

# National Employment Law Project

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Cheryl Atkinson, Administrator  
Office of Workforce Security  
U.S. Department of Labor  
200 Constitution Avenue, N.W., Rm. S-4231  
Washington, D.C. 20210  
Via E-mail and Regular Mail

Dear Ms. Atkinson:

The National Employment Law Project is a national nonprofit organization that advocates on behalf of the unemployed and the working poor. We write in response to the proposed standards (69 Fed. Reg. 33,669) issued by the Office of Workforce Security (OWS) to measure the performance of the state unemployment insurance programs (“UI Performs”).

Based on more than three decades of experience helping the nation’s jobless receive fair and timely treatment when they seek to access unemployment insurance (UI) benefits, the National Employment Law Project (NELP) believes that the proposed performance measures represent a substantial retreat from meaningful enforcement of standards that are critical to the operation of the program.

We are especially concerned with the proposed shift away from oversight and monitoring of those unemployment claims that have been pending in the system the longest and toward the “averaging” of the critical timeliness standards. In addition, for the first time in the history of the program, the OWS has proposed a “reemployment” standard that would effectively adopt a “work first” model rewarding those states that push people back to work the fastest, without including any measure of the quality of the job compared to the skills and employment history of the individual worker. Finally, while OWS proposes a new standard addressing the overpayment of benefits to workers, there is no meaningful improvement in the limited mechanisms to detect the millions of dollars in benefits that are underpaid to workers or to raise the level of enforcement against employers who fail to pay their fair share of unemployment taxes.

These and other major shifts in OWS policy that generally disfavor unemployed workers are proposed at the same time that the agency has failed to aggressively enforce the current standards as applied to the increasing number of non-compliant states. Thus, rather than adopt an entirely new regime of state standards that are less rigorous, what is needed is far more aggressive federal enforcement to bring about compliance with current federal law and policy. We therefore urge the OWS to revisit the proposed standards, and in the process more actively engage worker representatives to incorporate their experience in the critical decisions that determine the level of monitoring and oversight of the unemployment system.

## **I. The Proposed Regulations Would Dilute Key Timeliness Standards**

While the OWS has proposed new national standards in several areas, many states have persistently failed to meet the current federal benchmarks, particularly during times of recession (in 1989 through 1993, and again in 2001-2003). Despite this disturbing track record, OWS now proposes to weaken or defer timeliness standards in several key areas. In our view, more aggressive OWS oversight is needed, not less, to ensure that states take seriously their responsibility to fairly process the payment of benefits to unemployed workers.

### **A. Retain current timeliness and quality standards in key problem areas.**

Section 303(a)(1) of the Social Security Act, 42 U.S.C. Section 503(a)(1), requires that state law provide “Such methods of administration...as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due.” The U.S. Department of Labor (DOL) has established by regulation certain minimum criteria to ensure that states are in compliance with this federal mandate. It now proposes to change its long-standing interpretation of the “when due” clause and dilute some of the very standards that the states have chronically failed to comply with absent a compelling explanation for doing so. OWS should retain these necessary federal standards.

The timeliness standards and measures are among the most important protections for claimants. Workers who lose their jobs often have few resources for meeting their financial obligations. When UI benefit payments are unduly delayed, workers face extreme hardship in the interim. Moreover, delays often occur or are exacerbated during recessions. During these times, claims and appeals workload increases. But states often are under recessionary budget constraints and enact hiring freezes during those times when more resources are needed in state UI programs. The timeliness standards are the primary incentive for states to overcome their budgetary hurdles in their UI programs, so that unemployed workers do not suffer UI delays.

#### **1. First Payment Timeliness**

There are currently several measures that require timely initial payment of benefits. Federal regulations require that 87% of all first payments for intrastate claims be paid within 14 days in waiting week states and 21 days for non waiting-week states. In addition, 93% of claims have to be paid within 35 days. For interstate claims, the standards are 70% in 14/21 days, and 78% in 35 days, under regulations which have been in effect since 1980 (20 CFR Section 640.5).

OWS now proposes a single standard that would require all claims of all kinds (intra- and interstate, UCFE, UCX, full and partial weeks) to have an 87% decision rate within 14/21 days while eliminating the 35-day standard altogether.

