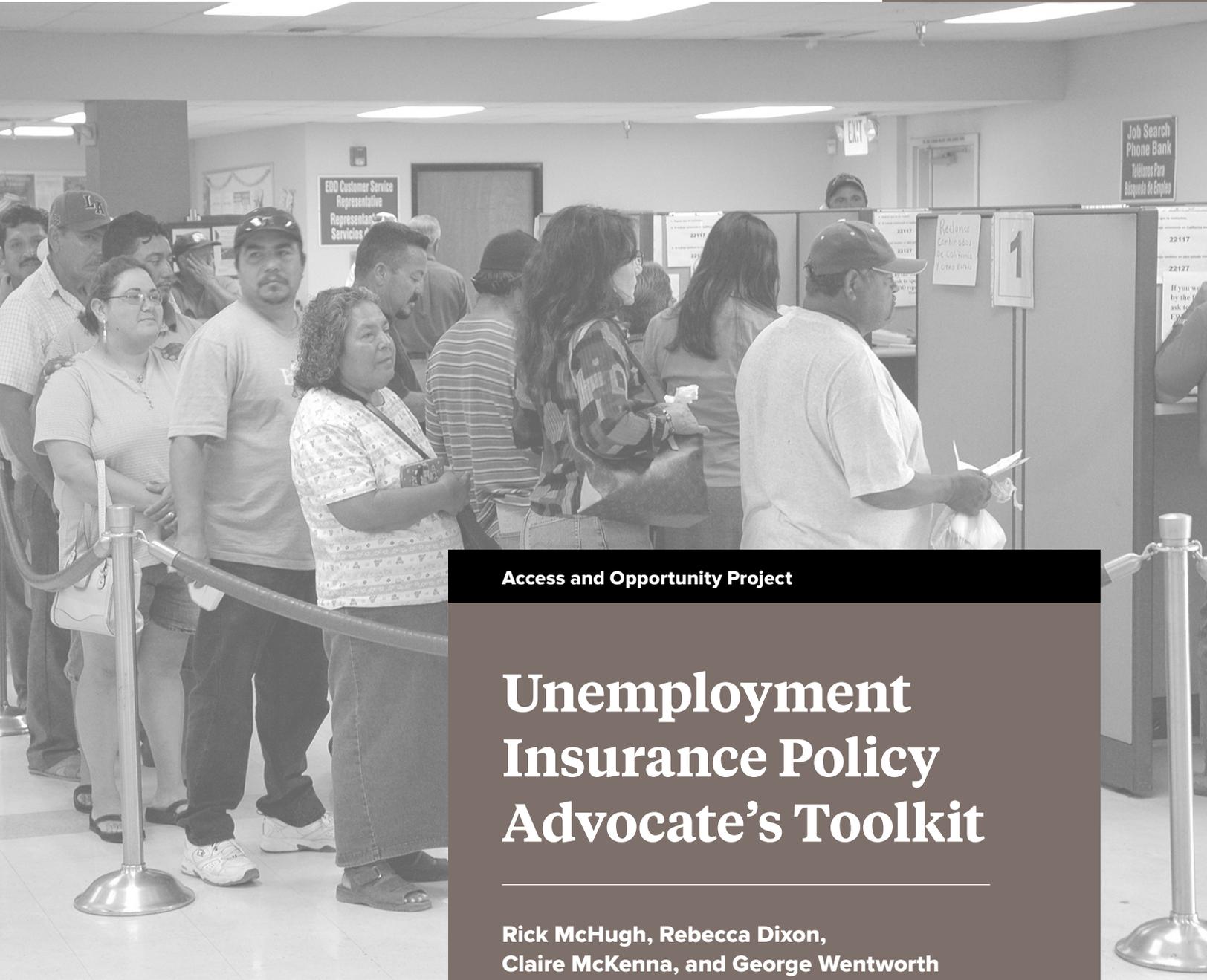




NATIONAL  
EMPLOYMENT  
LAW  
PROJECT

TOOLKIT



Access and Opportunity Project

# Unemployment Insurance Policy Advocate's Toolkit

Rick McHugh, Rebecca Dixon,  
Claire McKenna, and George Wentworth

OCTOBER 2015

---

### **A Message from NELP Executive Director Christine L. Owens**

A key strength of National Employment Law Project's work is our partnership with labor organizations, community groups, worker centers, and legal aid advocates. In the arena of unemployment insurance, NELP benefits tremendously from its ability to know what is happening around the country through our network of partners in nearly every state. Those friends seek our assistance and input on UI legislation and administrative battles, and, in turn, we seek their help with critical UI fights in Washington, DC, and in state capitols.

We offer the Unemployment Insurance Policy Advocate's Toolkit to this community of allies as well as future partners newly engaged with this critical program.

