

## **Unemployment Insurance and Social Security Retirement Offsets**

By National Employment Law Project

### **Introduction**

The policy of denying or reducing unemployment insurance benefits to Social Security recipients is not widely understood or even acknowledged. According to our research, 21 of the 53 unemployment insurance jurisdictions take some or all of a jobless individual's unemployment benefits when they are also receiving Social Security retirement benefits. See the attached table for a state-by-state summary.

In today's labor market, a significant percentage of individuals work after reaching the age for Social Security benefits (62 for reduced benefits, and 65+ (and climbing) for full benefits). With increasing numbers of older Americans remaining in the workforce and many "retired" individuals holding jobs, the denial or reduction of unemployment insurance benefits to jobless older workers due to their receipt of Social Security retirement benefits is drawing increased scrutiny in some quarters. AARP, among others, has turned its attention to the policy and in 2003 three states took action to improve their practices.

The reduction or denial of unemployment insurance benefits due to receipt of other income is termed an "offset." States with the Social Security "offset" reduce UI benefits dollar-for-dollar, depending upon the amount of Social Security retirement benefits received and the percentage of retirement benefits subject to the offset. States currently offset from 45 to 100 percent of Social Security retirement benefits. Typically, a monthly retirement benefit is converted to a weekly figure and then offset against the weekly UI benefit. As a result, the amount of UI benefits can be reduced to zero in many cases, although a partial benefit is paid in some situations.

### **Federal-State Background**

Understanding the legal and policy options regarding state and federal law on unemployment insurance (UI) benefit reductions because of the receipt of Social Security retirement benefits requires an overview of how pension offsets generally operate within the federal-state UI program. State UI laws largely determine eligibility for UI benefits within a framework of federal authority. States have legal power to offset any and all retirement payments against UI benefits under our federal-state UI system. States also have authority under federal pension offset law to "take into account" employee contributions toward retirement benefits in determining whether to offset UI benefits, and, if so, by how much.

States have the authority to eliminate or reduce offsets of unemployment insurance (UI) benefits of jobless workers also receiving Social Security and Railroad Retirement benefits. Indeed, 32 of the 53 unemployment insurance jurisdictions do not reduce UI benefits for individuals who are also Social Security

---

### **National Employment Law Project, Inc.**

55 John Street, 7th Floor, New York, NY 10038  
(212) 285-3025 • [www.nelp.org](http://www.nelp.org) • [nelp@nelp.org](mailto:nelp@nelp.org) • (212) 285-3044 (fax)

retirement recipients. This paper explains the legal background around pension offsets and how states can eliminate the offset of UI benefits due to receipt of Social Security and Railroad Retirement benefits.

### **Understanding the Federal Pension Offset Provision**

Until 1976, federal law did not require states to take any particular position regarding reducing state UI benefits due to the receipt of pension or retirement income. At that time, media reports inflamed Congress and resulted in the adoption of a federal requirement that states offset certain retirement payments from UI benefits.<sup>1</sup> The provision is found in Section 3304(a)(15) of the Federal Unemployment Tax Act.<sup>2</sup> It reads:

The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that —

(15) the amount of compensation payable to an individual for any week which begins after March 31, 1980, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week except that —

(A) the requirements of this paragraph shall apply to any pension, retirement or retired pay, annuity, or other similar periodic payment only if —

(i) such pension, retirement or retired pay, annuity, or similar payment is under a plan maintained (or contributed to) by a base period employer or chargeable employer (as determined under applicable law), and (ii) in the case of such a payment not made under the Social Security Act or the Railroad Retirement Act of 1974 (or the corresponding provisions of prior law), services performed for such employer by the individual after the beginning of the base period (or remuneration for such services) affect eligibility for, or increase the amount of, such pension, retirement or retired pay, annuity, or similar payment, and

(B) *the State law may provide for limitations on the amount of any such a reduction to take into account contributions made by the individual for the pension, retirement or retired pay, annuity, or other similar periodic payment.* (Emphasis added.)

At its core, Paragraph A of the federal pension offset provision requires states to offset UI benefits by any retirement or pension payments from a "base period" or "chargeable" employer. The UI terminology "base period" or "chargeable" employers refers to firms within the last year and a half prior to layoffs will make payroll tax contributions toward UI benefits. Since state UI payroll taxes are "experience rated," that is, they increase when UI claims for a firm's former employees are paid, former employers of retirees that are "base period" or "chargeable" employers are perceived as suffering a "double dip" by paying both pension benefits and UI benefits to former employees. This was the seeming problem that Congress focused upon in passing the federal pension offset provision.

