Legislative Guide to Unemployment Insurance Reform in the States

December 2002

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Cover art contains a replica of the nation's first unemployment check. The replica is courtesy of the Wisconsin Historical Society.

Legislative Guide to Unemployment Insurance Reform in the States

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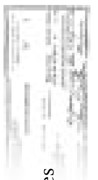
Background

The unemployment insurance (UI) system is critically important for employees, employers, and communities. Through UI, employers insure their employees against temporary income loss due to involuntary unemployment. UI benefits help maintain an employee's purchasing power by providing wage replacement payments while employees are seeking suitable new work. These benefits also help stabilize the economy during economic downturns. UI promotes stable employment by alleviating financial pressure on employees to accept new employment that is not a good match between employee skills and employer needs. And by making the cost of unemployment an element in the cost of producing goods and services, UI gives employers financial incentive to follow best practices in managing their workforce. Because UI is a payroll cost, UI system design must strike a balance between employee protections and employers' affordability.

Both Federal and State Governments are responsible for UI. Federal law imposes an unemployment tax on employers, but provides that they may receive credit against most of the tax if their State has an approved UI program. This tax offset approach provided the original incentive for all States to enact UI laws. Approval of the State UI law (necessary if employers are to receive the tax credit) requires conformity with Federal standards. These standards cover such matters as deposit and disposition of funds collected, circumstances under which benefits must be paid or denied, conditions under which extended benefits (financed 50-50, Federal-State and payable during periods of high unemployment in a State) may be paid, and a number of others.



The costs of administering the UI system are financed from the residual Federal unemployment tax that employers do not receive credit against. It is used to finance both Federal and State administrative costs, the Federal 50 percent share of extended benefits, and to maintain a loan fund for States. States must meet additional Federal standards to qualify for administrative grants.

Aside from the extended benefits program, none of the Federal standards significantly touches basic UI program elements. Accordingly, each State has broad freedom in determining key program components: the level of the maximum weekly benefit amount; the formula for computing the amount and duration of benefits payable to any individual; work and wage requirements to qualify for benefits; eligibility requirements to continue to receive benefits; conditions under which benefits may be denied; tax structure and rates for the purposes of financing benefits; and others.

Although the chief determinant of a State's unemployment benefit costs is the level of unemployment in the State, differences in program provisions can account for important cost differences. Program provisions have been the targets of both Federal and State cost cutting efforts, particularly during recessionary conditions. For example, in an effort to keep costs down, Federal amendments tightened conditions under which extended benefits may be triggered in a

State, and imposed restrictions on eligibility for such benefits. More recently, Congress and the states have debated proposals to expand basic eligibility, e.g., through the use of alternate base periods and the elimination of full-time availability requirements for part-time workers.

Effective measures for cutting regular State benefit costs have been adopted by individual States. Since (as indicated above) all important regular State program components fall within the scope of State jurisdiction, it is at the State level where the greatest opportunities for cost reduction exist, and where proposals for costly expansions are most likely to be considered.

PURPOSE

This document shows how State unemployment insurance program costs can be reduced through adoption of suggested provisions. The suggestions range from amendments that would cut costs substantially, such as temporary caps on maximum benefit escalators, to provisions likely to yield more indirect savings, such as those aimed at tightening eligibility requirements.

Suggestions are included only for provisions in conformity with applicable Federal standards. Nonconforming amendments are self-defeating.

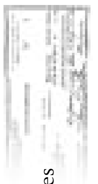
All the provisions suggested appear (or appeared) in at least one State's UI law. The fact that the provision has already been enacted somewhere should help overcome opposition to new and untested approaches. More important, experience with the provision from the State where it is (or was) in place should be readily obtainable if considered useful.

On the other hand, most of the provisions suggested have not been adopted by more than a handful of States. There is no point including provisions already widely accepted.

This document contains a brief explanation of the object of each suggested provision; a short summary of the chief arguments for and against its adoption; and one or more examples of legislative language, in the form of a quote of the provision as it appears in a State law. Where the suggestion is for deleting, instead of adding, a provision, the language to be deleted is shown in brackets. The provisions are grouped in major unemployment insurance subject categories.

ADDITIONAL REFERENCE MATERIALS:

A detailed summary of state UI laws, in chart form, with additional background material, is published by UWC's National Foundation for Unemployment Compensation and Workers' Compensation (NFUCWC) in its annual book, *Highlights of State Unemployment Compensation Laws*. The NFUCWC also publishes annual bulletins on unemployment insurance. The UI Fiscal Data Bulletin reports on costs and other financial data, including trust fund solvency, by state. The UI Wrapup Bulletin reports on major state legislative and regulatory changes of importance to business.



Weekly Benefit Amount

States use three basic methods for computing individual claimants' weekly benefit amount. The great majority of states (44) determine the weekly benefit as a fraction of the wages earned in the claimant's "high-quarter" (the calendar quarter in which has earnings were highest).

A 1/26 fraction will yield a weekly benefit amount equal to 50 percent of the claimant's normal weekly wage if he worked all 13 weeks of his high-quarter. Of the states with high-quarter benefit formulas, 15 use a larger fraction than 1/26.

Recommendation: States that compute weekly benefits as a fraction of high-quarter wages should use 1/26 as the fraction.

(example)

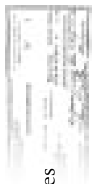
"An individual's weekly benefit amount…shall be one-twenty-sixth (1/26) of his total wages for insured work paid during that quarter of his base period in which such total wages were highest, computed to the next lower multiple of one dollar ($1.00) if not a multiple of one dollar ($1.00)." (Miss., section 71-5-503)

Reasons: A 1/26 fraction will provide a 50 percent replacement of most claimants' normal wages – a longstanding goal of UI.

A fraction larger than 1/26 (e.g., 1/23) will provide a wage replacement in excess of 50 percent.

Since the computation is based on the calendar quarter in which the claimant's wages were highest, the calculation probably already overinflates the claimant's normal wage.

The 1/26 is a fraction of gross wages and therefore already represents more than a 50 percent replacement of net wages.



Objections: Many claimants work fewer than 13 weeks even in their high quarter.

Gross wages do not reflect benefits (e.g., retirement, health plans) that are lost when workers become unemployed.

Benefit Computation

All states, in computing regular weekly benefit amounts, partial benefits, and benefit duration, provide for the rounding of fractions of a dollar to whole dollar amounts. Almost all states round to the next higher dollar, with some states rounding to the nearest whole dollar.

The amount of regular benefits payable to an individual determines also the amount of extended benefits he may receive if the Federal-State extended benefit program triggers on in his State. Extended benefits are paid at the same weekly rate as regular benefits.

Recommendation: Provide for rounding all benefit amounts (if not full dollar amounts) down to the nearest lower full dollar amount.

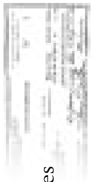
(example)

"notwithstanding any other provisions of this law to the contrary, any amount of unemployment compensation payable to any individual for any week, if not an even dollar amount, shall be rounded to the next lower full dollar amount." (New language, States should also delete all existing rounding provisions that contradict this provision.)

Reasons: (1) Failure to round down will increase the State cost of extended benefits.

(2) Rounding down regular benefits would produce savings without imposing hardships on claimants.

Objection: It is inequitable for a claimant to receive fewer benefits than otherwise entitled because of a provision established mainly for administrative simplicity.



Maximum Weekly Benefit Amount

The majority of States establish the maximum weekly benefit amount as a percentage (50% to 70%) of the Statewide average weekly wage. In 21 States, it is 60 percent or more of the average weekly wage. As wage levels increase, the maximum automatically goes up. In some States the maximum is now well over $400 (Connecticut - $481, Illinois - $431, Maine - $408, Massachusetts - $768, New Jersey - $475, New York - $408, Oregon - $400, Pennsylvania - $450, Rhode Island- $518, Washington- $496)

Recommendation: Adopt caps on maximum weekly benefit amounts when State reserves are low.

(example 1)

"Fifty-five percent (55%) of the amount thus obtained…shall constitute the maximum weekly benefit rate…except that for the benefit years beginning on or after July 1, of such year and prior to the first day of July of the next following year; beginning in calendar year 1999 if the "trust fund balance" as of December 31 immediately preceding the benefit year is less than one hundred twenty million dollars ($120,000,000), the maximum weekly benefit rate shall not exceed the prior year's maximum weekly benefit rate." (Ken., section 341.380(1))

Reasons: State fund solvency will be achieved more quickly by such a restraint, thereby avoiding sudden heavy tax burdens that could slow economic growth.

Responsibility for fund solvency should be shared by beneficiaries as well as employers.

Objection: Claimants should not bear the burden for low fund levels caused by failure to require adequate tax reserves.

Recommendation: Adopt limits on the annual increase of maximum weekly benefit amounts.

(example 2)

"…and provided the maximum benefit rate in any benefit year commencing on or after the first Sunday in October, 1983, shall not increase more than eighteen dollars in any benefit year, such increase to be effective as of the first Sunday in October of such year." (Conn., section 31-231a).

Reasons: Substantial annual increases in the maximum have contributed to inflation.

Sizable jumps in maximum amounts will ultimately jeopardize fund solvency.