### **Acknowledgements**

NELP thanks the following foundations and/or organizations for their contributions in support of this work: the Ford Foundation, the Public Welfare Foundation, and The Moriah Fund.

### **About the Authors**

The Unemployment Insurance Policy Advocate's Toolkit was produced by NELP staff from our Access and Opportunity project, including Rebecca Dixon, Claire McKenna, George Wentworth, and Rick McHugh. Former NELP policy analyst Mike Evangelist contributed to prior editions of the Toolkit and his work remains reflected in some sections.

### **About NELP**

For more than 45 years, the National Employment Law Project has worked to restore the promise of economic opportunity for working families across America. In partnership with grassroots and national allies, NELP promotes policies to create good jobs, enforce hard-won workplace rights, and help unemployed workers regain their economic footing. For more information, visit us at [www.nelp.org](http://www.nelp.org).

# Contents

---

<b>Introduction</b> .....	2
<b>Chapter 1—Benefits and Eligibility</b> .....	3
A. <a href="#">Raising Application Rates to Increase UI Reciprocity</a> .....	4
B. <a href="#">Why Every State Should Pay 26 Weeks of UI Benefits</a> .....	6
C. <a href="#">Maintaining Fair Weekly Benefit Formulas</a> .....	10
D. <a href="#">Expanding Part-Time Eligibility</a> .....	13
E. <a href="#">Accommodating Compelling Family Circumstances</a> .....	20
F. <a href="#">Updating Partial Benefits</a> .....	24
G. <a href="#">Using Work Sharing to Prevent Layoffs</a> .....	30
<b>Chapter 2—Challenges to UI as Earned Benefits</b> .....	32
A. <a href="#">Assisting Claimants with Job Searches and Reemployment</a> .....	34
B. <a href="#">Defining Misconduct Fairly</a> .....	42
C. <a href="#">Limiting Drug Testing for UI</a> .....	45
D. <a href="#">Seasonal Work and Occupational Exclusions Overview</a> .....	49
E. <a href="#">Avoiding Waiting Weeks</a> .....	56
<b>Chapter 3—Understanding UI Financing, Business Climate, and Employee Coverage Issues</b> .....	58
A. <a href="#">UI Financing Basics</a> .....	59
B. <a href="#">UI Taxes and Business Climate</a> .....	64
C. <a href="#">Employee Misclassification as Independent Contractors</a> .....	68
<b>Chapter 4—Influencing UI Policy Debates</b> .....	72
A. <a href="#">Economic and Social Impacts of UI</a> .....	73
B. <a href="#">UI and Disincentive Effects</a> .....	76
C. <a href="#">UI: Preventing Poverty, Supporting Job Search, and Helping the Economy</a> .....	80

# Introduction

---

The *Unemployment Insurance Policy Advocate's Toolkit* is designed as a reference guide to the issues we have faced together as advocates since the Great Recession and emerging issues we can expect to face in the future. This 2015 revision is intended to provide our readers with readily-used resources for significant state UI issues. We have added new topics, including independent contractors/misclassification and reemployment assistance. Readers will find resources supporting positive reforms as well as defending unemployment insurance (UI) programs from increasingly strident attacks.

We celebrated unemployment insurance's 80th birthday in 2015. At its birth in the late 1930s, UI was more important for its potential than for its reality as a safety net—out of caution, benefits were low and not many weeks of benefits were provided in the early years. By the 1950s, though, state UI programs were replacing half of lost wages for a reasonable portion of the nation's jobless workers and 26 weeks was becoming the accepted norm for available weeks of benefits. The 1950s program was designed for a labor market where traditional male breadwinners supported two-parent families. Most workers expected to return to their former jobs after temporary layoffs.

By 2015, this traditional household model and the 1950s labor market that supported it have dramatically changed. Today's workforce is made up of many different types of families. Women are in the workforce in large numbers and their incomes are no longer just supplemental, but are necessary for household essentials and, in some cases, are the primary source of family income. Workers are vulnerable to permanent and more frequent layoffs that could lead to involuntary part-time work or even a spell of long-term unemployment. Low-wage workers are more likely to lose their job, but less likely to receive UI benefits. Like part-time workers, they are mostly women.

Equally important, the emerging "gig economy" is combining with older forms of work that fall outside formal employment rules. To maintain relevance to our economy and viability in our political scene, UI must grow and adapt by ensuring that part-time workers are eligible in all states, work sharing programs are universally offered, and high quality reemployment tools are offered to jobseekers.