States are free to go beyond the federal pension provision and offset other retirement payments that are not within the terms of federal pension offset provisions. The District of Columbia, Maine, and Virginia are

the only jurisdictions that offset all private pension income regardless of whether the retirement payments are provided by a base period or chargeable employer.<sup>3</sup> All other states apply a variety of UI pension offset policies while meeting the federal minimum requirement to offset base period or chargeable employers.

Paragraph B of the federal law permits, but doesn't require, states to take the amount of any employee contribution toward his/her pension into account when complying with the federal pension offset mandate. *This option, highlighted in Paragraph B above, is the key option in terms of state authority to address Social Security offsets.* Under Paragraph B of Section 3304(a)(15), states have authority to reduce or eliminate Social Security offsets by "taking into account" the employee's contribution toward Social Security retirement. We now examine this state flexibility under the federal pension offset provision in more detail.

### **How States Handle Social Security Offsets Against UI Benefits in 2003**

The U.S. Department of Labor interpreted the federal pension offset law at the outset as covering Social Security and Railroad Retirement benefits as well as private and other governmental pensions. In effect, the Labor Department's interpretation argued that every employer's FICA contributions made them a "base period" employer for purposes of offsetting Social Security retirement benefits from UI benefits. The practical result of this administrative reading of the statute was that retired individuals laid off after they began drawing their Social Security retirement benefits had their UI benefits offset against those payments.

Many states soon sought to use their option under Paragraph B of the federal law to "take into account" employee contributions toward Social Security or other retirement benefits by reducing or eliminating the offset. The majority of states (32) now take advantage of their option under Paragraph B to exclude consideration of Social Security retirement benefits when paying UI benefits because they "take into account" the employee contribution by not offsetting any of the Social Security benefit. Altogether, 21 of the 53 states (including 50 states and the District of Columbia, Puerto Rico, and Virgin Islands) still offset all or part of Social Security benefits against UI benefits, according to recent research. Only six jurisdictions (District of Columbia, Ohio, Puerto Rico, Utah, Virgin Islands, and West Virginia) are currently offsetting 100 percent of Social Security retirement benefits against UI benefits. The attached table summarizes the Social Security offset status of all 53 unemployment insurance jurisdictions.

***Of the 53 jurisdictions, only four offset UI benefits by 100 percent of Social Security retirement benefits, with another 17 offsetting UI benefits by 50 percent (45 percent in Arizona) of a jobless individual's Social Security benefits. 32 states have no Social Security offset in their UI laws.***

Interestingly, North Carolina offsets Railroad Retirement benefits, but not Social Security retirement benefits. All other states treat Social Security and Railroad Retirement benefits similarly in applying their offset provisions. When seeking to eliminate Social Security retirement benefit offsets, advocates should also address Railroad Retirement benefits, in our view.

### **State Options to Eliminate Social Security Offsets And "Take Into Account" Employee Contributions**

In March 2003, the U.S. Department of Labor issued a "program letter" that is helpful in spelling out exactly what steps states can take to eliminate or limit the reduction of UI benefits because of the receipt of Social Security and Railroad Retirement pensions. (A program letter is a

legally binding interpretation formally issued by the Labor Department.) This particular program letter addressing pension offsets is formally known as Unemployment Insurance Program Letter No. 22-87, Change 2.<sup>4</sup>

This recent guidance from the U.S. Department of Labor clarifies that states have “broad latitude” under Paragraph B of the federal pension offset provision when “taking into account” an individual employee’s contribution toward his or her pension. In particular, the Labor Department has stated that when acting under Paragraph B, “. . . a state may disregard part or all of a retirement payment in determining the amount of [unemployment compensation (U.C.)] payable ‘regardless of the relative proportions of employee and employer contributions.’ Therefore, a state may disregard up to 100 percent of a retirement payment as long as the employee contributed some amount to the retirement plan, and any reduction in the amount of U.C. payable need not be proportionate to the amount of the employee contribution.”<sup>5</sup> That is, since employees pay one half of the contributions toward their Social Security and Railroad Retirement benefits, states have flexibility to disregard any or all of these retirement payments while still conforming to the requirements of the federal pension offset provision.

Clarifying further, the Department explicitly notes that Social Security retirement benefits need not be offset to satisfy federal pension offset requirements and that a state may treat Social Security retirement benefits differently than offsets against private contributory pensions.<sup>6</sup> This guidance language is virtually an invitation to states to adopt language specifically dealing with Social Security offsets.