Objection: Unless benefits keep pace with increase in wages, workers with average pay will receive less than a 50 percent wage replacement when they become unemployed.

Recommendation: Limit escalator maximums to no more than 50 percent of statewide average weekly wages.

(example 3)

"Fifty percent of such average weekly wage, rounded to the next lower multiple of $1, if not a multiple of $1, shall constitute the maximum weekly benefit amount." (Nev., section 612.340.2)

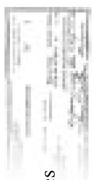
Reason: Unrealistically high benefit levels weaken claimants' incentive to return to work.

Objection: If the maximum is too low (e.g., 50 percent of the Statewide average weekly wage), a large portion of claimants will not receive benefits equal to half their wage loss.

Recommendation: Eliminate escalator provisions.

(example 4)

"The weekly benefit…shall be an amount equal to one twenty fifth of the person's total wages for insured work paid during that quarter…, but if (2) from and after June 30, 1999, this amount is more than two hundred five dollars, the weekly benefit amount shall be two hundred five dollars (Ariz., Section 23-779(A)).



Reasons: Automatic increases have contributed to inflation.

Escalators have produced such high benefits as to weaken incentive to return to work.

Elimination will permit States to adjust maximums to more realistic benchmarks, such as cost of living increases.

Objections: The reason most States now have escalators is that State legislators permitted maximums to become obsolete.

Elimination will result in maximums being subject to bargaining to the detriment of benefit adequacy.

BENEFITS FOR PARTIAL UNEMPLOYMENT

Every State provides partial benefits for individuals employed less than full-time and earning less than specified amounts. Most States provide for deducting each dollar of earnings in excess of a partial earnings allowance (the amount of earnings disregarded in computing the partial benefit) from the claimant's weekly benefit amount. This dollar-for-dollar reduction results in two situations that reduce the incentive to seek any substantial amount of part-time work. As soon as the claimant earns the amount of the earnings allowance, his total income (partial benefit plus earnings in part-time work) remains unchanged, despite additional part-time earnings, until he ceases to be unemployed and is no longer eligible for any benefit. Second, when he ceases to be unemployed (usually defined in part as the point at which his earnings exceed a prescribed figure), his total income drops sharply.

RECOMMENDATION: Adopt partial benefit formula that provides an incentive to take as much part-time work as possible if full-time work is not available; as duration increases, claimants should be disqualified for refusal of part-time or temporary work.

(example)

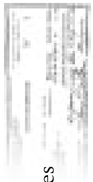
"An individual shall be deemed to be "unemployed" in any week during which he performs no services and with respect to which no remuneration is payable to him, or in any week of less than full-time work, if the remuneration payable to him with respect to such week is less than one and one-third times his weekly benefit amount plus five dollars."

"Each eligible individual who is unemployed in any week shall be paid with respect to such week a benefit in an amount equal to his weekly benefit amount less seventy-five percent of that part of the remuneration (if any) payable to him with respect to such week which is in excess of five dollars." (Wash., sections 50.04.339, 50.20.130.)

REASONS: The partial benefits formula would encourage workers to take part-time jobs.

The formula would reduce incentives to violate law by not revealing partial income.

OBJECTION: The formula would allow benefits to be paid to individuals already earning a large proportion of their normal wage.



Duration of Benefits

In most States the more wages a claimant earned in his base period, the more weeks he can collect benefits (up to a maximum, usually 26). These States compute a claimant's total benefit entitlement as a fraction (ranging from 1/4 to 2/3) or a percentage of his base period wage. Where, for example, the fraction is 1/3, a claimant with base period earnings of $12,000 and a weekly benefit of $200 would be entitled to a potential maximum of 20 weeks of benefits (1/3 x $12,000 ÷ $200).

Other States compute duration as a ratio of the number of weeks worked by the claimant during his base period. Some States do not relate duration to base period wages or weeks but provide all claimants with the same maximum potential duration.

Recommendation: Compute benefit duration (total benefit entitlement) as 1/3 base-period earnings.

(example)

"Any otherwise eligible person is entitled during any benefit year to a total amount of benefits equal to whichever is the lesser of: (a) Twenty-six times his weekly benefit amount, or (b) one-third of his total wages for employment by employers during his base period, computed to the next lower multiple of $1." (Nev., section 612.355.)

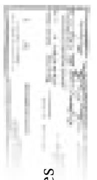
Reasons: In States with generous duration formulas some claimants can collect benefits in amounts approaching their entire annual income.

A 1/3 fraction is already the most common (19 States) method of computation. Each additional State would reduce the inequities of claimants with similar work experience receiving different benefit entitlement in different States.

In States with higher fractions or uniform duration, some claimants with the minimum wages needed to qualify are likely to lose their incentive to return to work before exhausting benefits.

Objections: Replacing duration to base period income rewards higher-paid claimants since they can qualify for more weeks of benefits on the basis of fewer weeks of work than others need.

The 1/3 fraction means that lower-paid claimants cannot qualify for the maximum number of weeks of benefits unless they worked substantially throughout their base period.



EXTENDED BENEFITS

State participation in the Federal-State extended benefits program is required by Federal law. States have no discretion over the amount of extended benefits payable, qualification requirements and eligibility conditions for such benefits, or the circumstances which trigger on and off the availability of such benefits in the State. There is one exception. The program must trigger on if the State's insured unemployment rate (IUR) for the past 13 week period is 120 percent of the rate for the corresponding period in the past two years and the rate is at least 5 percent. States have the option of disregarding the 120 percent condition provided the IUR is at least 6 percent. Most States adopted the option to waive the 120 percent figure. States also have the option to trigger on when the total unemployment rate (TUR) is 110 percent or higher than the rate for the corresponding period in the past two years, provided the TUR is at least 6.5 percent for the past three months. In states with the TUR option, an additional seven weeks of benefits are payable when the TUR is at least 8 percent. Eight states have the TUR option. (Prior to September 25, 1982, the necessary triggering on rate was 4 percent and the rate needed if the 120 percent requirement was to be waived was 5 percent.)

RECOMMENDATION: Drop the option to trigger "on" at 6 percent regardless of the 120 percent requirement for extended benefits.

(example)

"For weeks beginning after September 26, 1982, there is a 'State "off" indicator' for this State for a week if the Commission determines...that for the period consisting of such week and the immediately preceding twelve weeks, the rate of unemployment...was either (1) less than five percent and was less than one hundred twenty percent of the average of such rates for the corresponding thirteen week period ending in each of the preceding two calendar years or (2) was less than four percent." (Okl. 2-707(A)).

REASON: Extended benefits should not become available unless the unemployment rate is at least 20 percent higher than the rate last year. Otherwise, the program could regularly activate on a seasonal basis even though rates as high as 6 percent are not unusual during such periods. Furthermore, extended benefits should not become available based on the TUR method, which is not an accurate test and includes many individuals who are not eligible for UI benefits.

Objections: Failure to adopt the option could result in States with high rates two or more years in a row not triggering on.

Before making the 6 percent IUR waiver option available, Congress waived the 120 percent factor several times because it was keeping States with high unemployment from triggering on, and it voted other temporary extensions of duration because it felt that the standard trigger was unduly restrictive.

Qualifying Requirements

Qualifying requirements for minimum benefits vary considerably among the States. They are usually expressed either as a minimum number of weeks of employment in the base period (with "week" subject to different definitions), an amount of wages equal to a multiple of the claimant's high-quarter wage, or a multiple of the claimant's weekly benefit amount. States vary widely with respect to the amount of wages required from a claimant for minimum benefits. Claimants whose base periods are insufficient for eligibility may have their eligibility re-determined using an alternative base period, which usually includes the last four completed quarters preceding the first day of an individual's base year.

Recommendation: Require a minimum of 20 weeks of work or the equivalent to qualify for benefits.

Recommendation: Use of the alternate base period is not recommended. However, if the alternative base period is used, there should be no additional wage demands on employees. And if an employee reports incorrect wages, benefits should be reduced until overpayments are recovered or claimant should wait to collect benefits until the employer wages are furnished to the state.

(example 1)

"To qualify for benefits an individual must have had at least twenty weeks of work at wages of at least $35.00 per week in employment with a employer subject to this chapter in his base period." (Ver., section 1338(b))

(example 2)

"A person's weekly benefit amount is an amount equal to one twenty-fifth of his total wages for employment by employers during the quarter of his base period in which the total wages were the highest, but not less than $16 per week... (Nev., section 612.340(1)).

(example 3)

"Any application for determination of benefit rights...is valid if the individual filing such application is unemployed, has been employed by an employer or employer subject to this chapter in at least twenty qualifying weeks within the individual's base period, and has earned or been paid remuneration at an average weekly wage of not less than twenty-seven and one half percent of the statewide average weekly wage for such weeks." (Ohio, Section 4141.01(t)(R)(l)

Reasons: To qualify for benefits claimants should demonstrate substantial attachment to the labor force.

The requirement would assure no claimant is denied extended benefits because of insufficient base period work.

Objection: The requirement would prevent offering at least minimum unemployment insurance protection to very low paid workers whose work is not steady, and to workers unemployed much of a year because of recessionary conditions.