## Toolkit Overview

The 2015 edition of the UI Toolkit begins with an overview of recurring issues concerning benefits and eligibility rules for UI programs. Chapter 1 discusses topics ranging from the maximum number of available weeks to work sharing. We cover part-time availability and partial benefits and compelling family circumstances as well because these are logical steps toward making UI more relevant for today's labor market. In Chapter 2 we explore topics relating to benefit disqualifications and sanctions, misconduct standards, seasonal work and educational employee exclusions, and drug testing. Chapters 3 and 4 covers recurrent topics that advocates encounter when UI topics are debated; disincentive effects, economic impact, and reemployment. We look forward to your feedback on this publication as well as working with you in the future.

The goals of UI remain salient: income support for jobless workers, boosting the economy in recessions, and linking jobless workers to the labor market. Renewing UI for this century requires policies aligned with today's labor market, broader acceptance of the goals of UI, and greater confidence that strong UI programs still serve those goals.

# 1

## Benefits and Eligibility

---

In recent years, widespread state UI benefit cuts were justified as a response to a temporary UI financing crisis caused by the Great Recession. This crisis was amplified in many states by years of trust fund underfinancing. Even as unemployment has fallen and trust funds have partially recovered in recent years, no state has seriously considered reversing these benefit cuts. Indeed, some states added UI cuts in 2015 as the UI financial crisis was continuing to abate. The possibility of reversing some of these cuts or making progress on other reforms should now come forward as a priority for advocates.

At this point, we see that state cuts passed during the temporary UI financing crisis have created permanent restrictions on the generosity of state programs. For example, North Carolina, which in 2013 passed the most draconian cuts of all states, passed punitive weekly job search contact requirements in the summer of 2015. At the same time employers were relieved from some tax increases passed during the crisis. In Michigan, a partial restoration of trust fund solvency automatically triggered a return of the state's taxable wage base to \$9000 for the third quarter of 2015, eliminating a \$500 increase that was part of the state's 2011 solvency package. At the same time, a reduction in maximum available weeks of benefits from 26 to 20 weeks and other benefit restrictions included in Michigan's 2011 solvency legislation remain in place.

The negative impact of these cuts since 2011 was confirmed when UI reciprocity rates reached their lowest historic levels in 2014. This restrictive trend has continued into 2015. Fewer than 3 in 10 jobless workers received UI benefits in 2014 with the worst states paying as few as 14 weeks of available benefits to less than 2 in 10 jobless workers (McKenna, 2015). Although only a minority of states enacted extreme benefit restrictions, there is a significant risk that these states now will serve as a benchmark for future UI business climate battles in other states.

In this chapter, we survey the negative changes that have taken place under the solvency pressures created by the Great Recession with sections concerning available weeks of benefits and weekly benefit amount formulas. On the potential upside of UI debates, we offer discussion of compelling family circumstances as well as part-time availability and partial benefits. Reforms on these issues can address the needs of many low-wage workers. We cover work sharing as well.

### Resources:

Claire McKenna, National Employment Law Project. "The Job Ahead: Advancing Opportunity for Unemployed Workers." (February 2015), <http://www.nelp.org/publication/the-job-ahead-advancing-opportunity-for-unemployed-workers/>.

NELP, Changing Workforce, Changing Economy: State Unemployment Insurance Reforms for the 21st Century (2004, revised 2006), [http://nelp.3cdn.net/31c9039786a84cdc52\\_h5m6y1dsp.pdf](http://nelp.3cdn.net/31c9039786a84cdc52_h5m6y1dsp.pdf).

# 1A

## Increasing Application Rates to Increase UI Reciprocity

---

### **Question: What is the leading reason that jobless individuals do not receive UI?**

**Answer:** No single factor explains low UI receipt by jobless workers. But the biggest single reason for low UI reciprocity is non-application for UI. Indeed, the largest single group of non-recipients among unemployed workers is non-applicants. According to GAO reports using SIPP data, low-wage workers are more than twice as likely to experience unemployment as higher-wage workers, but about half as likely to receive UI benefits (GAO, 2007, 2000). While there are many formal legislative steps that advocates can seek to improve UI that we discuss in this Toolkit, making UI administration more customer-friendly and accessible is a potentially worthwhile step that will have a positive impact by increasing UI reciprocity among non-applicants.

### **Question: What are the known reasons for low application rates for UI?**

**Answer:** Supplemental CPS surveys of unemployed workers have been conducted (in 1976, 1989, 1993, and 2005) to provide us with some reasons why individuals don't apply for UI. Wayne Vroman of The Urban Institute has analyzed these surveys over the years to try to determine the reasons for low application rates. His latest paper summarizes his findings using the 2005 supplement data along with his observations about results of the earlier surveys (Vroman, 2009a). Survey results show the single biggest reason (51.9 percent) that individuals surveyed did not apply was a belief that they were not eligible. Workers in temporary employment were identified as especially ill-informed about UI, with 17.2 percent believing their work was not covered by UI and 8.9 percent saying they did not know about UI or know how to file for UI (id., Table 5).