State compliance with certain standards has been a continual and worsening problem. For example, according to UI Performs, five states failed to meet the 14/21 criteria for intrastate claims in 1997. In 2002, that number rose to 13 states. According to DOL’s Ranking Report for the year ending March 31, 2003, 13 states failed to meet the federal criteria. States have also been failing the UCFE, UCX and partial weeks timeliness standards. In fact, 36 states failed at

least two of these three standards as of the March 2004 Ranking Report.

The unitary standard being proposed by OWS will make it far more difficult, if not impossible, to address these persistent delays in processing UI benefits. DOL's authority to aggressively detect and correct these problems will diminish because the data will be aggregated with other timeliness standards. Collection of data and determinations of non-compliance at only the 14/21 day standard would allow claims to languish far beyond an acceptable length of time. Since this standard affects first payments of benefits, it is crucial that workers receive a prompt decision on their cases and prompt payment of benefits. OWS should retain the current standards, including the 35-day rule, while also collecting case aging data so that it is aware of the numbers of initial cases that are pending beyond an acceptable period of time.

## **2. Lower Authority Appeals Timeliness**

The current standard requires that 60% of lower authority appeals (i.e. appeals to an administrative law judge) be decided within 30 days of filing, 80% within 45 days, and 95% within 90 days. The 60% and 80% criteria were established by regulation in 1984 (20 CFR Section 650.5). OWS now proposes to change the standard to an "average age" of pending appeals criteria.

We agree with statement by OWS that lower authority appeals timeliness represents a major "trouble spot" in the operation of the program. In 2003, more than half of the states failed two or all three of the criteria, some by huge percentages. According to the March 2004 Ranking Report, twenty states are still failing at least two of the three criteria.

Even before the recession, timeliness of these appeals was a continuing problem in the states. Over the period from 1982-1991, the national percentage of cases decided within 30 days has ranged from 50.1% (1983) to 68.6% (1989).<sup>1</sup> In some states, the issue has been a chronic one, leading to many years of litigation.<sup>2</sup> In California, the Employment Development Division (EDD) has not only failed to comply fully with the Secretary's standards for lower authority appeals promptness since 1999, but their performance in this area has been on a steady trajectory downward. The March ranking report indicates that EDD's slide to the bottom in this category continues, with only 20.6% of lower authority being issued within 30 days and 48.6% within 45 days.

In general, we support the move to a pending age standard versus the current benchmark of the time taken to render a final decision. Using the age of pending decisions will provide information that is more relevant to the question of the volume of undecided cases. The final standard should promote the goal that the number of pending cases should never exceed the incoming caseload. At such a point, the state reaches a basic equilibrium; in essence, clearing its caseload monthly. However, we have strong concerns about using an average age of pending appeals—a measure that could allow states to conceal those cases that languish the longest by settling certain cases quickly. A new standard should retain the current 30, 45 and 90-days

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<sup>1</sup> DOL *Program Accomplishments in the Unemployment Insurance Program*, July 9, 1992.

<sup>2</sup> See, *Dunn v. New York State Department of Labor*, 474 F.Supp. 269 (S.D.N.Y. 1979), 594 F.Supp. 239, and 73 CIV 1656 (Feb 16, 1994)

standards at appropriate levels that embody the current standard's expected time to make decision. The additional information about the average age will be helpful but only in paired with ongoing information about the distribution of case aging.

### **3. Non-monetary Determinations Timeliness**

The current standard requires that 80% of separation determinations be made within 21 days of detection, and 80% of non-separation determinations must be made within 14 days of detection. OWS now proposes to determine a new standard at a later date and seeks to combine the separation and nonseparation measures into a single 21-day standard.

According to the UI Performs 2002 report, OWS recognizes the "downward trend" in compliance on non-monetary determinations. The 2002 report notes non-separation aggregate data about 15 percentage points below the standard. Over half of the states failed to meet all six criteria on non-monetary determinations according to the March 2003 ranking report, and the March 2004 report shows about two-thirds of the states failing half or more of the six benchmarks.