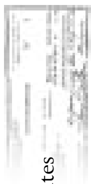
Distribution of Benefit Charges

When benefits drawn by a claimant are based on wages paid by more than one employer, charges are usually allocated among employers in two ways. A few states charge all benefits to the claimant's most recent employer, reasoning that the employer responsible for the unemployment should bear full responsibility for financing it. Most states, however, charge each base period employer a share of the benefits in proportion to the share of base period wages it paid to the claimant. This approach assumes that those who paid the wages that made the benefits possible should be liable for the benefit charges.

Recommendation: Benefits should be charged in proportion to base period wages.

(example 1)

"For the purposes of this section and sections 4141.241 and 4141.242 of the Revised Code, an employer's account shall be charged only for benefits based on remuneration paid by such employer. Benefits paid to an eligible individual shall be charged against the account of each employer within the claimant's base period in the proportion to which wages attributable to each employer of the claimant bears to the claimant's total base period wages." (Ohio Revised Code 4141.24 (D)(1))



(example 2)

Except as provided in subsection (3) of this section, all regular benefits paid to an eligible worker in accordance with KRS 341.380 plus the extended benefits paid in accordance with KRS 341.700 through KRS 341.740, subject to the provisions of paragraphs (a) and (b) below, shall be charged against the reserve account or reimbursing employer account of his most recent employer. No employer shall be deemed to be the most recent employer unless the eligible worker to whom benefits are payable shall have worked for such employer in each of ten (10) weeks whether or not consecutive back to the beginning of the worker's base period." (Ken. Revised Statutes Section 341.530)

(example 3)

" Except as provided in the other subsections of this Section and in Sections…, the last employer prior to the beginning of the individual's benefit year (which is defined at Section 242 of the Act) for whom the individual provided services during at least 30 days beginning with the first day of the individual's base period (which is defined at Section 237 of the Act) but prior to the beginning of his benefit year shall be liable for the benefit charges or payments in lieu of contributions, as the case may be, which result from any benefits paid to that individual." (Ill. Reg. Sec. 2765.325)

Reasons: Charging claims to the base period employers puts the responsibility of funding a claim on all employers (who paid qualifying wages) directly responsible for the unemployment.

Charging benefits to the base period employers distributes the charge among the employers responsible for claimant's benefit eligibility.

Charging benefits to the base period employers dilutes the charges charged to the employers' accounts.

Objections: Charging benefits to the base period employers puts the burden of paying for a claim on an employer even though that an employer may not be responsible for the claimant's unemployment.

Charging benefits to the base period employers puts the burden of paying for a claim on an employer even though the employee voluntarily separated from a base period employer.

WAITING WEEK REQUIREMENT

Most States require claimants to serve one uncompensated week of unemployment before benefits become payable for succeeding weeks. No such requirement exists in 12 States. In several others the requirement is modified by providing that the week becomes compensable if the claimant remains unemployed a specified period; that it is waived if the individual's unemployment straddles two consecutive benefit years; or that it can be suspended at the discretion of the Governor in an emergency.

The waiting period for partial unemployment is almost identical to the waiting period for total unemployment.

RECOMMENDATION: Require a waiting week and eliminate all conditions under which such week may become compensable, but allow payment of a waiting week as incentive for not drawing benefits for the maximum duration.

(example 1)

"Benefits shall be paid to an eligible individual for no more than his weeks of unemployment subsequent to a waiting, the waiting period, the duration of which shall be determined as follows: (Mass. Section 23)

(example 2)

["He has been unemployed for a waiting period of one week."] (Penn.,43 P.S. Section 801(e)(3))

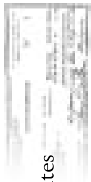
(example 3)

["Notwithstanding any provision of this subsection, when an individual has been paid benefits in his current benefit year equal to four times his weekly benefit amount, he shall be eligible to receive benefits for his waiting period claim in accordance with this act."] (Penn., section 401(e)(3))

REASONS: The system should not compensate for short periods of unemployment.

Unless all exceptions to the waiting week requirement are eliminated, the State's cost of extended benefits will be higher than otherwise.

OBJECTION: Under certain circumstances e.g., during consecutive weeks of unemployment that overlap benefit years it is unreasonable to require an interruption of benefit checks so that the waiting week may be served.



VALID CLAIM

A valid claim is simply an original claim for benefits by an individual who has enough wages and work to qualify for them. When it is filed it establishes for the claimant his benefit year and base period. The benefit year is a future one year period, usually beginning with the date the claim is filed, during which the claimant's benefit entitlement may be used. Most States do not require the claimant to be unemployed in order to file a valid claim. Thus, a fully employed individual anticipating a future layoff or reduction in work hours and wages, or for some other reason, may choose to establish a base period immediately in order to freeze a period of his highest earnings.

RECOMMENDATION: Require that claimants must be unemployed in order to establish a base period and benefit year.

(example)

"Any application for determination of benefit rights…is valid if the individual filing such application is unemployed, has been employed by an employer or employers subject to this chapter in at least twenty qualifying weeks within the individual's base period, and has earned or been paid remuneration at an average weekly wage of not less than twenty-seven and one half percent of the state wide average weekly wage for such weeks." (Ohio, section 4141.01(R.))

REASON: It is not consistent with the program's purposes to allow individuals the advantage of choosing what period their work history will be measured for benefit purposes.

OBJECTION: Individuals foreseeing a long period of diminished wages and hours should be permitted to have their base period reflect more representative full-time earnings.

Availability for Work

To be eligible for benefits in any State, a claimant must be able to work and be available for suitable work. Basically, each claimant is expected to do what a reasonably prudent person in his circumstances would do to find work. Enforcement of this requirement is one of the weakest links in the UI system. Availability cannot conclusively be tested except by offering a claimant an actual job. There are, however, clues to a claimant's unavailability, revealed by the efforts he makes to find work, restrictions he imposes on the jobs he will accept, his behavior during a job interview, and other factors. The requirement takes thought and effort to administer properly. It is often ignored, particularly during periods of heavy unemployment.

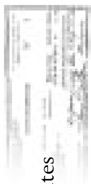
Although it is neither possible nor desirable to prescribe a course of action for all claimants, some States have spelled out in their laws specific steps that must be taken by all claimants. Others have described disqualifying behavior.

These provisions tend to limit the discretion of the administrator in evaluating a claimant's availability in light of his individual circumstances. However, they remove some of the ambiguity characteristic of the availability requirement.

Recommendation: Disqualify individuals as unavailable for work if they move to an area where jobs are less plentiful, or use lower standard for what is suitable work.

(example 1)

"An individual shall be deemed unavailable for work if, after his separation from his most recent employing unit, he has removed himself to and remains in a locality where opportunities for work are substantially less favorable than those in the locality he has left." (Ill., 820 ILCS 404/500(C)(3)).



(example 2)

"With respect to each week, he or she must provide the Commission with a true and correct statement of all material facts relating to his or her unemployment; ability to work; availability for work; activities or conditions which could restrict the individual from seeking or accepting full time employment immediately…" (Okla., section 2-203(A))

Reason: Such action is a clear indication that the claimant is not genuinely available for work.

Objection: Good cause may exist for claimant's action. Availability requirements should be expressed only in general terms so that individual circumstances can be considered.

RECOMMENDATION: Require seasonal workers to demonstrate availability during nonseasonal periods:

(example 3)

"...Provided further, that an individual customarily employed in seasonal employment, shall during the period of nonseasonal operations, show to the satisfaction of the commission that such individual is actively seeking employment which such individual is qualified to perform by past experience or training during such nonseasonal period." (N. Car., section 96-13(a))

REASON: Claimants who limit themselves to seasonal work are not really unemployed during the off season, but they may claim to be looking for work after the season ends in order to continue receiving benefits. Paying them benefits during these periods is tantamount to subsidizing their employers at the expense of the greater employer community.

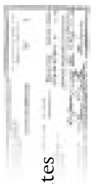
OBJECTIONS: An availability requirement expressed in general terms should disqualify seasonal workers who are not looking for work during the off season.

Disqualifying individuals who never worked during past off seasons seems inequitable if they are now available for and actively seeking work in the off season.

RECOMMENDATION: Require workers to document work search efforts:

(example 4)

"The individual shall be instructed as to the efforts that he must make in his search for suitable work...and shall keep a record of where and when he has sought work in complying with such instructions and shall, upon request, produce such record for examination by the director." (Ohio, section 4141.29(b) (4))



REASON: Workers should be required to demonstrate their availability by producing tangible evidence of their efforts. The provision also explicitly requires an agency to establish a work search plan for each claimant.

OBJECTION: The provision imposes unreasonable burden on illiterate claimants. It is a futile requirement when jobs are scarce.

RECOMMENDATION: Require, as a condition for benefits, that claimants be available for full-time work.

(example 5)

"He is able to work and is available for full-time work for which he is fitted by prior training or experience and is doing what a reasonably prudent person in his circumstances would do in seeking work." (W. Va., Article VI, Sec. 1; underscoring added.)

REASONS: In most States claimants will be denied benefits if they limit their availability to part-time or partial work. No individual unwilling or unable to accept full-time work can reasonably be considered available for work. Workers

who normally work part-time but do some full-time work (especially seasonal work) abuse the system by seeking to collect benefits for partial unemployment when they return to their regular part-time work schedule. The administrative burden of administering claims for relatively small amounts is high relative to the amount of compensation paid. Workers who want only part-time work frequently have weak return to work incentives. Thus, benefits and earnings received during part-time employment should not exceed the total state unemployment benefit amount.