Among the reasons given for not applying by those in the group who gave a belief that they were ineligible, the two biggest subgroups were those saying they had insufficient past work to qualify (27.6 %) and individuals reporting they were separated due to a quit or discharge (13.8 %). Another 13.6 percent of non-applicants had a job lined up or were employed by the time of the survey. A significant group of those not applying for UI (17.8%) had some barrier arising from their attitude or understanding of UI, with 5 percent stating they did not need the money or did not want the hassle, 4.9 percent saying they did not know about UI or know how to file for UI, and 4.0 percent being told they were not eligible for UI. Only 1.8 percent gave a negative attitude about UI as a reason for not applying, and this is consistent with earlier findings that stigma is not given as a big reason for non-application for UI (id., Table 4). For more detailed results analyzing the 2005 data, see Vroman, 2009b.

In a later study of the 2005 CPS supplement data, Alix Gould-Werth and Luke Shaefer explored the demographics of non-applicants for UI. They found that those without a high school degree and Hispanic speakers made up a significant portion of non-applicants and that individuals in these groups especially lacked knowledge of UI. (Gould-Werth, 2012a, 2012b).

Explanations for non-filing that NELP has heard anecdotally from jobless workers include fear of employer retaliation (in terms of not rehiring workers who file claims).

---

In some states, anti-fraud measures directed at UI claimants have resulted in reluctance to apply for benefits. In addition, some employers may advise workers they are not eligible or ask employees to sign documents (legally unenforceable under federal and state law) to indemnify employers for UI benefits. These anecdotal reasons for non-filing have not been explored in depth. Nonetheless, it seems difficult for employer groups to argue against measures to reduce the risk that these sorts of activities are reducing UI application rates.

**Question: What steps can be taken to increase UI application rates?**

**Answer:** Sensible steps to increase UI application rates would include ensuring that at least two of the three typical means of taking UI applications (in-person, online, and telephone) are available in every state, providing UI access in more languages than English, public education about UI programs, employer posting of UI benefit information, anti-retaliation protections, requiring or encouraging employer-filed claims, and eliminating technological barriers to claims filing and work registration. (Gould-Werth, 2012b).

Many of these access recommendations are now legally mandated. Recent guidance from the U.S. Labor Department significantly clarified the responsibilities of state UI agencies regarding access to UI benefits. Relying upon both federal UI and civil rights legal requirements, Labor has instructed states that while on-line filing requirements can be promoted as a primary means of filing UI claims, state policies and operational practices cannot be exclusively on-line, and alternative methods for in-person and telephonic filing must provide “equal access” to individuals seeking benefits (USDOL, 2015). Increasing administrative funding for state UI agencies in order to implement customer service standards and mandating outreach to potential claimants are other measures that states can undertake or that USDOL could encourage.

**Resources:**

Government Accountability Office (GAO), “Unemployment Insurance: Low-Wage and Part-Time Workers Continue to Experience Low Rates of Receipt,” GAO-07-1147 (September 2007), <http://www.gao.gov/assets/270/266500.pdf>.

----- (GAO), “Unemployment Insurance: Role as Safety Net for Low-Wage Workers is Limited,” GAO-01-181 (December 29, 2000), <http://www.gao.gov/products/GAO-01-181>.

U.S. Department of Labor, “State Responsibilities for Ensuring Access to UI Benefits,” UI Program Letter No. 2-16 (October 1, 2015), [http://wdr.doleta.gov/directives/attach/UIPL/UIPL\\_02-16\\_Acc.pdf](http://wdr.doleta.gov/directives/attach/UIPL/UIPL_02-16_Acc.pdf).

Alix Gould-Werth and H. Luke Shaefer, “Unemployment Insurance participation by education and by race and ethnicity,” Monthly Labor Review, vol. 135 (October 2012a), pp 28-41, <http://www.bls.gov/opub/mlr/2012/10/art3full.pdf>.

Alix Gould-Werth and Claire McKenna, “Unemployment Insurance Application and Receipt: Findings on Demographic Disparities and Suggestions for Change,” Brief (December 2012b), <http://www.nelp.org/content/uploads/2015/03/Unemployment-Insurance-Application-Receipt-Demographic-Disparities-Report.pdf>.

Wayne Vroman, “Unemployment insurance recipients and nonrecipients in the CPS,” Monthly Labor Review, (October 2009a), <http://www.bls.gov/opub/mlr/2009/10/art4full.pdf>.

