Bringing Pennsylvania's Unemployment Compensation Law into the 21st Century and Improving Access for All Workers

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My name is Julia Simon-Mishel and I am the Supervising Attorney of the Unemployment Compensation Unit at Philadelphia Legal Assistance ("PLA"). We have represented nearly 2000 low-wage workers seeking unemployment benefits since the COVID-19 crisis began. We are also the leading non-governmental source of information for communities across the Commonwealth about Pennsylvania unemployment compensation and the federal extension programs under the CARES Act. I personally serve on Pennsylvania's Benefit Modernization Advisory Committee. Thank you for inviting me to provide testimony on the proposed changes to the Unemployment Compensation Law and how these changes will impact the experience of workers filing for benefits.

The Covid-19 crisis has highlighted many of the gaps in our unemployment safety net. As Pennsylvania recovers from the pandemic with an eye towards the next unemployment crisis, we have a unique opportunity to address those gaps and improve our law.

1. Simplify the Administration of Unemployment Compensation and Remove Outdated Barriers to Benefits

a. Eliminate credit weeks and waiting weeks

In order to qualify for unemployment compensation, a claimant must first be financially eligible for benefits. In Pennsylvania that involves two analyses: base year earnings and credit weeks. For base year earnings, in 2020 a claimant had to earn at least $1,688 in their highest quarter of earnings and at least $2,718 in overall earnings during the base year period. The base year is the first four of the last five completed quarters. For credit weeks, in 2020 a claimant had to have at least 18 credit weeks to qualify for any benefits, and had to have 26 credit weeks to qualify for 26 weeks of benefits. A credit week is any week in which the claimant had earnings in employment of at least $116.

Pennsylvania is the **only** jurisdiction that has a standalone weekly earning requirement.[1] Our Commonwealth should eliminate this requirement as it creates a substantial administrative burden for the Department of Labor and Industry ("Department") and causes unnecessary benefit delays for claimants. For example, when other states share wage data with Pennsylvania to support a claimant's eligibility, that data often does not include credit weeks. The federal government does not report credit weeks with its wages. And many out of state and multi-state employers do not report credit weeks. This requires the Department to spend time constantly following up to request credit week information before it can issue a correct financial determination to a claimant. During the COVID-19 pandemic, this has delayed payments to many claimants. As we have all seen, the Department can better use its time and resources to address other benefit issues rather than chase down entities for credit week amounts.

Eliminating the credit week requirement would also result in a modest expansion of eligibility for claimants while saving Pennsylvania employers, especially small employers, the administrative burden of tracking and reporting credit week information to the Department.

b. Allow claimants to qualify for benefits using an "alternative base period"

As many of your offices have experienced, financial eligibility is often too obtuse for even the most seasoned claimant to understand. At the beginning of the pandemic, thousands of frustrated claimants filed unsuccessful benefit appeals because the wages from their most recent employer did not appear on their financial determinations. As we heard from countless clients, "the employer I filed for was not even on the notice!" That is because in late March 2020, anyone who applied for unemployment compensation would **not have seen** their wages from the **previous six months** appear on their financial determinations. That is because the base year for a March 2020 claim was October 2018 to September 2019. Therefore, even claimants who began a new job in July 2019 and had been working for nine months would not have qualified for Pennsylvania unemployment compensation in March 2020.

If not for the federal government providing an extra safety net through the Pandemic Unemployment Assistance program, many of your constituents would not have been eligible for any benefits until July 5, 2020 at the earliest, and would have missed the majority of weekly supplemental payments through the Federal Pandemic Unemployment Compensation program. Restricting financial eligibility to our current base year is an outdated system. That limitation was put in place because of the delay in employer reporting of earnings **back when it was done**

[1] United States Department of Labor, Employment & Training Administration, "Comparison of State Unemployment Laws." Chapter 3: Monetary Eligibility (https://oui.doleta.gov/unemploy/pdf/uilawcompar/2020/monetary.pdf)

by paper. A refusal to consider a claimant's most recent earnings means that claimants legitimately attached to the labor market are cut off from benefits.