With so many states failing this benchmark, the current standards should remain in place. The current standard recognizes that separation and non-separation determinations require a fact-finding process that can sometimes be complex. Nonetheless, unemployed people need far more timely determinations of their eligibility for benefits, and thus OWS should adopt more detailed and demanding benchmarks in this area.

#### **B. DOL should adopt more meaningful remedial action for non-compliant states.**

We are deeply concerned that the newly proposed UI Performs system will do little to rectify the major problem of ongoing noncompliance with those standards central to the proper operation of the program.

Under the current regime, states have been required to submit continuous improvement plans about their efforts to improve their performance on the 19 Tier I measures. DOL proposes to drop this monitoring requirement, only requiring a "corrective action plan" after the state has failed to meet the criteria and workers have lost out on benefits for a substantial period. Those measures that are no longer core standards (such as 35-day first payment timeliness) will be relegated to management information measures with no corrective action plan required unless performance is "conspicuously poor."

The new proposal continues the trend away from the historic distinction between "Secretary's Standards," namely the first-payment timeliness and lower-authority appeals standards that are in federal regulations, and "acceptable levels of performance" that are not. Indeed all the new standards are referred to as "acceptable levels of performances," failing to highlight the issue of compliance with federal law.

DOL must do much more to fulfill its role in ensuring that workers receive benefits when due through a speedy first-payment determination or a timely appeal determination. Current federal

regulations (20 CFR Section 640.8) outline a number of steps that DOL can use to address key performance issues before holding a formal hearing related to state's federal certification. These steps include:

- informal discussions with state agency officials
- conducting evaluation of state benefit payments processes and analyzing reasons for state failure
- recommending specific actions for improvement
- requesting that the state to submit a compliance plan with a prescribed date
- initiating special reporting requirements
- consultation with the Governor of State about the consequences of non-compliance
- providing technical assistance to that state.

These regulations could be strengthened with practices by providing immediate notification of a state when it falls into non-compliance, active on-site monitoring of troubled states and public notice of non-compliance.

However, DOL has too infrequently gone beyond the stage of informal discussions with state officials into active efforts to improve state operations. DOL has been especially loathe to utilize the key step of engaging Governor's offices in issues related to their state's failure to meet established federal standards. DOL's proposal does not explain the steps that it will take to ensure that states comply under the revised UI Performs System. Therefore, we urge the agency to adopt and utilize more specific and graduated steps for bringing states in compliance with federal requirements, incorporating the reasonable tools outlined above.

## **II. The Proposed Emphasis on Rapid Reemployment Standard Should Be Abandoned**

### **A. The Proposed Reemployment Standard Undermines the Core Purpose of the UI System**

DOL proposes adding a new performance standard related to "facilitating reemployment." The proposed standard is "the percent of UI claimants who become reemployed within the quarter following their first UI payment." Currently, there is no reemployment standard in the existing set of Tier I or Tier II UI Performs measures.

As originally conceived of over sixty years ago, the UI system exists to enable jobless workers to find new work that matches, and when possible improves, the quality of his or her prior job. This purpose is summarized by William Murray and Merrill Haber in their seminal history of the UI system: "Unemployment insurance is of value to the worker, not only as a partial replacement of his lost earnings, but as an aid in preserving his skills for a reasonable period of time until he can find suitable work. The unemployment insurance claimant can refuse unsuitable work and still receive his benefits. He thus can avoid having to take jobs far below his skill and abilities which may downgrade his status and make it more difficult for him to 'land' a suitable job when it becomes available."<sup>3</sup>

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<sup>3</sup> William Haber & Merrill Murray, *Unemployment Insurance in the American Economy: An Historical Review and Analysis* (Richard D. Irwin, Inc., 1966), at p. 34.

Indeed, this principle was considered so core to the program that it was even codified in federal law. According to the “prevailing conditions of work” requirement, “compensation shall not be denied to any otherwise eligible individual for refusing to accept new work...if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality.”<sup>4</sup> Not only must the wages line up with those normally paid for such work in the local labor market, but according to the DOL, “fringe benefits such as life and group health insurance, paid sick, vacation and annual leave, provisions for leaves of absence and holiday leave; provisions for leaves of absence and holiday leave; pensions, annuities and severance pay” must also be commensurate with prevailing standards.<sup>5</sup>

In short, the purpose of UI program is to encourage workers to find a good and suitable job, and not merely to promote rapid job placement. The proposed reemployment standard represents a retreat from this fundamental mandate and principle of federal UI law. As proposed, the core reemployment measure will measure whether UI recipients have been employed at any job during the quarter following their first benefits payment, without regard to the level of pay or any other basic job quality measures.