Alabama furnishes an example of a state law (Industrial Relations and Labor Code, 25-4-78-(8)b.2.c.) that specifically excludes Social Security benefits from its state UI pension offset provision.

The other provisions of this subdivision to the contrary notwithstanding . . . the amount of any pension, retirement or retired pay, annuity, or other similar periodic payment under the Social Security Act or the Railroad Retirement Act shall not result in a reduction of benefits under this subdivision.

Depending on the existing terms of a state’s UI pension offset provision, a similar explicit exclusion can serve to eliminate the offset of Social Security and Railroad Retirement benefits while conforming to the federal pension offset provision.

### **Policy Arguments Supporting Elimination of Social Security Offsets**

UI benefits are intended to partially replace lost wages for involuntarily unemployed individuals who meet a threshold attachment to the labor force and continue to seek other employment.<sup>7</sup> For this reason, jobless workers who retire in the traditional sense—meaning they voluntarily leave the labor market—will run afoul of two universal rules of state UI laws. First, they will be disqualified for voluntarily leaving work, and second, they will be ineligible because they are not seeking work or available for work. In fact, there are many reports of these penalties being imposed upon retirees.

These existing UI rules are important because their disqualification and ineligibility provisions prevent voluntarily unemployed retirees from drawing UI benefits without any necessity for a pension offset provision. For this reason, problems with the Social Security offset do not typically occur when an individual actually “retires” from his or her employer. In these cases, a voluntary quit

penalty would typically apply.<sup>8</sup> In addition, if retirees do not maintain a connection with the labor market, they are ineligible because they are not available for work or seeking work.

***Providing UI benefits to otherwise eligible older workers regardless of their receipt of Social Security benefits is consistent with American values rewarding work and disfavoring discrimination based upon age.***

Most Social Security offset cases arise when an individual has begun receiving Social Security benefits and continues working on the job, or again works after retiring. If such individuals are then separated involuntarily from employment, they cannot get UI benefits in offsetting states to cushion their loss of wages. This happens despite the fact that these individuals have established

monetary eligibility under state UI law and continue to actively seek work. The mere receipt of Social Security benefits no longer marks a withdrawal from the labor market. The application of the Social Security offset in these cases prevents payment of UI benefits to deserving involuntarily unemployed older individuals that meet all other requirements for UI eligibility.

Applying offsets of Social Security and Railroad Retirement benefits against UI benefits punishes jobless older workers merely because they have reached an age sufficient for them to get these retirement benefits. A better policy recognizes that UI benefits are intended to assist jobless workers separated from recent work for non-disqualifying reasons without regard to their age.

Social Security and unemployment benefits are paid for different, but complementary, purposes. Social Security benefits are paid to older workers in recognition of a lifetime of economic activity. Social Security benefits are not paid with respect to a period of unemployment taking place after the age of retirement eligibility is reached. In contrast, UI benefits are awarded to involuntarily unemployed jobless workers to replace wages from recent employment. UI programs generally do not take into account payments received by claimants from third parties. Both programs reflect labor market participation, but award benefits for distinct reasons that are not violated by the simultaneous receipt of both types of benefits.

In short, providing UI benefits to otherwise eligible older workers regardless of their receipt of Social Security benefits is consistent with American values rewarding work and disfavoring discrimination based upon age.

### **Conclusion**

Pension offsets have been a contentious and often obscure area of unemployment insurance law and legislation since 1976. The changing patterns of work for older workers has recently made Social Security and Railroad Retirement benefit offsets against UI benefits a subject of broader concern. Those older workers that remain active in the workforce should not be singled out for denial or reduction of UI benefits simply because they have reached an age sufficient for Social Security benefit eligibility.

Fortunately, states retain authority under our federal-state UI system to ameliorate pension offsets by taking employee contributions into account, including employee contributions to Social Security and Railroad Retirement benefits. This permits states to offset any or no amount of these retirement benefits,

and the majority of states have already taken advantage of this provision to exclude all of an individual's Social Security and Railroad Retirement benefits from their state pension offset laws.

For further information contact:

Rick McHugh, Staff Attorney  
National Employment Law Project  
Midwest Office  
(734) 426-6773  
rmchugh@nelp.org

## Endnotes

---

<sup>1</sup> Resistance to the federal pension offset provision delayed its effective date until April 1980. Congress amended the provision in September 1980 to give states added options under the measure.

<sup>2</sup> 26 United States Code §3304(a)(15).