Thirty-eight (38) other jurisdictions offer "alternative base-periods (ABP)," and Pennsylvania should amend our law to offer the same. The federal Department of Labor describes that "many states use an ABP. For example, if the individual fails to qualify using wages and employment in the first four of the last five completed calendar quarters, the state will use wages and employment in the last four completed calendar quarters."[2] Putting in place an ABP will ensure that Pennsylvania unemployment compensation actually covers the majority of workers who had an attachment to the labor market, and will more effectively provide wage replacement based on recent earnings.

c. Require affirmative reporting by employers of "reasonable assurance" for employees of educational institutes

Another cause of benefit delays during this pandemic has been the investigations required to determine the eligibility of employees of educational institutes, including: teachers, adjunct professors, teaching assistants, bus drivers, janitorial staff, and cafeteria staff among others. The Pennsylvania UC law, similar to every other jurisdiction, prohibits benefits to these employees in certain situations where they have "reasonable assurance" of similar work during the following term or semester. Last summer, thousands of workers waited in purgatory for benefits as the Department tried to investigate whether the employer had provided such reasonable assurance. These determinations added to the growing backlog at the Department.

Federal guidance requires that the Department must "make a determination **at the time of filing** that reasonable assurances exist for employment in the fall semester or term based on information provided by the individual and the employing educational institution or system."[3] Employers often wait months to report reasonable assurance, or lack thereof, to the Department, unfairly prejudicing workers. Pennsylvania should require all employers whose employees are subject to the reasonable assurance doctrine to provide a response within 10 days of notification of the claimant's application. If the employer fails to respond, benefits should be determined based on the information provided by the claimant. This will speed up payments to claimants who are out of work due to no fault of their own, especially in times of high unemployment claim filing.

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[2] *Id.*

[3] Unemployment Insurance Program Letter 10-20, page 6.

If an employer has not provided reasonable assurance at the time of benefit application, but provides reasonable assurance at a later time and informs the Department, federal guidance indicates that benefit eligibility can be redetermined at that time for the period going forward.[4]

d. Extend appeal deadlines for claimants and employers

Currently, claimants and employers must file appeals within 15 days of the mailing date of a notice granting or denying benefits. That time period is too short. Both employers and claimants consistently lose their opportunity to contest the merits of a case because they miss an appeal deadline. Most often, that is because of delays in the mail that cause the determinations to arrive late. The appeal deadline runs from the date of mailing, as written on the determination, not the date of receipt. Small employers may not have the staff to quickly evaluate claims and file appeals. Claimants with language barriers often struggle to get help understanding the determination before the appeal deadline expires.

There is no downside to giving both parties more time to appeal. Everyone wants it, everyone needs it.

e. Require user-centered design and language on all notices that deny or grant benefits

Your constituent services will be able to quickly confirm for you that unemployment claimants do not understand a majority of the documentation that the Department mails them. In fact, your staff may not understand several of the documents. Correspondence from the Department is **not** written in plain language. And none of the notices have been designed with the reader in mind. Both employers and claimants often struggle to identify the pertinent information on these notices. This is especially problematic for notices that deny or grant benefits, or "appealable notices." The Department should be required to hire a user-centered design consultant to review and redesign appealable notices. This will help all parties preserve their rights in the unemployment process, and also prevent many unnecessary phone calls to the Service Centers.

[4] Unemployment Insurance Program Letter 5-17, page 7-8.

2. **Address the Changing Economy by Eliminating the Self-Employment Disqualification**

   a. **Section 402(h) should be removed from the Unemployment Compensation Law**

While Section 402(h) of the UC Law has been problematic for years, the pandemic has highlighted the many ways in which this section unfairly disqualifies claimants who have paid into the system and creates an administrative burden for the Department. Our economy no longer reflects the realities of the early 1940s, which is when this provision was added. Now, many workers must hold down multiple jobs or gigs to earn a living and keep food on the table for their families, even as they continue to look for a steady full-time job. During the pandemic, while claimants waited four months or longer for benefits, many put their health at risk and took up gig work or contract work to keep a roof over their head. Currently, Section 402(h) disqualifies a claimant for any week

> (h) In which he is engaged in self-employment: Provided, however, That an employe who is able and available for full-time work shall be deemed not engaged in self-employment by reason of continued participation without substantial change during a period of unemployment in any activity including farming operations undertaken while customarily employed by an employer in full-time work whether or not such work is in "employment" as defined in this act and continued subsequent to separation from such work when such activity is not engaged in as a primary source of livelihood. Net earnings received by the employe with respect to such activity shall be deemed remuneration paid or payable with respect to such period as shall be determined by rules and regulations of the department.