States that consider highest pay quarters when computing benefits will overcompensate claimants who have high earnings during one quarter of a calendar year, but then their earnings drop significantly during the rest of the year. For example, retailers tend to increase part-time worker hours during the fourth quarter holiday season. A part-time employee who normally works twenty hours a week may be asked to perform services for thirty-five to forty hours a week during the fourth quarter and then return to the normal twenty hour work schedule after the holiday season. The fourth quarter wages earned will artificially inflate the amount of benefits the employee is eligible to receive.

Objection: Workers who normally work part-time and who are available for similar part time work do not qualify for any benefits. Employers have increased the amount of part-time work, and a full-time availability requirement is harsh to those workers (esp. women and low income workers) with family obligations or disabilities preventing full-time work, etc. Part-time workers may collect benefits by misrepresenting themselves as available for full-time work. Employers pay taxes on part-time workers who then do not qualify for benefits.

Recommendation: Deny benefits for any part of a week claimant is unable to work or unavailable for work.

(example 6)

"If an eligible individual is available for work for less than a full week he shall be paid his weekly benefit amount reduced by one-seventh of such amount for each day he is unavailable for work: Provided, that if he is unavailable for work for three days or more of a week, he shall be considered unavailable for the entire week." (Wash., section 50.20.130)

(example 7)

"Notwithstanding the provisions of subdivision c of Section 1253, if an individual is, in all other respects, eligible for benefits under this part, and such individual becomes unable to work due to a physical or mental illness or injury for one or more days during such week, he shall be paid unemployment compensation benefits at the rate of one-seventh the weekly benefit amount payable for that week for each day which he is available for work and able to work. The amount of benefits payable, if not a multiple of one dollar…The individual shall not be entitled to unemployment compensation benefits for any day during such week which he is unable to work due to such physical or mental illness or injury." (Calif., Article 1, section 1253.5)

Reasons: States now treat claimants unavailable or unable to work during part of a week in different ways. Generally, the temporary condition – if it comes to light at all – does not affect the claimant's benefit amount for the week, unless it prevailed most of the week. It is not reasonable to penalize a claimant, who is ill one day, for the entire week, but it is reasonable to pay only for those days the availability requirement was satisfied.

Objection: Unless the temporary availability condition or illness prevented a claimant from accepting a job offer, it is not reasonable to deny benefits. The availability requirement should not mean that an individual must be constantly ready, with tools at hand to search and accept work.

Refusal of Suitable Work

A claimant who refuses an offer of suitable work without good cause is subject to disqualification in all States. In determining whether a given job is suitable for a claimant, generally the agency is required to take account of such factors as the degree of risk the job poses for the claimant's health, safety, and morals; his physical fitness and prior training; his previous experience and earnings; the length of his unemployment; his prospects for securing local work in his customary occupation; and the distance of the available work from the claimant's residence.

In additions, all States are prohibited by Federal law from disqualifying a claimant for refusing work if the job is vacant due to a labor dispute, if the wages, hours or working conditions are substandard, or if the individual would be required to join a company union or be prevented from joining any bona fide labor organization.

Some States now provide that in determining the suitability of a job, greater significance be accorded the period the claimant has been unemployed.

Recommendation: Explicitly require claimants to lower suitability requirements as the period of their unemployment increases.

(example 1)

"Upon receipt of fifty percent (50%) of his benefits, suitable work shall not be limited to his customary or registered occupation." (Okla., section 2-408)

(example 2)

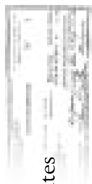
"Further, after an individual has received 25 weeks of benefits in a single year, suitable work shall be a job which pays the minimum wage and is 120 percent or more of the weekly benefit amount the individual is drawing." (Fla., 443.101(d)(2))

(example 3)

"Following four weeks of unemployment, failed to apply for or accept suitable work other than in his customary occupation offering at least fifty percent of the compensation of his previous insured work in his customary occupation;" (Wy., section 27-3-311)

(example 4)

"If, after the claimant has filed an otherwise valid claim for benefits, the claimant has failed without good cause either to apply for available, suitable work when so directed by an employment office of Commissioner or to accept suitable work when offered to the claimant by any employer. Such disqualification shall continue



until she or he has secured subsequent employment for which the individual has earned insured wages equal to at least ten times the weekly benefit amount of the claim and has lost that job through no fault on the part of the individual." (Ga., section 34-8-194(3)(A))

(example 5)

If prospects for obtaining work in his customary occupation within a reasonably short period are not good, suitable work for an individual means any work within the individual's capabilities provided it pays an amount in excess of the individual's weekly benefit amount and the local, State or Federal minimum wage, whichever is higher, and it is not otherwise inconsistent with the suitable work provisions of the State law. (Paragraph of P.L. 96-499, Approved 12/5/80, relating to conditions for extended benefits.)

REASONS: It is unrealistic for claimants to hold out indefinitely for jobs commensurate with their prior experience and wage levels if experience, reflected by the growing length of their unemployment, indicates the unlikelihood of such jobs being available.

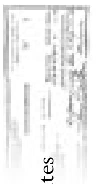
The longer claimants delay in expanding their work search efforts, the more difficult will be the transition for them when their benefits expire and they are then forced to take whatever job is available, if any.

OBJECTIONS: The length of the claimant's unemployment is already one criterion all States require be considered in evaluating the suitability of work.

If claimants are forced to take jobs requiring less than their top skills or paying less than their prior wages, they are not likely to remain on the job long.

They will perpetuate the unemployment of others for whom the job is truly suitable.

Claimants skills will be downgraded and possibly lost.



MISCONDUCT DISQUALIFICATION

Misconduct must be willful or deliberate and must be committed in connection to job performance, such as violation of company rules, insubordination, and absence from work. Some States provide a stiffer penalty for aggravated or particularly serious acts of misconduct that can be construed as criminal or dishonest acts connected with the work than for conventional misconduct.

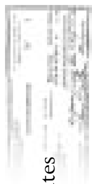
RECOMMENDATION: Establish a separate penalty for discharge for gross misconduct connected with work.

(example 1)

"An individual shall be disqualified from benefits beginning with the first calendar week in which he or she has been discharged or suspended for misconduct connected with his or her work and thereafter for seven calendar weeks until he or she has obtained bona fide work… Alcoholism shall not constitute a defense to disqualification from benefits due to misconduct." (Wash., section 50.20.060)

(example 2)

"For the purpose of this section, aggravated employment misconduct means: (1) the commission of any act, on the job or off the job, that would amount to a gross misdemeanor or felony if the act interfered with or adversely affected employment; or (2)…an act of patient resident abuse, financial exploitation, or recurring or serious neglect." (Minn., section 268.095)



REASON: The penalty should reflect the seriousness of the offense.

OBJECTION: The only question involving UI is whether or not the individual caused his own unemployment. The UI agency should not be in a position to evaluate particular acts of misconduct.

Gross Misconduct Disqualification

Several states provide disqualification for gross misconduct which translates into criminal or dishonest acts, "flagrant, willful and unlawful misconduct," "forgery, larceny, embezzlement," or "arson, intoxication, sabotage, or dishonesty."

Recommendation: Benefits should be denied to any individual by reason of cancellation of wage credits or total reduction of his benefit rights for discharge for gross misconduct connected with his work or fraud in connection with a claim for benefits. Wages credits from involved employer should be cancelled.

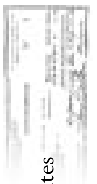
Recommendation: Benefits should not be charged to the base period employer where the claimant is separated for voluntary quit or gross misconduct.

(example 1)

"The gross misconduct of an individual causing his discharge from employment shall result in a disqualification of twenty-six weeks. "Gross misconduct" means conduct evincing such willful or wanton disregard of an employer's interests or negligence or harm of such a degree or recurrence as to manifest culpability or wrongful intent, or assault or threatened assault upon supervisors, coworkers, or others at the work site." (Colo., Revised Statutes Sec. 8-73-108)

(example 2)

"Notwithstanding any other provisions of this article, all of the individual's wage credits established prior to the day upon which such individual was discharged for gross misconduct in connection with work are canceled. "Gross misconduct" includes a felony or Class A misdemeanor committed in connection with work but only if the felony or misdemeanor is admitted by the individual or has resulted in a conviction." (Ind,. Section 22-4-15-6.1)



Reason: The penalty should reflect the seriousness of the offense. Acts of gross misconduct should be disqualifying events without the need for a criminal conviction.

Objection: The state unemployment agency should not be in a position to evaluate particular acts of misconduct, and no disqualification should be allowed without at least a criminal conviction in a judicial proceeding.

Labor Dispute Disqualification

In most States the labor dispute disqualification provides for postponement of benefits for an indefinite period related either to the continuation of the labor dispute, including work stoppage, dispute-caused stoppage of work or the period the dispute is in active progress.

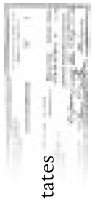
Generally, the disqualification applies only to workers at the "factory, establishment or other premises at which he or she is or was last employed." Other States extend the applicability of the disqualification to workers in other establishments owned by the employer.

