million Americans have been unemployed more than 26

weeks – that is 46% of all jobless workers. In addition, more than half – 54% - of all UI claimants are exhausting their state benefits without finding a job. Even more alarming – 23% of all unemployed workers have been jobless for more than a year. Finally, the Administration’s own economists tell us that national unemployment will not get below 8% for a couple of years and will not likely return to that pre-recession 5% rate until a couple years beyond that.

Congress took this crisis seriously from the start, enacting the EUC program in the summer of 2008 and expanding its coverage later that fall. The Obama administration immediately made aid to the unemployed a priority in its efforts to stimulate the economy through the American Recovery & Reinvestment Act, enacted in February 2009. The Recovery Act reauthorized EUC, increased every UI check by \$25, made the Extended Benefits program a viable state option through temporary federal funding and established meaningful support to families losing health insurance through a 65% COBRA subsidy. Equally important was incorporation of the UI Modernization Act that has financially incentivized states to expand eligibility and access for part-time workers, recent workforce entrants and workers who must leave employment for compelling family reasons – all categories that skew overwhelmingly female. All of these measures collectively have represented an economically sound response to the human suffering of millions of unemployed American families and the need to shore up our communities until this economy begins creating jobs in healthy numbers.

But reauthorization of programs that help the unemployed has become a much greater political struggle over the past nine months. At regular intervals eerily reminiscent of the film “Groundhog Day”, Congress engages in bitterly partisan battles over whether it should continue to help the unemployed. And in recent months, we have seen the question re-framed as one of concern about the deficit. Although Congress and the prior administration had no problem invoking emergency spending powers consistently over the last ten years, the line has now been drawn at unemployment insurance and COBRA. Arguing that the worst recession since the Great Depression is not an emergency, it is time for the newest version of the oldest tactic – “blame the victim.” It goes like this – the unemployed could find a job if they looked harder and the reason they are not looking harder is unemployment insurance. Senator Kyl of Arizona put it this way:

“(Unemployment insurance) doesn’t create jobs. In fact if anything, continuing to pay people unemployment compensation is a disincentive for them to seek new work.”

And Rep. John Linder from Georgia, the ranking minority member on the subcommittee that oversees UI , who said:

”Some respected scholars argue these record unemployment extensions actually are resulting in more unemployment not less. That seems more than plausible.”

OK, it is one thing to complain about your lazy brother-in-law on UI who isn’t looking hard enough for work. It is quite another to attack the program that has functioned successfully as the primary safety net for the American

worker for 75 years as the *cause* of unemployment. And it is just plain callous to make public policy based upon outdated research and wrong-headed caricatures of unemployed Americans who are struggling to stay out of foreclosure or trying to explain to their kids why there is nothing left to pay for college. So let's get the facts straight.

- (1) It is the depressed job market – not UI – that is the reason for the long durations of unemployment. There are more than 5 unemployed workers for every job opening in the U.S. today. Nearly all the prior research on the disincentive effects of UI has assumed that jobs are readily available. That is simply not the reality of this labor market.
- (2) UI replaces on average 36% of a worker's pre-layoff earnings. The average UI check in this country is \$308. Does anybody think that - for the typical out-of-work American – this is a disincentive to return to full-time employment? There are six states where the *maximum* benefit amount is less than \$285.
- (3) It is true that without UI, some unemployed would return to work sooner. But the most current research says the impact of UI on the duration of unemployment is minimal and far outweighed by the program's critical role in preventing family poverty and maintaining consumer spending, as well as its contribution to the efficient churning of labor supply and demand. UI allows an IT systems analyst the time to seek work with wages comparable to her last job so she isn't forced to re-enter the workforce in a job far below her highest wage and skill level. And that opportunity, that idea that we should encourage our neighbors to get back on the economic ladder somewhere near where they fell off is not only good for the nation's

economic health. It is a public policy that says we are investing in the potential of every unemployed worker to fight their way back to something close to normal and to again provide for their families and contribute to their communities.