While timely reemployment is, of course, a goal that we strongly share, we also believe that the proposed standard provides a major incentive for many states to push claimants to accept the first job offer that comes their way. This is not merely a hypothetical concern. In 1998, OWS issued new guidelines out of concern that the states were not properly enforcing the federal law that mandates the prevailing conditions of work standard. More recently, at the urging of the business community and others, it is clear that many more states have mandated rapid reemployment despite record levels of long-term joblessness.

Thus, we strongly urge OWS to abandon the proposed reemployment standard. If the agency chooses to move forward with this approach, it should clearly incorporate a job quality standard in order to prevent overzealous state action. For example, in the alternative, the standard should target the percentage of workers at an overall compensation package commensurate to their prior employment. Absent a job quality standard, the OWS will be sending the wrong signal to the states while undermining the core purposes of the UI program.

### **B. Longer Unemployment is a Product of the Labor Market, Not the Fault of the Jobless**

As advocates for the unemployed, we are well aware of the reemployment challenges of UI claimants. The UI exhaustion rate reached 43.9% in July of 2003, the highest rate recorded since monthly data was first published in 1975. As of July 2004, long-term unemployment had been over 20% of the unemployed for 22 straight months, which is also the longest stretch of long-term joblessness on record.

However, these trends have far more to do with the overall labor market than with the actions of the UI system. Today’s UI recipients are more likely to find themselves unemployed because of

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<sup>4</sup> Federal Unemployment Tax Act, Section 3304 (a) (5) (B)

<sup>5</sup> Unemployment Insurance Program Letter No. 41-98.

permanent layoffs and structural changes in the economy than in the past. For example, during the 1980s job slump, 18% of all jobless workers were on temporary layoffs compared to 14% today. Moreover, the percent of long-tenured workers who were displaced from their job reached a twenty-year high from 2001-2003 despite that the fact the overall unemployment rate (5.5%) was lower than other recessionary periods.<sup>6</sup> Indeed, New York Federal Reserve Bank found that job changes were much more likely to have resulted from permanent structural gains or losses during the 2001 recession and subsequent recovery, as opposed to recessions of 1980s, 1990s and 1970s when a far greater share were cyclical.<sup>7</sup>

Workers displaced due to structural changes take the longest to be re-employed, as they struggle to deal with changes in the economy and to make up for the loss of tenure-based pay and benefits. Many displaced workers and unemployed workers will be forced to take a significant pay cut when they return to work (in the most recent displaced worker survey mentioned above, a third took a 20% pay cut.) However, pushing them to do so too early in their unemployment spell might foreclose options for further training to improve their long-term options or to seize on whatever opportunities might remain in their prior fields. Indeed, as experienced workers, with demonstrated labor force attachment, UI recipients themselves are in the best position to determine the course of their job search. With regular benefits replacing less than half of prior wages and capped at 26 weeks, there is little danger that UI will disrupt long-term work participation.<sup>8</sup>

Targeted reemployment services like job search assistance and job training along with appropriate enforcement of the UI system's existing work-search requirements can aid a successful search. However, setting a specific numerical standard tips the balance too far away from giving UI claimants the leeway to find their best route back to an effective career path. State agencies should not be held accountable for economic forces beyond their control, nor should workers be expected to be re-employed when suitable jobs are not available.

### **C. A Single Reemployment Standard Fails to Take Into Account Substantial Labor Market Variations Between the States**

The pilot study undertaken to set a baseline reemployment rate found that a one percentage change in the total unemployment rate leads to a 6.7% change in the first quarter reemployment rate.<sup>9</sup> Especially during times of high unemployment, total unemployment rates vary dramatically from state. For example, in July 2003 (near the high point of the jobs slump), there was a 5% spread between the state with the lowest unemployment rate (South Dakota-3.3%) and the highest unemployment rate (Oregon-8.2%).