In most States, workers not participating, financing, or directly interested in the dispute (or not in a grade or class of workers, some of whose members are participating, financing, or interested) are not subject to the disqualification. Denial of benefits is designed to maintain a neutral position with respect to the labor dispute.

Recommendation: Extend applicability of disqualification to other establishments of the employer and to establishments necessary to the continued operation of the employer.

(example 1)

"…for any week with respect to which the commission finds that his total or partial unemployment is caused by a labor dispute in active progress on or after July 1, 1961, at the factory, establishment, or other premises at which he is or was last employed or caused after such date by a labor dispute at another place, either within or without this State which is owned or operated by the same employing unit which owns or operates the factory, establishment, or other premises at which he is or was last employed and which supplies materials or services necessary to the continued and usual operation of the premises at which he is or was last employed." (N. Car., section 96-14(5))



(example 2)

"If his unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute." (Ohio, section 4141.29(D)(1)(A))

Reason: In instances where there is nationwide collective bargaining between a union and a particular employer, the bargaining going on at the central headquarters is for the benefit of all the employees of that company throughout the nation. These employees are members of the same union, they are interested in the dispute, and would have been disqualified if it were not for the current limitation.

Objection: The disqualification should reasonably be confined to workers actually concerned in the dispute and not bar others in another State.

Recommendation: Eliminate lockout as an exception to the labor dispute disqualification.

(example 3)

"An individual shall not be eligible for benefits with respect to any week it has been found by the Director that such individual is unemployed in such week as a direct result of a labor dispute, other than a lockout, still in active progress in the establishment where he is or was last employed…" (Dist. of Col., section 51-110(f))

Reason: The disqualification should apply to all claimants whose unemployment is caused by a labor dispute, regardless of the merits of the dispute or the cause. Moreover, it is not always clear that a walkout or a lockout was not provoked by actions of the opposing party.

Objection: Workers unemployed, not because of their action but because their employer locked them out, should not be denied benefits.

Disqualification Penalty

Most States now provide that individuals disqualified for the three major causes (voluntarily quitting, discharge for misconduct, refusal of suitable work) shall be denied benefits for the duration of their unemployment and until they are reemployed for a specified time or earn a specified amount of wages, and then are separated for nondisqualifying reasons. Several States apply this duration disqualification to one or two of the three causes, but not all three.

The results of a survey of the states that provide for weeks of work subsequent to the disqualification for voluntary quitting, misconduct in connection with the work, and refusal of suitable work indicate that of the 19 states that provide for weeks of work for voluntary quitting, the average duration is 6.1 weeks. For misconduct connected with the work, the 13 state average is 6.0 weeks, and for refusal of suitable work, the 15 states that provide for weeks of work after disqualification averaged 6.4 weeks. Thus, the average is six weeks.

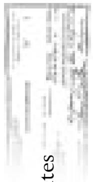
Recommendation: Require that the penalty for the three major causes be denial of benefits for the duration of the claimant's unemployment and until he works a prescribed amount in a subsequent job.

(example)

"An individual shall be disqualified from benefits beginning with the first day of the calendar week in which he or she has been discharged or suspended…[from] with his or her work and thereafter for seven calendar weeks and until he or she has obtained bona fide work in employment covered by this title and earned wages in that employment equal to seven times his or her weekly benefit amount. Alcoholism shall not constitute a defense to disqualification from benefits due to misconduct." (Wash. Revised Code Section 50.20.060)

Reasons: Without the provision, an individual who had been disqualified for one of the three major causes by being subject to a postponement of benefits, for example, could not be paid extended benefits even though he served the period and had been reinstated to regular State benefits.

The average length of unemployment tends to be lower in states that impose disqualification for the duration of unemployment.



Objections: This type of disqualification is extremely harsh in recessionary periods when jobs are scarce. The penalty may be more severe than the action justifies.

Under the penalty, claimants are penalized for different periods for the same offense.

DISQUALIFICATIONS – SEPARATING EMPLOYER

Every state disqualifies individuals who either bring about or perpetuate their own unemployment. Ordinarily, disqualifications apply to the claimant's separation from his most recent employment, where claimant has worked at least 30 days whether or not consecutive. Thus, a claimant who voluntarily quit one job, for example, may escape disqualification if he finds a temporary job and is laid off for nondisqualifying reasons. Similarly, claimants who voluntarily quit to pursue self-employment may be disqualified from benefits. Some States attempt to avoid this possibility by applying the disqualification to other than the last work under certain circumstances. Some states reduce the claimant's benefits by the number of weeks of disqualification.

RECOMMENDATION: Apply disqualification to separation from the claimant's most recent covered employment, where claimant has worked a minimum of 30 days whether or not consecutive.

(example 1)

"For the purpose of experience rating provisions of Section 25-4-54, no portion of the benefits payable to him, based upon wages paid to him for the period of employment ending with the separation to which the disqualification applies, shall be charged to the employer's experience account. If the individual has been separated from employment other than his most recent bona fide work under conditions which would have been disqualifying under subdivision (2) had the separation been from the most recent bona fide work… (Ala., section 25-4-78(b)(3))

(section 2)

"As used in this section and in section (3) of KRS 341-530 'most recent' work shall be construed as that work which occurred after the first day of the worker's base period and which last preceded the week of unemployment with respect to which benefits are claimed; except that, if the work last preceding such week of unemployment was seasonal, intermittent or temporary in nature, most recent work may be construed as that work last preceding such seasonal, intermittent or temporary work." (Ken., section 341.370(4))

(example 3)

"…claimant is separated, through no fault of his own, from his most recent bona fide employer; provided, however, the term 'most recent bona fide employer' shall mean the work or employer from which the individual separated regardless of any work subsequent to his separation in which he earned less than eight times his weekly benefit amount." (S. Car., section 41-35-110(5))

(example 4)

"The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer… the claimant left to enter self-employment." (Iowa State Regulation 871-24.25(19))

REASON: The provision would prevent individuals from avoiding disqualification simply by taking temporary work. A new job must be in "covered employment" to prevent fraud and abuse, such as false claims of employment by a family member, which cannot be verified.

OBJECTION: The only separation that should be considered for UI purposes is the separation from the claimant's most recent job since it is only that separation that caused his current unemployment.

DEDUCTIBLE INCOME

In addition to wages, most States reduce a claimant's benefits by other income he may receive, either on the grounds that it is a substitute for wages, or duplicative of unemployment insurance. The most common types of deductible income are wages in lieu of notice, and dismissal payments, Social Security payments and severance pay. Some States treat receipt of workers' compensation (particularly if for permanent, total disability) as disqualifying, while others consider it deductible income. This is because receipt of worker's compensation may raise questions about a recipient's availability and ability to work. A few States provide specifically for reducing benefits by the amount of training allowances a claimant receives. Some States include provision for recovering benefits paid for periods of unemployment that are later covered under back pay awards.

Federal law requires that claimants' weekly benefits be reduced by the weekly amount of retirement income or any other periodic payment based on previous work of such individual. The requirement applies to all Social Security and Railroad Retirement benefits. It applies to other retirement income made under pension plans maintained or contributed to by a claimant's base-period or chargeable employers. The law permits these States to disregard pension payments if the base-period employment did not affect eligibility for or increase the amount of the pension. States may also take into account any contribution made by the worker to the retirement plan and provide for reduction on a less than dollar-for-dollar basis. Most States have limited the deduction to plans financed by base-period employers and many have taken account of employee contributions in computing the reductions. The Department of Labor has interpreted "take into account" to mean that states are not required to apply any Social Security offset because workers contribute 50 percent of the FICA taxes, and 22 states do not have any Social Security offset (Alaska, Arkansas, California, Delaware, Florida, Idaho, Indiana, Iowa, Kentucky, Maryland, Missouri, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Vermont, and Washington). However, States are not precluded from applying the deduction on a wider basis than Federal law requires.

RECOMMENDATION: Reduce benefit amounts by any pension income received by a claimant.

(example 1)

"(a) The amount of unemployment compensation benefits, extended duration benefits, and federal-state extended benefits 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 that week." (Calif., Article 1, section 1255.3(a))

REASON: There is no reason why benefits should be reduced by some pensions but not others; why pension income should be nondeductible simply because it was not affected by base-period employment; or why employee contributions to the pension should be taken into consideration. The basis for deducting retirement income is a presumption that it is duplicative of unemployment insurance in that both are paid on the basis of prior work and are compensation for wage loss. A second presumption is that anyone receiving retirement income has withdrawn from the labor force and is not genuinely available for work. These two presumptions apply to all retirement income.

OBJECTION: Based-period employer-financed pensions are deductible because otherwise the same employer is saddled with both pension and unemployment compensation charges for the same worker. This does not apply to pensions financed by pre-base-period employers. Moreover, by working during the base period the claimant has conclusively demonstrated his attachment to the labor force, despite receipt of retirement income on the basis of prior work. In addition, it is no more reasonable to ignore the employee's contribution to the pension than to apply the deduction to IRA or other wholly employee-financed retirement plans.

RECOMMENDATION: Provide for recovery of benefits paid during periods for which a back pay award is made.