----- “An Analysis of Unemployment Insurance Non-Filers: 2005 CPS Supplement Results,” IMPAQ International for USDOL (ETAOP 2009-07) (2009b), [http://wdr.doleta.gov/research/FullText\\_Documents/An%20Analysis%20of%20Unemployment%20Insurance%20Non-Filers%20-%202005%20CPS%20Supplement%20Results.pdf](http://wdr.doleta.gov/research/FullText_Documents/An%20Analysis%20of%20Unemployment%20Insurance%20Non-Filers%20-%202005%20CPS%20Supplement%20Results.pdf).

# 1B

## Why Every State Should Pay 26 Weeks of UI Benefits

---

**Question: How many states offer less than 26 weeks of available regular state UI benefits?**

**Answer:** Forty-five of the 53 UI jurisdictions paid a maximum duration of at least 26 weeks of benefits in 2015.

The eight states offering less than 26 weeks of available benefits are Florida, Georgia, Kansas, Michigan, Missouri, Arkansas, North Carolina, and South Carolina. All these states acted to cut available weeks in 2011, except Kansas and North Carolina, which adopted changes in 2013. Of these eight states, Arkansas (25), Michigan (20) and Missouri (20) cut to a fixed number of available weeks below 26. In Florida, Georgia, Kansas and North Carolina, a so-called sliding scale of available weeks was adopted as the means to cut benefits. These sliding benefits scales, mostly ranging between 20 weeks down to as low as 12 weeks, adjust the number of available weeks annually based upon each state's unemployment rate in the prior year (or semi-annually in NC). For claims filed in January 2015, Florida offered a maximum of 14 weeks, Georgia 17, Kansas 16, and North Carolina 15.

During 2015 sessions, the legislatures in both Arkansas and Missouri decided to move beyond their already-reduced number of available weeks – Missouri by adopting sliding scales similar to those in Florida, Georgia, Kansas and North Carolina and Arkansas by cutting their benefits weeks further from 25 back to 20. (The Missouri change has been vetoed and its status is likely to end up in the courts there.)

**Question: What is meant by “maximum available weeks of benefits”?**

**Answer:** The maximum available weeks is NOT the same as the actual duration of benefits. This issue concerns what is commonly known as “maximum duration,” which refers to the maximum potential weeks for UI claims offered in a state, and not the number of weeks that individual claimants will each receive. In all states, the maximum number of available weeks is only applicable for claimants who remain eligible and claim benefits for the entire potential duration of their claim. Even during the depths of the recession, many workers found jobs prior to drawing the full number of weeks that applied to their UI claims. By the end of 2014 only 40 percent of claimants drew their final week of benefits—marking a return to pre-recession levels of benefit exhaustions.

Whatever maximum number of available weeks a state sets in law, each individual claim has a maximum duration that is determined for each claim when it is filed. The number of weeks and the weekly benefit amount determined at that time remain in place for the next year. States use two main methods to set the number of maximum duration of each claim. The term *uniform duration* means that every worker who is monetarily eligible for benefits qualifies for a full 26 weeks of benefits if their joblessness lasts for 26 weeks. Currently only 9 states have uniform duration of benefits. Again, this does not mean that all workers get 26 weeks of benefits in uniform duration states, only that those who cannot find jobs before exhausting a claim will receive the full 26 weeks.

In the 42 states without uniform duration, workers with a history of less than full-year work frequently do not have sufficient pre-layoff earnings to qualify for 26 weeks

---

of benefits. These remaining states use a *variable duration* formula that caps the total benefit amount based on a share of the worker's base period wages, most commonly one-third of the base period wages. The duration period is calculated by dividing this total benefit amount by each individual's weekly benefit amount. In many cases, this results in claimants qualifying for less than 26 weeks on a claim.

In the majority of states with variable duration, another less-discussed form of benefit cut has been to tighten the statutory formula that determines each claimant's weekly maximum of UI. In 2012, Pennsylvania adopted a more restrictive variable duration formula for weeks of benefits as one cost-cutting measure, but did not cut its maximum available weeks below 26. Instead, Pennsylvania changed the formula—which previously required 18 credit weeks to qualify for 26 weeks of benefits—to now pay the number of weeks determined by multiplying the number of credit weeks by the weekly benefit amount. In addition, the minimum number of credit weeks was raised from 16 to 18 weeks. As a result, every claimant with less than 26 credit weeks received a maximum available weeks of UI less than 26 weeks down to the cap of 18 weeks, and individuals with fewer than 18 credit weeks were not monetarily eligible for UI.

**Question: What are the main reasons states should have at least 26 weeks of UI?**

**Answer:** In the US, policy discussion concerning the number of weeks available was traditionally focused on four assumptions identified by Merrill Murray in 1974. First, providing a definite number of weeks was preferable to paying benefits for the duration of unemployment. Second, available weeks of benefits should be related to the number of weeks of each claimant's prior year of employment. Third, state UI programs are primarily designed for short-term unemployment. Fourth, longer durations of benefits should be provided during recessions through benefit extensions. After many years, 26 weeks emerged from this mixture of policy discussion and legislative debate, and was established as a US norm for state UI programs. Many states paid 26 weeks in the 1950s. South Carolina was the last state to reach the 26 week norm, waiting until 1968.