This provision fully disqualifies any claimant who engages in self-employment or who increased their work on a side business after losing their W2 employment. Section 402(h) only serves to disqualify claimants who have **already qualified** for benefits based on prior employment. Eliminating the section would not allow more claimants to initially qualify for benefits, nor would it create any new tax liability for businesses. **Pennsylvania is the only jurisdiction with a separate self-employment disqualification in its law.** Other states simply require workers to report any and all earnings and offset those earnings against their weekly benefit rate.

Section 402(h) was originally added to prevent *business owners* who owned and controlled the operations of a business from collecting benefits when the business closed. But Pennsylvania courts have broadened the disqualification considerably, going as far as to disqualify workers who have taken a "positive step" towards creating a business, or who also earn 1099s from multiple businesses. It no longer makes sense in 2021. Many workers do the same type of work for multiple businesses, some of which pay them as a W2 and some of which pay them as a 1099. Others may have a 40 hour a week job and a small side business, such as being a wedding photographer or a dance instructor. These workers have been put through the ringer during the pandemic, not fitting clearly into the PA UC system because of income that may be classified as self-employment, but not able to navigate through the PUA system because of their W2 earnings. These workers, and their employers, have already paid into the trust fund and should be permitted to collect benefits when they lose their qualifying employment. Allowing these workers to collect benefits will not result in any additional charges to businesses who issue 1099s.

Furthermore, this section of the law creates considerable unnecessary and burdensome work for the Department. Every time a claimant responsibly reports earnings from work not associated with an employer in the UC system, the Department begins a "self-employment" investigation. I have seen claimants report minimal income from non-W2 work get investigated: the cancer-stricken patient who participated in a survey as part of her treatment program which compensated her with a payment of $25; the construction worker who was paid for two days on a job as a subcontractor; or the unemployed retail associate who reported cash payments from dog walking. Similarly, workers who find themselves unemployed often look into starting a new venture and therefore report to the Department that they are "self-employed" - simply because they created a Facebook page, put an ad on Craigslist, or advertised on their community listserv. None of this should disqualify claimants from benefits they earned based on prior employment; nor should the Department waste its strained resources on these investigations.

Everyone will benefit from moving past this archaic disqualification. To the extent this raises any concerns about business owners qualifying for benefits if they pay themselves through payroll, that could be addressed by adding an exclusion under the definition of "employment" in the law.

b. Individuals with non-W2 income should report income in the same weekly manner as claimants with W2 income

Claimants are required to report earnings for any work performed during the week. If a claimant engages in work that falls outside the traditional employment structure, they should similarly report it on weekly filings. Instead of disqualifying them for such work, as often

required by Section 402(h), those earnings should be offset against current benefits. For income earned in self-employment, claimants should be required to report their net earnings, similar to how the PUA program is run. The Department can and should issue regulations that provide guidance on income reporting.

Eliminating Section 402(h) also addresses serious inequities in how income from "sideline businesses" is applied to unemployment claims. Currently, the Department determines a **weekly** deduction from benefits for anyone it has determined has a "sideline business," by dividing their net income from the prior tax year by fifty-two weeks. During the pandemic, we have seen that claimants whose sideline businesses were not profitable during the last tax year, but are profitable now, do not have any offset and do not need to report their weekly self-employment income. On the other hand, claimants who did make a profit in 2019 are hit with an automatic weekly deduction, even if they have not had any earnings from their sideline business or are no longer engaged in that business during their claim (not uncommon during the pandemic). For example, a client of mine received a weekly benefit rate of $210, based solely on her W2 wages. The Department then issued a $235 weekly *deduction* based on her 2019 self-employment earnings, even though she had lost all self-employment work during the pandemic. She therefore qualifies for only $38 a week, despite the fact that she has **no** income at this time. That is untenable. Every claimant should simply have to report their net income from any self-employment during the week. These entrepreneurial claimants should not be treated any differently than claimants earning W2 income when it comes to income reporting.

3. Maintain in-person UC Hearings after the COVID-19 Pandemic

Unemployment Compensation Referee Hearings are required by the UC Law to be held in the county in which the claimant worked.[5] During the COVID-19 pandemic, the Unemployment Compensation Board of Review has been holding all hearings as telephone hearings, for safety purposes and in accordance with the Governor's emergency declaration. As front-line advocates at these hearings, we have **strong objections** to any proposals that seek to make telephone hearings permanent after the pandemic. These hearings have been problematic for many of our clients, and we believe unrepresented claimants are in even worse positions in telephone hearings.