## **Solvency**

The problem of solvency is monumental. Today, 34 states owe the federal government around \$38 billion, including 12 states that have more than \$1 billion of debt. USDOL projects that by 2012, as many as 40 states will have debt in the neighborhood of \$90 billion. During the past year, states paid out \$77 billion in benefits but took in only \$32 billion in revenues. And while higher tax rates will drive up revenues to over \$50 billion this year, payments will likely remain in the \$75 billion range. As a result, the Federal Unemployment Account which funds loans to the states has itself become insolvent and is borrowing from the federal treasury to cover state loans.

This issue – more than any other – is going to drive the immediate future of the UI system. It is pretty clear that most state UI programs were not ready to handle this recession. Some of this can be attributed to the unprecedented depth and duration of unemployment. But to a much greater extent, state financing systems were not sufficiently prepared even if this recession had been a lot milder. Look at the facts. At the beginning of the last recession in 2001, there was about \$54 billion in state UI trust funds. When the current recession began in January 2008, states had \$38 billion in their trust funds. This is largely because states kept employer tax rates lower than necessary to handle recessionary levels of benefits. As recently as last year, 20 states

still had minimum tax rates of \$15 or less. In too many states, business interests have convinced legislatures to disregard sound insurance principles and instead adopt a “pay-as-you-go” approach. Only now the price of that philosophy is much steeper than anyone anticipated. So it is time for states to get serious about forward financing so that the program has a fighting chance of operating as a safety net in the *next* recession.

The federal government will begin collecting on all this debt through increased federal unemployment taxes in the coming year and Congress will be facing pleas from states to continue waiving interest costs, to delay collections and maybe even to forgive some of the debt. This is a tough sell, especially for those states that have stayed solvent by acting responsibly and have set realistic taxable wage bases that are indexed in some way to wages. If Congress is going to provide any relief to the states, it will need to be premised on assurances that states will improve their financing systems in the future.

But for states to do the right thing, they will also need to acknowledge that an employer’s UI tax rate is more than a variable in a state’s economic development sales pitch. There needs to be a renewed national commitment to the importance of UI to our economy. Without an appreciation of why the safety net is vital to our country’s economic health, states will nickel-and-dime state programs into ineffectiveness. We have already seen the first wave of state responses to insolvency and they often begin with the assumption that the costs of restoring solvency must be borne equally by workers and business. Proposals to cut maximum rates, increase minimum earnings requirements, alter monetary formulas to drive down average

benefits, expand conditions for disqualification – they have all been raised as necessary to getting trust funds out of debt. This notion of an “equality of sacrifice” is, in most states, not the appropriate legislative response. The major cause of insolvency has been poor financing choices, not overly generous benefits. And the solution is fixing those financing systems.

Congress and the Administration need to set the tone. Most states won’t fix the problem voluntarily. The federal framework for UI has to be rebuilt in a way that guarantees states will make sound funding decisions that are based on actuarial principles and are free from political interference. A framework that requires states to maintain benefit standards that represent a meaningful economic safety net, no matter where a worker lives.

### **Operational Challenges**

In my opinion, the word “stress” is generally overused. But for the past two years, there is probably no better word to describe the conditions facing the operation of state unemployment insurance programs. Let’s address them separately.

- (1) **Infrastructure.** Once this recession began, it did not take long for the call centers built in the late 1990’s to start buckling under the pressures of dramatic increases in claims. Systems that were built to handle 7 percent unemployment began shutting down routinely in the winter of 2008-2009. In some states, hundreds of angry phone calls and emails quickly elevated the operation of UI programs into political issues for governors. And as additional tiers of EUC and EB

were legislated, much state automation simply lacked the capacity to accommodate as much as 99 weeks of benefits

States have responded in a variety of ways, most of which require diverting resources from one side of the program to the other. Many states are overpaying consultants to re-write 30-year old legacy systems, while limited agency IT staff are being stretched thin just to keep the trains running. Employees who should be adjudicating disputed claims are instead being deployed to the front lines to process initial claims. State efforts to hire new claims takers have met a range of obstacles including burdensome civil service hiring rules, statewide hiring freezes and layoffs being applied to federally-funded UI staff and the huge challenge of training new staff quickly on both UI law, procedures and automated claims-processing systems.