The main purpose of UI is to provide partial replacement wages to jobless workers. While the income replacement and economic stimulus goals of UI are more often mentioned, other goals of UI include keeping jobless workers connected to the labor market and supporting their job search activities. The goal of state UI programs should be to provide enough weeks to permit an adequate number of weeks of job search in non-recession years, with federal benefit extensions taking up the slack during recessions.

Part of the debate about maximum duration should consider the underlying labor market. In 2014, the annual unemployment rate had fallen to 6.2 %, and average duration of UI claims was 16.4 weeks. Just over 40% of 2014 claimants received a final payment on their claim. In contrast, the average duration of unemployment in 2014 was still 37.3 weeks with long-term unemployment (27 weeks or more) above 30 % in the 4th quarter of 2014. Setting a duration of benefits below 26 weeks clearly cuts some claimants off benefits before they can reasonably be expected to find a job even in an improved labor market.

---

Some critics contend that cutting claimants off benefits is a better way to encourage them to accept jobs. [Recent studies](#) (discussed in Chapter 4) have confirmed that UI claimants do seek work and that more stop participating in the labor market when they exhaust benefits than find jobs in the weeks following exhaustion. In addition, there is [evidence](#) that UI does support job search and better job matching.

**Question: So, states are not required by federal law to provide 26 week of state benefits?**

**Answer:** No. On most matters of benefits, states are given control in our federal-state UI system. But, in fact, there were four prior decades of all states of paying at least 26 weeks of benefits in the US prior to 2011 and most states had done so since the 1950s. As a result, at the start of 2011, all 53 UI jurisdictions paid up to 26 weeks of state benefits. (Two states, Massachusetts and Montana, pay weeks beyond 26.) States started abandoning the 26-week norm for available weeks of benefits only in 2011, and while the numbers have grown slowly in recent years, this restrictive trend has evident potential to spread to other states.

Although there is no federal law designating the maximum weekly duration of benefits, in 1962 the Department of Labor recommended that states provide a least 26 weeks of benefits if using a uniform duration formula or 30 weeks of benefits if using a variable duration formula. Two federal advisory bodies adopted 26 weeks of state benefits as a standard duration for benefit payments in 1995 and 1980.

**Question: What reasons are given for providing less than 26 weeks of available benefits?**

**Answer:** There are two main arguments against providing a maximum of 26 weeks of benefits. First, states may restrict benefits as a way of reducing the cost of their UI programs. Secondly, proponents of reducing weeks of benefits claim that collecting unemployment insurance benefits is a disincentive to returning to work. Indeed, these critics expect jobless worker to find jobs immediately when they are cut off benefits, rather than accepting that UI supports work search and helps jobseekers find better job matches.

Common sense and studies both show that the financial strain of trying to make ends meet on a small fraction of prior earnings provides adequate pressure for most workers to diligently search for work. For a detailed discussion of the policy debates around work disincentives as well as the positive roles played by UI in supporting work search and job finding see [Chapter 4](#) of the Toolkit.

---

**Resources:**

- Advisory Council on Unemployment Compensation. Unemployment Insurance in the United States: Benefits, Financing, Coverage, p. 20 Recommendation No. 22 (1995), [http://workforcesecurity.doleta.gov/dmstree/misc\\_papers/advisory/acuc/February\\_1995/adv\\_council\\_0295.pdf](http://workforcesecurity.doleta.gov/dmstree/misc_papers/advisory/acuc/February_1995/adv_council_0295.pdf).
- Center on Budget and Policy Priorities, “How Many Weeks of Unemployment Compensation Are Available?” (July 15, 2015), <http://www.cbpp.org/research/economy/policy-basics-how-many-weeks-of-unemployment-compensation-are-available>.
- Murray, Merrill G., The Duration of Unemployment Benefits. Kalamazoo, MI: Upjohn Institute for Employment Research (1974).
- Woodbury, Stephen A., and Murray Rubin. “The Duration of Benefits.” In Unemployment Insurance in the United States: Analysis of Policy Issues, Christopher J. O’Leary, and Stephen A. Wandner, eds. Kalamazoo, MI: Upjohn Institute for Employment Research, pp. 211-283 (1997).