(example 2)

"In addition to the deductions provided for in clause (1), for any week with respect to which an individual is receiving a pension, including governmental or other pension, retirement or retired pay, annuity or any other similar periodic payment, under a plan maintained or contributed to by a base period of chargeable employer, the weekly benefit amount payable to such individual shall be reduced, but not below zero, by the pro-rates weekly amount of the pension as determined under subclause (ii))." (Penn., section 804(d)(2))

REASON: Back pay and benefits represent duplicative payments for the same week.

OBJECTION: Benefits should not be recovered since the claimant was eligible for them when they were made.

RECOMMENDATION: Reduce benefits by any amount of training allowances received by a claimant.

(example 3)

"No payment under this chapter made possible under this section shall be made to any individual for any week, or part of any week, with respect to which he is entitled to receiving training allowance under any public training or retraining program if such training allowance equals or exceeds the benefits to which the individual would otherwise be entitled." (Ariz., Code Section. 23-771.01)

REASON: Allowances paid to subsidize the individual taking training are duplicative of unemployment insurance.

OBJECTION: Allowances may be paid not only for living costs but also for tuition, fees, books and special training expenses. Such payments are not duplicative of UI.

RECOMMENDATION: Reduce benefits by the amount of workers' compensation received by the claimant, including permanent partial disability and schedule benefits.

(example 4)

"For any week with respect to which he is receiving or has received remuneration in the form of: (a)...(b) Compensation for temporary partial disability, temporary total disability or permanent total disability under the workers' compensation law of any state or under a similar law of the United States.
Provided that if the remuneration referred to in paragraphs (a) and (b) of this subsection is less than the benefits that would otherwise be due under this chapter, he shall be entitled to receive for such week, if otherwise eligible, benefits reduced by the amount of such remuneration." (Fla., section 443.101(3))

REASON: Workers' compensation represents payment for loss of earnings and is duplicative of UI. Sometimes workers' compensation benefits, especially for permanent partial disability and schedule injuries, are paid in a lump sum that represents advance payment for future loss of earnings (analogous in some ways to severance pay).

OBJECTION: Workers' compensation payments are not duplicative, since they are paid for loss of earning capacity and not for loss of earnings due to unemployment.

WARN ACT PAYMENTS

The Federal Worker Adjustment Renotification and Training (WARN) Act, 29 U.S.C. Sec. 1201 et seq., provides for the advance notice of facility closures and payments to workers due to the closures. Some states allow workers to collect WARN Act payments by excluding them from the statutory definition of wages, in conjunction with state unemployment benefits. This allows employees to receive more benefits than if they were fully employed. Example 1 is an objectionable provision, while example 2 is a favorable provision.

RECOMMENDATION: Payments made due to a violation of the WARN Act should be disqualifying income, thus preventing a claimant from drawing both WARN payments and UI benefits simultaneously.

(example 1)

"...payments to an individual by an employer who has failed to provide the advance notice of facility closure required by the federal Worker Adjustment Renotification and Training (WARN) Act (29 U.S.C. Sec. 1201 et seq.) shall not be construed to be wages or compensation for personal services under this division, and benefits payable under this division shall not be denied or reduced because of the receipt of payments related in any way to an employer's violation of the WARN Act." (Calif. Code. Chapter 308 Section 1265.1)

(example 2)

Payments made to employees required by the federal Worker Adjustment and Retaining Notification (WARN) Act are fully deductible from state unemployment benefits. Accordingly, two claimants who did not receive 60 days' advance notice of a plant closing as required by the WARN Act but who instead received payments from their employer for days without work within 60 days of the closing as an alternative under the Act for reduction of the notice period had their unemployment benefits offset by the amounts received. (DES v. Alma Gowan, LIRC and De Soto Shoe Co., 856 S.W.2d 376, LA)

REASON: A claimant should not be enriched by receiving both WARN Act payments and UI benefits simultaneously. Once the WARN Act payments are exhausted, the claimant can receive UI benefit payments.

OBJECTION: Coordinating UI and WARN Act payments seems unfair because such payments could be considered a separate income source and not compensation for unemployment.

Collection of Overpayments

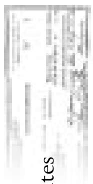
Most States require that payment of benefits made erroneously be recouped, regardless of whether the overpayment was caused by fraud or simply a mistake and not the claimant's fault. Many States provide that, in the latter case, recovery of the overpayment may be waived by the administrator if collection would defeat the purposes of the program or would be against equity and good conscience. Not all States allow the administrator discretion to waive collection.

Recommendations: Eliminate authority to waive collection of overpayment.

Allow offers of compromises.

(example)

"Any person who has received any sum as benefits…to which he or she was not entitled shall be liable to repay such sum to the commissioner for the fund. Any such erroneous benefit payment shall be collectible: (1) without interest by civil action in the name of the commissioner, or (2) by offset against any future benefits payable to the claimant with respect to the benefit year current at the time of such receipt, or any benefit year which might commence within three years after the end of such current benefit year; except that no such recoupment…shall be had if such sum was received by such person without fault on his or her part and such recoupment would defeat the purpose of the Employment Security Law or would be against equity and good conscience, or (3)by setoff against any state income tax refund due the claimant pursuant to sections…" (Neb., 48-665)



Reason: The volume of nonfraud overpayments has soared since the Supreme Court's 1971 Java decision, which requires States to pay benefits following a determination of eligibility and to stop payment only if and when the determination is reversed. Failure to recoup these and other erroneous payments results in a loss to the fund that produces an unfair burden on employers. To relieve hardship, the law can provide that nonfault overpayments may be collected by offset against future benefits and set a limit on the proportion of such benefits that may be offset each week.

Objection: The provision for waiver of recoupment should be retained to allow relief in hardship cases.

Special Disqualifications

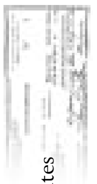
Several States have spelled out particular circumstances for treatment and penalty that do not fall easily within the scope of the three major disqualifications. For example, professional athletes are denied benefits during the "off" season with respect to services which substantially consist of participating in sports or athletic events and there is reasonable assurance that the individual will perform such services in later seasons.

Benefits to employees of educational institutions may not be paid to an individual during the period between school terms, vacation or holiday period. Similarly, benefits to students who perform services for a school, college or university while regularly attending such school are denied in all states.

Recommendation: Provide for disqualification of individuals absent from work because of incarceration.

(example 1)

"If the employment of an individual is terminated due to his absence from work for a period in excess of 24 hours because of his incarceration and he is convicted of the offense for which he was incarcerated or of any lesser offense, he shall be deemed to have left his work voluntarily without good cause for the purposes…A plea or verdict of guilty, or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this section irrespective of whether an order granting probation or other order is made suspending the imposition of the sentence or whether sentence is imposed but execution thereof is suspended." (Calif., section 1256.1(a))



Reason: An individual unable to work because he has been found guilty of a crime and jailed can reasonably be considered to have voluntarily quit his job without good cause.

Objection: What an individual does outside his job is not applicable to his UI eligibility. If absence for 24 hours or more is not otherwise disqualifying, the fact the individual is convicted of a crime unconnected with his work should not make it disqualifying.

Recommendation: Provide that full-time students shall be considered unavailable for work unless they have a history of employment during school.

(example 2)

"…for any week of unemployment if such individual is a student. For the purposes of this subsection, the term student shall mean an individual registered for full attendance at and regularly attending an established school, college, or university or who has so attended during the most recent school term unless the major

portion of his or her wages for insured work during his or her base period was for services performed while attending school; Provided attendance for training purposes under a plan approved by the Commissioner shall not be disqualifying." (Neb., section 48-628(a))

REASON: Ordinarily, a student's principal occupation is being a student. The provision takes account of appropriate exceptions.

OBJECTION: A blanket disqualifications of all students will inequitably affect some individuals who are genuinely in the labor market and would quit or adjust school hours to take a job. Those not available for work would be weeded out by application of the availability requirement.

RECOMMENDATION: Disqualify individuals who retire from their jobs and receive pensions.

(example 3)

"...for the duration of his of his unemployment period subsequent to his having retired; or having been retired from his regular employment as a result of a recognized employer policy or program, under which he is entitled to receive pension payments, if so found by the deputy, and disqualification shall continue until claimant has earned 6 times his weekly benefit amount in employment by an employer..." (Maine, section 1193 1.B)

REASON: Retirement and receipt of a pension are evidence of withdrawal from the labor market. It is reasonable to require such individuals to reestablish their attachment to the work force by finding a post-retirement job.

OBJECTION: Mandatory retirement is not a voluntary quit. It is not reasonable to assume such an individual has left the work force. His availability should be tested under the availability requirement rather than impose a blanket disqualification covering all retirees.

RECOMMENDATION: Disqualify individuals on disciplinary suspension provided there was misconduct.

(example 4)

"...for the duration of any period, but in no case more than ten weeks, for which he has been suspended from his work by his employing unit as discipline for violation of established rules or regulations of the employing unit." (Mass., section 25(f))

REASON: The individual suspended should be no less liable for his unemployment than another worker discharged by the employer for the same misconduct connected with the work.

OBJECTION: The employer's act of suspending rather than discharging the individual indicates action less than misconduct and should not be subject to disqualification.