While there may be a sense among some administrators that the system has survived the worst of its infrastructure challenges, the fact is that if the economists are correct and we are facing a “new normal” of 8- 9% unemployment in the next couple of years, now is the time to be reassessing the way our systems operate.

- It is time to reevaluate whether it really makes sense for 50 states to separately negotiate 50 different multi-million dollar automation contracts when most of those systems will operate under laws that look a lot alike. Shouldn't the federal government have some presence in the procurement of hugely expensive contracts with vendors that are spending years to

modernize UI systems in ways that may or may not be informed by federal policy?

- USDOL needs to drive home the message that statewide hiring freezes, furloughs and personnel actions should not apply to UI-funded staff during a time of economic emergency. ETA has issued two program letters reinforcing this point, but some governors are still ignoring this guidance and playing politics with UI. DOL needs to take whatever action is necessary to enforce this guidance.
- States need to invest in permanent full-time front-line staff and provide them meaningful training in UI law. This recession is not a temporary economic blip. Investing in new staff is critical to insuring that existing staff are working where and how they can do the most good and be the most productive, and can avert another infrastructure crisis when the next recession hits.
- Isn't it time to start measuring the effectiveness of call center and web technology in terms of claimant access? How many people are being shut out under the new systems and what are their demographics and primary languages? How many claimants are having trouble navigating complex IVR or web filing instructions, leading to unnecessary delays, erroneous charges of fraud or worst of all, just giving up?

## **(2) Due Process & Timeliness**

This group – probably more than any other – understands that when a system takes too long to determine whether an individual is eligible for benefits, federal law is being violated. It has been almost 40 years

since the Supreme Court interpreted the words “when due” in the Social Security Act to not only require an opportunity to be heard by the parties, but also to make a decision as soon thereafter as feasible. Federal time lapse standards have been in place since 1979. Arguably the most important of these is the first payment standard which requires that 87% of all eligible claimants receive their first payment within three weeks of their initial claim. For 30 years the national UI system met that goal. Then in the first full year of this recession – 2008 – the nation missed the standard for the first time at 86%. By the middle of last year, compliance had fallen to 81% with 32 states failing to meet the standard. Thirteen states were below 80 % and five states were making less than 70 percent of first payments timely. The largest state, California, was only making timely first payments to 61% of the unemployed.

The numbers in appeals, which were generally bad even before the recession, are equally poor with more than half the states failing to meet the performance standard of deciding 60% of lower authority appeals within 30 days of the appeal being filed. By the middle of 2009, less than 25 percent of all first level appeals were being decided timely. In the first quarter of this year, the average age of a pending lower authority appeal is 51 days, three weeks longer than the federal standard.

While it is clear that the tripling of the number of claims nationally is a big driver in these performance problems, certain other realities are also becoming apparent. First, not all of these problems are new; some

state programs have chronic performance deficiencies. For example, 25 states were facing major appeals timeliness problems during the 4 relatively low workload years prior to the current recession. Second, federal enforcement of timeliness at all levels has been very limited to date. ETA's corrective action plan (CAP) process has been largely ineffective. States pledge to do better but when they do not, there are no consequences. Nobody wants a state to lose its administrative grant, but there needs to more teeth in federal enforcement. We are encouraged by talk of a new enforcement regime that will identify states that are egregious performers and find new means to mandate improvements in processes and investments in resources. It is time to put pressure on states that are not meeting their federal obligations to pay benefits when due. The fact is sometimes the glare of public scrutiny is necessary to motivate state officials to take these problems seriously.

Beyond timeliness standards, we need to be watchful of the impact that this recession is having on everyday due process. In the relentless day-to-day of high claims volume, we need to insure that basic administrative practice is fair and consistent. Unemployed workers are entitled to clear and understandable explanations of their rights and how the process works. They need to know that an appeals reversal could result in a large overpayment obligation. They need to know the proper way to report part-time earnings. They need a fair opportunity to respond to a former employer's account of a worker's separation. These basic fairness issues are often the first victims of an overburdened bureaucracy. They should not be and you all – as

guardians of system fairness – should remain vigilant to make sure these fundamental rights are protected.