Telephone hearings are administered under longstanding regulations of the Unemployment Compensation Board of Review ("the Board"). 34 Pa. Code §§ 101.127-101.133. These regulations govern procedural matters such as: notice of testimony by

[5] 43 P.S. § 825.1

telephone (§ 101.130); use of documents (id.); and how a telephone hearing shall be conducted (§ 101.131). But they are not sustainable as the default for the following reasons:

- **Telephone hearings are often *less* accessible than in-person hearings.** We have heard countless stories of claimants losing their opportunity to testify because they missed a phone call from the Referee. UC Referee hearings do not always run on time, and while claimants try to patiently wait by their phones for a call, it inevitably comes when they run to the bathroom or step into the next room to change a diaper. Claimants immediately call the Referee office, but either no one picks up or they are told they cannot be added to the hearing. We have seen appeals from employers who experienced similar issues. At least when in-person hearings are delayed, the claimant is aware, has access to someone to ask about the delay, and has been able to check in and make their presence known. Furthermore, when a claimant has not been paid benefits, they may lose access to a cell phone because they cannot pay their bill, or do not have enough minutes for the entire hearing. While in-person hearings require transportation, we have seen claimants willing to walk for miles to get to a hearing. No such option exists if they do not have a working phone.

- **Credibility decisions are more difficult**. More than most administrative hearings, UC cases frequently turn on the factfinder concluding which side is telling the truth. For this reason, UC Referees often express a strong preference for in-person hearings. In our view, the loss of the ability to view the parties – especially in each other's presence – is the single biggest loss to the process when testimony is taken remotely. Even the Board of Review's credibility determinations, which are based solely on the record, are harmed by telephone hearings. Transcripts from these hearings are often incomplete and difficult to read as the recordings do not clearly pick up all testimony over the phone.

- **Integrity of the process is weakened.** Telephone hearings also present the risk of witness coaching. This is of special concern to claimants, who face employer witnesses that will be in a room with their supervisors during testimony. As Pennsylvania courts have noted, there is also the possibility of witness fraud, as there is no way to confirm the identity of the witness testifying by telephone.[6] Courts have also raised the concern that individuals may try to testify from documents that have not been shared with the opposing party or Referee.[7] Our advocates have been in telephone hearings during the pandemic where Referees have raised concerns about communication happening between party witnesses, or when it seems a witness is reading off a document not in evidence.

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[6] *Knisley v. Unemployment Comp. Bd. of Review*, 501 A.2d 1180, 1182 (Pa. Commw. Ct. 1985)
[7] *Chobert v. Unemployment Comp. Bd. of Review*, 484 A.2d 223, 225 (Pa. Commw. Ct. 1984).

- **Providing and using documents as exhibits is difficult.** An expansion of telephone hearings would result in more claimants and employers losing their ability to present documentary evidence necessary to meet their burdens. Unlike in-person hearings, where parties can bring exhibits with them, telephone hearings require parties to submit exhibits to the Referee's office five days prior to the hearing, or they will not be permitted to be used (§§ 101.130(e), 101.131(h)). Throughout the pandemic, we have seen both claimants and employers fail to submit documents in a timely manner, or encounter situations where for some reason the Referee does not have the documents they submitted. It is also difficult for parties to collect and provide exhibits, and many claimants struggle to create electronic versions to send to the Referee (as there is no guarantee mail will arrive in time). Employers, who rely on documentation even more so than claimants to meet their burden of proving willful misconduct, will also experience problems, especially when it comes to video or audio exhibits. Once exhibits have been properly presented, telephone hearings are often marred by clumsy attempts to use them in the hearing, as the two parties and the referee all stumble to find relevant information from different locations.

- **Telephone hearings involving language interpretation are especially difficult**. When an interpreter is not in the same room as the party/witness who needs interpretation, the quality of the interpretation can suffer because the interpreter cannot use facial expressions and tone for context. Additionally, the problem of people talking over each other on the phone is exacerbated in these cases. Interpretation of documents is also difficult, as an interpreter for an in-person hearing will review the case file with the claimant at the Referee office to ensure they understand the documents. These deficiencies will impair the ability of non-English speaking claimants and employers to gain fair access to the adjudication of their cases.

After the pandemic, parties can still request telephone hearings under conditions that have been clearly delineated by regulation. The Board can schedule telephone testimony when both parties consent or when "the party or witness is reasonably unable to testify in person due to a compelling employment, transportation, or health reason, or other compelling problem." 34 Pa. Code § 101.128(b)