RECOMMENDATION: Disqualify individuals whose required license, permit, certificate or bond is suspended and the suspension results in their unemployment.

(example 5)

"…for the week in which he has become unemployed because a license, certificate, permit, bond or surety which is necessary for the performance of such employment and which he is responsible to supply has been revoked, suspended or otherwise become lost to him for a cause other than one which would fall within the meaning of subsection (c) of this section [misconduct], but one which was within his power to control, guard against or prevent, and for each week thereafter until…." (Ala., section 25-4-78(d))

REASON: By causing his license to be suspended, the individual has caused his own unemployment. Example: a driver whose license is suspended for DUI conviction or a nurse who loses her certification.

OBJECTION: If the employee's conduct that caused the suspension was not misconduct connected with the work, there should be no more reason to disqualify him than to disqualify anyone who no longer qualifies for a job or who never had such a license in the first place.

Claimants in Training

Federal law prohibits States from denying benefits (on the grounds of unavailability, refusal to work, not seeking work) to claimants taking training with the approval of the State agency. All States have provisions spelling out this immunity from disqualification. Few State laws, however, explicitly require of such a claimant any evidence that he is actually attending the training course and making satisfactory progress.

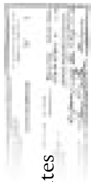
Recommendation: Require claimants in training to submit evidence of their attending and satisfactory pursuit of such training.

(example 1)

"No otherwise eligible individual shall be denied benefits for any week because the individual is in training with the approval of the commissioner, nor shall such individual be denied benefits with respect to any week in which the individual is satisfactorily progressing in a training program with the approval of the commissioner…relating to availability for work and active search for work, or failure to apply for or refusal to accept suitable work." RCW Title 50, Chapter 50.20, Section 50.20.043 (Wash. State).

(example 2)

Standards for training program approval…are: (iv) Regular class attendance, satisfactory progress in course work and individual compliance with other training requirements of the institution… Wy. 27-3-3307b).



Reason: A claimant in training is immune from the work search and other availability requirements only because it is assumed that the training is his best path to quick reemployment. It is important that for each week benefits are paid, the agency have proof the claimant is attending the course and making satisfactory progress.

Objection: A formal requirement of weekly proof of attendance and progress may be unnecessarily demeaning to claimants.

APPEALS

Every State permits claimants and employers to appeal initial determinations awarding or denying benefits. After an appeal is filed, an informal hearing is held usually by a single referee, who issues a decision, usually within 30 days of the hearing, affirming or reversing the original decision. Following an original decision to award benefits, benefit payments must begin immediately, regardless of the pendency of an appeal and regardless of whether or not the time for filing an appeal has expired, in accordance with the Supreme Court decision in California Human Resources Dept. v. Java (1971). Under Java, benefits may be terminated only pursuant to a subsequent hearing and decision reversing the determination. A claimant whose original award is reversed by a referee is liable for repayment of overpayments he received. In the interest of reducing the volume of overpayments, it is desirable that the appeal process be speeded up. The period for filing an appeal ranges from 7 days to 30 days, with most States permitting 10 or more.

RECOMMENDATION: Limit the period within which an individual may file an appeal to no less than 15 and no more than 30 days, with extensions of the time permitted only by lateness caused by circumstances beyond the appellant's control.

(example 1)

"Unless the claimant or last employer or base-year employer of the claimant files an appeal with the board, from the determination contained in any notice required to be furnished by the department under section five hundred and one (a), (c) and (d), within fifteen calendar days after such notice was delivered to him personally,…" (Penn., Statutes Section 501(a))

(example 2)

"Unless the individual, within twenty (20) days after such determination was mailed to the individual's last known address, or otherwise delivered to the individual, asks a hearing thereon before an administrative law judge, such determination shall be final and benefits shall be paid or denied in accordance therewith." (Ind., Section 22-4-17-2(a))

(example 3)

"A determination of disqualification or a determination of non-disqualification shall be final unless an appeal is filed by the applicant or notified employer within 30 calendar days after mailing. The determination shall contain a prominent statement indicating the consequences of not appealing. Proceedings on the appeal shall be conducted in accordance with section 268.105." (Minn., Statutes Section 268.01(d).

REASONS: Fifteen to 30 days should be enough time to decide whether or not to appeal. The exception should take care of those cases where, because of agency error, Post Office delays, etc., the appeal is delayed beyond the appellant's control.

The limit should reduce overpayments by ensuring that appeals are filed promptly

OBJECTIONS: It is not equitable to limit good cause for late filing to cause beyond the appellant's control.

Good cause should include good personal cause.

Seven days is too short to allow an individual to investigate whether or not he has enough of a case to appeal.

TELEPHONE HEARINGS

Some states allow for UI administrative hearings to be conducted either in person or by telephone, giving the claimants, employers and witnesses more flexibility in attending the hearings. Telephone hearings provide claimants an opportunity to appeal a determination of non-eligibility through the convenience of a telephone call.

RECOMMENDATIONS: Allow for telephone hearings in all states, with the option of having an in-person hearing which may be exercised by either party. The party objecting to the telephone hearing should have the burden of demonstrating why the telephone hearing is unfair.

States should update their telephone systems to allow for multi-party dial in to allow participation of parties who may not be in the same location.

States should allow both sides flexibility in asking witnesses questions or seeking comments during telephone hearings to ensure that witnesses have nothing further to add to the hearing.

When using a telephone hearing, parties who have a witness appearing in person must be required to give notice to the opposing side.

States should allow more than the typical 10-day notice to allow for mailing of exhibits to interested parties when a telephone hearing is scheduled.

(example 1)

"Advance written notice of the hearing will be provided by regular mail to all interested parties at least twenty days prior to the hearing to permit adequate preparation of the case. The notice will include: (1) The time, date, and place of the hearing. Hearings shall be held at the regularly established hearing locations most convenient to the interested parties, or at the discretion of the presiding administrative law judge, by telephone;" (Wash., Administrative Code 192-40-080)

(example 2)

"Hearings shall normally be scheduled to be conducted in person. However, any interested party, authorized representative, or witness may participate by telephone at their option. The in-person presence of some parties or witnesses at the hearing shall not prevent the participation of other parties or witnesses by telephone. Sworn testimony from witnesses shall be received during telephone hearings under the same regulations as other hearings." (7 Colorado Codified Regulations 1101-2-11.2)

(example 3)

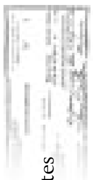
"Unless the appeal is withdrawn, an administrative law judge, after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and decision of the representative. The hearing shall be conducted pursuant to the provisions of chapter 17A relating to hearings for contested cases. Before the hearing is scheduled, the parties shall be afforded the opportunity to choose either a telephone hearing or an in-person hearing." (Code of Iowa Section 96.6)

COLLATERAL ESTOPPEL

The doctrine of collateral estoppel prohibits the use of findings of fact or determinations of law from being used to prove such facts or determinations in other proceedings. Ten states have not addressed the issue of collateral estoppel (Alabama, Delaware, Hawaii, Mississippi, Montana, New Jersey, Pennsylvania, Rhode Island, South Carolina, and West Virginia). Thus findings made during an administrative hearing can be used in subsequent proceeding that may be unrelated to the UI administrative hearing.

RECOMMENDATION: Determinations of fact or law made during UI administrative hearings should not be binding on subsequent proceedings as administrative hearings are not court proceedings. The purpose of UI administrative hearings are to determine UI benefit eligibility only, not to make findings of fact in matters such as wrongful discharge or sexual harassment. The administrative law judge should announce at the beginning of the hearing that the hearing is limited to issues directly related to the UI claim.

REASON: Limiting findings made during UI administrative hearings to such hearings prevent administrative judges from overstepping their duty of determining claimant eligibility for UI benefits. This recommendation protects employers and employees from an adverse determination on legal issues unrelated to the merits of a UI claim, which parties to the proceeding may not have been prepared to address. Additionally, this would prevent the cost of extending the proceeding for unrelated purposes or use as a "fishing expedition."



(example 1)

"A finding of fact, conclusion of law, judgment, or final order made under this subtitle is not binding and may not be used as evidence in an action or proceeding, other than an action or proceeding brought under this subtitle, even if the action or proceeding is between the same or related parties or involves the same facts." (Texas Section 213.007)

(example 2)

"A finding of fact or law, judgment, conclusion, or final order made with respect to a determination made under this chapter may not be conclusive or binding or used as evidence in any separate or subsequent action or proceeding in another forum except for proceedings under this chapter, regardless of whether the prior action was between the same or related parties or involved the same facts." (Revised Code of Montana Section 39-51-110)

Attorney Representation

Several states prohibit non-attorneys from representing a worker or an employee if they receive a fee for providing representation. Employers have found the use of non-attorney representatives representatives to be a cost-effective best practice for administering claims and UI liabilities. By excluding non-attorneys as representatives, many experienced and knowledgeable individuals are precluded from meaningfully participating in the UI process. In July 1980 in its Final Report, the National Commission on Unemployment Compensation strongly and unanimously endorsed the use of non-attorney representation. As a due process safeguard the party has the right to be represented by a person of the party's own choosing. The Commission, comprised of both management and labor representatives, disagreed on many issues, yet unanimously supported the use of non-attorney representation.