### **Integrity**

The Administration will be putting some focus on UI integrity with its recently proposed “Unemployment Compensation Integrity Act of 2010.” Like a similar proposal from the last administration, this bill encourages more active collection of overpayments by offering states 5% of collections for enforcement purposes. It would attempt to remove existing obstacles in federal law to the garnishment of federal income tax refunds to satisfy UI overpayment debts. It would require minimum fraud penalties in every state.

While the President’s recent executive order has shone an important spotlight on the issue of preventing improper payments, it is equally important that any new integrity initiatives be – as some would put it – fair and balanced. If states are going to keep a portion of overpayment collections, they should be required to provide minimal procedural safeguards in overpayment actions. The 13 states that have no waiver guidelines in non-fraud cases should at least be expected to adopt them for federal benefit programs like EUC. And garnishment of federal income tax refunds should be limited to fraud cases.

The Integrity bill does at least recognize the need to address employers and third party agents that engage in abuses of state adjudication and appeals processes. It would require that employers be charged for benefits paid as a result of untimely or inadequate responses to requests for separation information at the first level, when those awards are overturned on appeal. But first the state would have to establish a pattern of untimely or inadequate responses. This is simply not enough. States should not have to document patterns of untimely or inadequate participation in necessary adjudication processes; the rule should be one of strict liability in which benefits are charged in all such cases. And if the benefits were paid initially based on the employer's failure to participate and the employer is being charged, what justification is there to require that the claimant repay benefits that were paid lawfully under the facts as developed by the agency at the first level?

Integrity is a word that will become more prominent in political discussions of UI in the near future. We are likely to see legislative proposals at the state level that reflect the reactionary thinking of those who would blame the unemployed. We will surely see efforts to lower the bar for what work ought to be considered suitable and efforts to raise the bar around work search. In some states, we are seeing the tough economy being used to justify policies that systematically lower expectations for the unemployed. In Georgia, claimants can voluntarily offer employers their services for free under the Georgia Work\$ program. They receive their UI benefits while entering into an extended job tryout for up to 6 weeks. While it is of

course lawful to receive UI while in an approved training program, it violates both the Fair Labor Standards Act and FUTA to substitute UI for wages. Georgia Work\$ is a relatively popular program that capitalizes on the notion that it is better for the unemployed to be doing something to secure jobs at a time when jobs are so hard to find. But however politically appealing this may be, it is flat out wrong for any state to use its UI program as a tool to provide employers with free labor for any period of time. And when government starts saying that offering your services for free is the best way to secure your economic future, aren't we pretty much abandoning the idea that UI is supposed to help workers find employment comparable to the job they lost? The bottom line is this – no matter how bad the economy is, the UI program should never be used by government as part of an economic strategy that in any way undermines and erodes fair labor standards for working people.

### **The Future**

So where should the UI program be going? Assuming we can preserve a meaningful safety net, rebuild strong financing and insure fundamental fairness, are there ideas and new directions we should be exploring to make the system a more effective tool in changing the lives of the unemployed? There are lots of them and we need to move the public debate so we can start innovating again.

My short list includes:

- Reexamining rules around partial unemployment and earnings disregards to find new ways to incentivize part-time employment.
- Prioritizing enforcement of employee misclassification by giving states the funding necessary to audit industries that routinely misclassify workers and cheat UI trust funds out of millions of dollars every year.
- Making Shared Work (Short-time Compensation) a nationwide program that helps employers, especially manufacturing, avert layoffs during temporary downturns in production.
- Investing in subsidized employment programs that pay living wages and help the unemployed learn new skills and move toward permanent full-time jobs.
- Revitalizing the public Employment Service to again perform the public labor exchange function that is supposed to be an important component of the UI program.

Last month, the UI program lost one of its finest minds. Jerry Hildebrand was that guy who seemed to know everything there was to know about unemployment insurance. He was a major history buff, especially around the New Deal and the early days of UI. Jerry taught so many people in the UI system so much, but more than anything, his words and example always reminded me that this is important work that we are all doing.

In the days to come, the UI system is going to need people who can lead state programs through the economic, political, financial and operational challenges we have discussed today. More than most, the people in this room understand what the public should expect from a strong, well-run unemployment insurance program. I encourage you to think about where you can make a difference, how you can do the most good. And keep fighting the good fight. Thank you.