<sup>3</sup> U.S. Department of Labor, Comparison of State Unemployment Insurance Laws (July 2002), Table 5.38.

<sup>4</sup> U.S. Department of Labor, Unemployment Insurance Program Letter No. 22-87, Change 2 “Treatment of Retirement Pay-Employee Contributions,” 68 Fed. Reg. 15241 (March 28, 2003).

<sup>5</sup> Unemployment Insurance Program Letter No. 22-87, Change 2 “Treatment of Retirement Pay-Employee Contributions,” Question and Answer 1. *See also* Unemployment Insurance Program Letter No. 22-87, “Pension Offset Requirements Under the Federal Unemployment Tax Act,” 52 Fed. Reg. 22,546 (April 30, 1988), Paragraph 6(d).

<sup>6</sup> Unemployment Insurance Program Letter No. 22-87, Change 2, Questions and Answers 2 and 3.

<sup>7</sup> Advisory Council on Unemployment Compensation, Unemployment Insurance in the United States: Benefits, Financing, Coverage (U.S. Department of Labor, 1995), “Statement of Purpose,” p. 8.

<sup>8</sup> This does not mean that a voluntary leaving disqualification is properly imposed where the employer induces the individual to leave his or her work with “buy out” incentives or otherwise makes a retirement involuntary.

Table 1 - States Offsets of Social Security Retirement Against UI Benefits in 2003

<b>State</b>	<b>Status of Social Security Offset</b>
<b>Alabama</b>	<b>None</b>
<b>Alaska</b>	<b>None</b>
<b>Arizona</b>	<b>45 Percent</b>
<b>Arkansas</b>	<b>None</b>
<b>California</b>	<b>None</b>
<b>Colorado</b>	<b>50 Percent</b>
<b>Connecticut</b>	<b>50 Percent</b>
<b>Delaware</b>	<b>None</b>
<b>Dist. of Columbia</b>	<b>100 Percent</b>
<b>Florida</b>	<b>None</b>
<b>Georgia</b>	<b>None</b>
<b>Hawaii</b>	<b>50 Percent</b>
<b>Idaho</b>	<b>None</b>
<b>Illinois</b>	<b>50 Percent</b>
<b>Indiana</b>	<b>None</b>
<b>Iowa</b>	<b>None</b>
<b>Kansas</b>	<b>None</b>
<b>Kentucky</b>	<b>None</b>
<b>Louisiana</b>	<b>50 Percent</b>
<b>Maine</b>	<b>50 Percent</b>
<b>Maryland</b>	<b>None</b>
<b>Massachusetts</b>	<b>50 Percent</b>
<b>Michigan</b>	<b>None</b>
<b>Minnesota</b>	<b>50 Percent</b>
<b>Mississippi</b>	<b>None</b>
<b>Missouri</b>	<b>None</b>
<b>Montana</b>	<b>None</b>
<b>Nebraska</b>	<b>50 Percent</b>
<b>Nevada</b>	<b>None</b>
<b>New Hampshire</b>	<b>None</b>
<b>New Jersey</b>	<b>None</b>
<b>New Mexico</b>	<b>None</b>

<b>New York</b>	<b>None</b>
<b>North Carolina</b>	<b>RR Retirement Only</b>
<b>North Dakota</b>	<b>50 Percent</b>
<b>Ohio</b>	<b>100 Percent</b>
<b>Oklahoma</b>	<b>None</b>
<b>Oregon</b>	<b>None</b>
<b>Pennsylvania</b>	<b>50 Percent</b>
<b>Puerto Rico</b>	<b>100 Percent</b>
<b>Rhode Island</b>	<b>50 Percent</b>
<b>South Carolina</b>	<b>None</b>
<b>South Dakota</b>	<b>50 Percent</b>
<b>Tennessee</b>	<b>None</b>
<b>Texas</b>	<b>None</b>
<b>Utah</b>	<b>100 Percent</b>
<b>Vermont</b>	<b>None</b>
<b>Virgin Islands</b>	<b>100 Percent</b>
<b>Virginia</b>	<b>50 Percent</b>
<b>Washington</b>	<b>None</b>
<b>West Virginia</b>	<b>100 Percent</b>
<b>Wisconsin</b>	<b>None</b>
<b>Wyoming</b>	<b>None</b>

Source: National Employment Law Project compilation based upon information in the U.S. Department of Labor, Comparison of State Unemployment Insurance Laws (July 2002), Table 5.39 and additional legal research by NELP staff. Table updated with information about states adopting legislation in 2002 (Kansas, Virginia, and Wyoming).