# 1c

## Maintaining Fair Weekly Benefits Amounts

---

### **Question: How do states calculate unemployment insurance weekly benefit amounts?**

**Answer:** Each state uses a one-year look back period to calculate eligibility. This period, usually called a *base period* or *base year*, is used to determine if the jobless worker has sufficient recent wages to satisfy monetary eligibility requirements. The standard base period in almost all states is the first four of the last five completed calendar quarters preceding the filing of the worker’s initial claim. Monetary eligibility requirements vary widely, but generally require that a claimant at least earn wages in 20 weeks or roughly one and one half calendar quarters. These standards are typically expressed in terms of dollar amount or a multiple of the minimum wage (USDOL, 2015a: p. 3-4 to 3-7). Any monetary eligibility formula expressed solely in dollars discriminates against lower-wage workers (NELP, 2004: Monetary Eligibility). The best states (NJ, OR, WA) have a monetary eligibility standard that includes hours of work.

In addition, 39 states utilize an *alternate base period* when a claimant does not have sufficient wages to qualify for benefits using the standard base period (USDOL, 2015a: Table 3-2). The most common “alternate base period” is the last four calendar quarters preceding the filing of the worker’s initial claim. Alternate base periods typically help recent workforce entrants qualify for benefits by considering recent wages not included in a standard base period.

### **Question: What are the formulas used by states to calculate weekly benefit amounts?**

**Answer:** Once monetary eligibility is established, states have statutory formulas for determining jobless workers’ weekly benefit amount and duration of benefits. In all states, a worker’s weekly benefit amount (WBA) varies based on the worker’s past wages so as to replace a portion of their lost wages within minimum and maximum benefit limits set by state law. In August 2015, the U.S. average weekly UI benefit was near \$320. Seven states (AL, AZ, FL, LA, MS, MO, TN) had maximum WBAs below the U.S. average WBA.

Each state’s UI law uses a weekly benefit formula that seeks to replace a fraction (normally at least 50%) of a worker’s lost wages as measured during that worker’s base period up to its maximum WBA. Most states use one of four main kind of weekly benefit formulas, each designed to ensure that benefit payments are based on that worker’s customary pattern of full-time work, though some states laws provide a choice of formulas (USDOL, 2015a: Table 3-5).

In 2015, twenty-four states used the *high-quarter* formula which determines weekly benefits as a fraction of wages in the highest quarter of earnings in the base period (id.). Although most states use the same fraction of high quarter wages for all benefit levels, some favor a weighted schedule that uses a larger share of high-quarter wages for lower-wage workers. As a result, lower-wage workers get higher wage replacement levels in those states. In recent years, there have been a number of proposals to shift away from

---

high-quarter formulas to other formulas that provide lower wage replacement for jobless workers. The latest is Arkansas, which moved away from the high-quarter formula in May 2015 and will switch to an annual wage formula.

Thirteen states used the *multi-quarter* formula which most often uses a fraction of wages in the two highest quarters in 2014. Six states use the *annual-wage* formula which bases benefits on a fraction of annual wages. Seven states use the *average-weekly-wage* formula, which uses a fraction of average weekly wages in the base period to determine benefit amount (id.). Annual wage and average weekly wage formulas can result in significantly lower benefits for all jobless workers whose earnings vary due to part-year employment or wage variations caused by fluctuating hours of employment. Notably, there is no situation in which using a weekly benefit formula other than the high quarter formula will benefit jobless workers.

**Question: What is the range of minimum and maximum weekly benefit amounts in the states?**

**Answer:** Minimum benefit amounts in the states range from \$5 (HI) to \$158 (WA) per week (excluding dependent allowances available in some states) in 2015 (USDOL, 2015b). Maximum weekly benefits range from \$235 (MS) to \$698 (MA) per week (excluding dependent allowances available in some states). State maximum benefit levels can be set as a fixed dollar amount or indexed to that state’s average weekly wage. In 33 states and the District of Columbia, the maximum benefit is indexed to levels between 47 percent (IL) to 75 percent (HI) of state average weekly wages (USDOL, 2015a: Table 3-6).

Indexing the maximum WBA allows benefit amounts to grow in line with a state’s wage growth and keep pace with increases in the cost of living. The bipartisan Advisory Council on Unemployment Compensation recommended in its 1995 report that states set their maximum weekly benefit to equal to two-thirds of a state’s average weekly wage with durations of six months. States that don’t have automatic adjustments in benefit levels must rely upon state legislatures to make adjustments, meaning that benefit levels are below reasonable levels in nearly all states that rely upon legislative adjustments of benefit levels.

**Question: Can a change to a state’s benefit formula amount to a cut in benefits for workers?**

**Answer:** Yes. If a state currently using a high quarter formula moves to a multi-quarter formula or an annual wage formula, claimants can experience a significant cut in their weekly benefit amounts. Workers who work only part of the year, those who have irregular schedules, or those who have uneven earnings to due seasonal wage fluctuations are most adversely affected by such a change.