Still, the Labor Department appears to be proposing a single reemployment standard for states

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<sup>6</sup> Bureau of Labor Statistics, Current Population Survey Displaced Worker Supplement, 2001-2003.

<sup>7</sup> Groshen, Erica and Potter, Simon, "Has Structural Change Contributed to a Jobless Recovery," *Current Issues in Economics and Finance*, August 2003

<sup>8</sup> US D.O.L. Employment & Training Administration, Calendar Year 2002 Benefit Accuracy Measurement Data Summary, found at [www.ows.doleta.gov/unemploy/bam/2002/bamecy2002.asp](http://www.ows.doleta.gov/unemploy/bam/2002/bamecy2002.asp).

<sup>9</sup> Analysis of Unemployment Insurance Reemployment Pilot Data, U.S. Department of Labor Employment Training Administration, 2004. (<http://atlas.doleta.gov/unemploy/reemployipilot.asp>)

across the nation based on the national unemployment rate. Thus, states may find themselves out of compliance because of their labor market conditions, rather than any strength or weakness in their state's program. State agencies would have substantially less control over this outcome than other core performance measures – like the timeliness of first payments or the aging of claimant appeals that directly relate to agency activities.

### **III. The Proposed Program Integrity Standards Are Unbalanced Against Workers**

For the first time, the new proposed performance measure includes a standard relating to overpayment detection. The standard proposed is “overpayments established for recovery as a percent of the overpaid amount estimated through BAM that the state can detect and recover.” In short, this is an attempt to have a measure of actual overpayments compared to potential overpayments.

No one argues with the positions that workers should not receive UI benefits if they are not entitled to them, especially if they have actively concealed information about their employment status. However, if the Labor Department was serious about improving the integrity of the UI system, they would pursue a more balanced approach. As described by Prof. Stephen Woodbury of the Upjohn Institute to a Congressional panel, “Program Integrity in the unemployment insurance system has three components: whether workers are overpaid, whether they are underpaid, and whether employers are paying the taxes that they owe.”<sup>10</sup> Most importantly, DOL would require states to do a better job reducing the hundreds of millions of dollars in benefits that are underpaid today's workers, and more aggressively address the problem of program integrity as applied to employers who fail to pay their fare share of unemployment taxes.

In 2002, the Department posted its first ever 50-state data related to the accuracy of unemployment insurance denials. The Denied Claims Accuracy (DCA) project found 14.7% of monetary denials, 7.6% of separation denials and 11.8% of non-separation denials were improper. While the Department did not estimate a dollar amount associated with these denials, NELP estimates that such denials represented cost workers over a billion dollars in 2002.<sup>11</sup>

The wrongful denial of benefits undermines public confidence in the UI system just as much, if not more than, the problem of as overpaid benefits. Thus, the Department should take the steps necessary to establish performance goals in the area of denied claims and work with poor performing states to implement improvement plans.

Similarly, the new proposed standard offers little in the way of enforcement to prosecute employers who cheat the system by not paying their UI taxes. Most importantly, employers often avoid paying UI taxes by misclassifying their workers as “independent contractors.” A major DOL-commissioned study concludes that there was nearly \$200 million in lost UI tax revenue per year through the 1990s based on existing audit procedures.

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<sup>10</sup> Stephen A. Woodbury, Michigan State University, Department of Economics, testifying at U.S. House of Representatives, Committee on Ways and Means, Human Resources Subcommittee, June 11, 2002.

<sup>11</sup> Rebecca Smith and Andrew Stettner, *The Whole Truth: Employer Fraud and Error in the UI System* (National Employment Law Project, November 2003).

DOL should support efforts that would help states improve their tax audit programs. Not unlike its policy with regard to overpayments, DOL should provide grants to support collaboration between various state departments involved in payroll tax collection and collaborations between the Labor Department and the IRS that can ferret out those employers that engage in misclassification. The tax quality standard proposed for the new UI performs does not relate directly to either the audit procedures or underpayment of UI taxes.

Thank you for this opportunity to comment on the proposed performance standards. Please feel free to contact us if we can provide additional input at 212-285-3025 x 110.

Sincerely,

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