Recommendation: All States should allow claimants and employers to be represented by a person of their choice during UI proceedings.

(example 1)

"Any individual claiming benefits in any proceeding before the commission or a court may be represented by counsel or other duly authorized agent. Any employer may be represented in any proceeding before the commission by counsel or other duly authorized agent." (Mich. Compiled Laws Section 421.31)

"In any proceeding before an appeal tribunal or the Appeals Board of the Department of Economic Security or any successor agency: an individual party (either claimant or employer) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the state of Arizona shall be responsible for and supervise such agent." (Ariz., DES Newsletter, April 1986)

(example 2)

"No individual shall be charged fees of any kind by the director or his representatives, in any proceeding under this chapter. Any individual claiming benefits in any proceeding or court action may be represented by counsel or other duly authorized agent but no such counsel or agents shall together charge or receive for such services more than 10 percent of the maximum benefits at issue in such proceeding or court action." (Ala., Code Section 25-4-139)

REASONS: Doing away with attorney representation requirements allows interested and knowledgeable persons who are not attorneys to represent claimants and employers during UI proceedings.

Few attorneys have the knowledge or interest in UI to provide effective representation.

Forcing parties to rely only on attorneys will change the character of UI hearings by turning them into adversarial proceedings, with formal and complicated procedures leading to costly delays and extended appeals.

OBJECTION: Non-attorney representatives who handle UI proceedings are practicing law without being admitted to the bar.

Reimbursing Employers

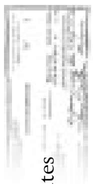
Federal law requires that certain nonprofit organizations be permitted to finance benefit costs either on the same tax method as other employers or on a reimbursement basis. Employers that choose reimbursement are liable only for the cost of benefits paid based on employment for them. Unlike other employers, they are exempt from Federal tax and from liability for any pooled benefit costs which are not financed by individual employers either because the liable employer is already at the maximum rate, or the liable employer is out of business. Benefits attributable to reimbursing employers who go out of business are financed by taxpaying employers.

Federal law permits States to establish safeguards (usually bonds) to assure reimbursements will be paid. Most States have no such safeguards either on a mandatory basis or optional at the administrator's discretion.

RECOMMENDATION: Provide authority to require a bond as a condition for electing the reimbursement method of financing benefits.

(example 1)

"In the discretion of the Director, any nonprofit organization that elects to become liable for payments in lieu of contributions shall be required within thirty days after the effective date of its election, to execute and file with the Board a surety bond approved by the Director, or it may elect instead to deposit with the Board money. The amount of such bond or deposit shall be determined in accordance with the provisions of this paragraph." (Dist. of Col., section 46-303(h)(3).



REASON: The reimbursement option has been less expensive for nonprofit organizations than alternative taxes. It is not unreasonable to require assurance that their bills will be paid. Unpaid reimbursements inequitably become the responsibility of tax-paying employers

OBJECTIONS: It is inequitable to require a bond of some but not all employers.

Requiring a bond may offset the advantages of reimbursement.

Making the bond discretionary permits abuse.

RECOMMENDATION: Provide authority to terminate reimbursement status of delinquent employers.

(example 2)

"If any nonprofit organization is delinquent in making payments in lieu of contributions as required under subdivision (3) of this subdivision, the commissioner may terminate such organization's election to make payments in lieu of contributions as of the beginning of the next taxable year, and such termination shall be effective for that and the next taxable year." (Neb., section 48-660.01(4))

REASON: It is not unreasonable to require delinquent employers temporarily to forfeit their right to the reimbursement option. This should encourage compliance.

OBJECTION: While interest on late payments might be reasonable, the penalty of denying the employer his right to choose reimbursement is more severe than mere delinquency warrants.

Employee Contributions

Originally, nine States required worker contributions to help finance UI benefits. Over the years, most of these states dropped the employee tax or shifted it to financing temporary disability insurance programs. Alaska and Pennsylvania still require worker contributions, and Alabama retained it only for periods when its benefit reserves were low. California, Hawaii, New Jersey, New York, Puerto Rico and Rhode Island adopted a temporary disability program funded either entirely by the employer or in combination with employee contributions.

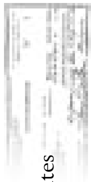
Recommendation: Continue 100 percent employer financing in states that currently do not collect UI taxes from employees.

Reasons: One hundred (100) percent employer financing is a better means of internalizing UI claim costs as a business operating cost and thus ensuring prices of goods and services properly include the costs of UI.

Worker contributions encourage workers to over-utilize the system ("I paid into it so I want to collect back as much as pas possible").

Employer contributions give business a greater voice in UI tax issues.

The administrative burden of collecting a tax on workers is significant, relative to the amounts collected, because most states impose only a token tax on workers



Objections: Employers, not workers, are responsible for managing their workforce to avoid involuntary unemployment.

The tax is regressive.

When balances are low, worker contributions may be necessary to help shoulder the financial burden of replenishing trust funds.

Workers already mistakenly believe they are contributing to the costs of UI.

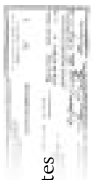
UI taxes influence wage levels and thus workers in an economic sense may already be making a financial contribution

Alternative Uses of Unemployment Insurance

The unemployment insurance system was originally intended to assist workers who had become unemployed through no fault of their own by supplying unemployment benefits that serve as temporary replacement income while they attempt to become re-employed. Benefits are paid for by the imposition of a payroll tax on employers that is variable in rate based upon each employer's unemployment claims experience. Administrative costs of the system are funded through the imposition of another tax, the Federal Unemployment Tax Act (FUTA) tax, paid by all for-profit employers at a flat rate (normally 0.8% on a $7,000 wage limit).

In recent years, actions at the federal and state levels have either expanded benefits or eroded the financing concepts that comprise the original purpose of the UI program. The current recession, mild by comparison to the recessions experienced in the 1970's and the 1980's, shows how quickly state trust fund reserves can become eroded.

As an example of this at the federal level, in the final days of the Clinton administration, the US Department of Labor (DOL) adopted regulations allowing state laws that permit workers who have jobs to collect "unemployment" benefits during leave following the birth or adoption of a child. The public policy issue dealt with in the Birth and Adoption Unemployment Compensation regulations (BAA-UC), is not whether paid leave is desirable, but rather whether it makes sense to transform the fundamental purpose of unemployment insurance as compensation for workers who lose their jobs while actively seeking work, into the entirely different purpose of compensating workers who have jobs but decide to take leave because they do not wish to or cannot. This change potentially opens the door to additional ways of misusing state unemployment trust funds for purposes other than payment of benefits to workers who lose their jobs. The Bush administration, realizing the impact that the BAA-UC regulations could have on already shaky state trust fund financing, recently moved to retract the BAA-UC regulations.



As an example of this at the state level, the New Jersey State Unemployment Tax (SUT) is deposited into three different accounts. 0.1175% is allocated to the Workforce Administrative Fund (WF) for basic skills training. 0.1% to 0.8% (depending on reserve ratio) is allocated to the Healthcare Subsidy Fund (HSF). The remainder (based on true UI experience) is allocated to the Unemployment fund.

Only the UI contributions are counted for establishing the experience reserve ratio. Nineteen (19) percent of contributions were diverted.

A similar problem occurs when states divert Reed Act funds. Although Reed Act money are FUTA funds, this money is intended to flow back into the state trust funds where it can be used to enhance trust fund solvency and improve administration of the system. Several states including New Jersey and Michigan have siphoned off their Reed Act money by using it for functions (formerly financed from state general revenues) only remotely connected to Unemployment Insurance/Employment Services administration or UI benefits.

Recommendation: States should refrain from making system changes that use state UI tax revenues for purposes other than the original purpose of the UI system, which is to supply workers with temporary replacement income while seeking to become re-employed.

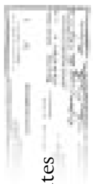
Reason: State unemployment taxes are collected during good economic times so that adequate reserves are available in times of high unemployment. Expansion of program benefits beyond the original intent of the unemployment insurance program seriously undermines this concept. Using UI funds to finance paid leave or other governmental objectives unrelated to the UI/ES system can have devastating consequences during recessionary periods.

Recommendation: States should not divert Reed Act funds from their original purpose — the financing of unemployment benefits or improving state unemployment system administration.

Reason: Diversion of Reed Act funds can have the same serious consequences as in the case of BAA-UC. Additionally, state unemployment administrative financing has been severely under funded over the past several years. The release of Reed Act monies was intended to counteract and correct this condition and improve UI trust fund solvency.

Objections: Workers whose compensation stream has ceased for any reason could be considered unemployed. There is little or no conflict with basic UI eligibility principles because the system already recognizes the legitimacy of paying benefits to workers in approved job training, on jury duty, or on layoff expecting recall. Those benefits are payable even if the worker is not seeking other available work.

UI-paid leave may increase attachment to the workforce and lower employment costs because payment of UI increases the likelihood workers will return to their jobs after their leave period expires.



The UI system can absorb the cost of expanded purposes because trust funds balances were high during the economic expansion, and because proponents believe alternative purposes will not be costly.

It is cheaper to deliver paid leave through the UI system than to create an entirely new mechanism to deliver this benefit.

Diverting UI trust funds may be preferable to tax increases on employers to fund government programs.