For example, if a worker with a total of \$12,500 in their base period has earned \$7500 in her high quarter but only \$2500 in her second highest quarter, that worker could receive up to \$288 per week in a high quarter formula state. Under these same

---

circumstances in a state that uses the two highest quarters, this worker's benefit would only be \$192 per week. More dramatically, the worker's benefit drops to only \$120 per week in a state where the formula uses all four quarters.

The significant real-world impact of four-quarter averaging on weekly benefit levels is illustrated by Indiana. Prior to implementing four-quarter averaging in 2012, Indiana's weekly benefits averaged \$295. Average benefits fell to \$250 under four-quarter averaging, representing a decline of 15 percent.

**Resources:**

Advisory Council on Unemployment Compensation, Unemployment Insurance in the United States: Benefits, Financing, Coverage (February 1995), [http://workforcesecurity.doleta.gov/dmstree/misc\\_papers/advisory/acuc/February\\_1995/adv\\_council\\_0295.pdf](http://workforcesecurity.doleta.gov/dmstree/misc_papers/advisory/acuc/February_1995/adv_council_0295.pdf).

National Employment Law Project, Changing Workforce/Changing Economy, "Monetary Eligibility Chapter" (2004), [http://nelp.3cdn.net/31c9039786a84cdc52\\_h5m6y1dsp.pdf](http://nelp.3cdn.net/31c9039786a84cdc52_h5m6y1dsp.pdf).

U.S. Department of Labor, ETA, Office of Unemployment Insurance, Comparison of State Unemployment Insurance Laws, 2015, Chapter 3, "Monetary Entitlement," <http://workforcesecurity.doleta.gov/unemploy/pdf/uilawcompar/2015/monetary.pdf>.

-----, Significant Provisions of State Unemployment Insurance Laws (July 2015b), <http://workforcesecurity.doleta.gov/unemploy/content/sigpros/2010-2019/July2015.pdf>.

## Expanding Part-Time Eligibility

---

### Question: Why is UI important for part-time workers?

**Answer:** In 2015, just over 18 percent of the workforce was working part time (BLS, 2015a: Chart 8). This constitutes over 25 million individuals. There are many characteristics of these part-time workers that suggest that their welfare is a matter of concern to proponents of economic justice. In short, part-time workers are disproportionately a) female, b) poverty-impacted, and c) minority employees. In terms of UI programs, there are several program features that result in low benefit receipt by part-time and low wage workers. As mentioned earlier, GAO has reported, using SIPP data, that low-wage workers are more than twice as likely to experience unemployment as higher-wage workers, but about half as likely to receive UI benefits (GAO, 2007, 2000).

Within the ranks of the 9.2 million working poor individuals in 2013 (employed for 27 weeks or more), 4.9 million were full-time workers, while 4.2 million were part-time workers. This translates to 15.8 percent of part-time workers classified as working poor, while only 4.1 percent of full-time workers were working poor (BLS, 2015b: Table 1). The majority of the working poor employed for 27 weeks or more were women, with 5.4 million women workers falling below the poverty level as compared to 5.0 million men in 2013. Blacks and Hispanics were over-represented among the ranks of the working poor in 2013, with 2.35 million Blacks (or 13.3 percent of all Black workers) and 3.03 million Hispanics (12.8 percent of Hispanic workers) (id., Table 2).

A useful frame for analysis of part-time workers is to differentiate part-time workers by their status as primary or secondary wage earners. According to Luke Shaefer of the University of Michigan, the proportion of part-time workers who are primary wage earners has grown steadily since 1970, reaching 36 percent in 2007 (Shaefer, 2009). Shaefer's analysis of CPS ASES data found that primary part-time earners worked 44.7 weeks (as compared to 49.7 weeks for full-time employees) (id., Table 4). Despite this substantial participation in the labor market, 47.5 percent of part-time primary earners had incomes below 150 percent of the federal poverty line. In comparison, only 10.1 percent of part-time secondary earners had incomes less than 150 percent of poverty levels. Shaefer credits the persistence of 1950s employer practices; namely, that most were married women who did not support families, with the realities of 21st century part-time primary earners. As we'll see later, similar gendered assumptions about part-time workers are at the root of existing UI rules limiting access to part-time wage earners.

In summary, part-time workers represent a significant element within the working poor and they disproportionately include women and minority workers. These workers receive benefits less frequently due a number of factors, including UI eligibility requirements. Given the significant number of part-time workers in our labor market and their low receipt of UI benefits, reforms targeting part-time workers represent an important arena for future expansion.

---

**Question: What is “availability for work” and why is it a significant barrier to receipt of UI for part-time workers?**

**Answer:** All states require that claimants maintain “availability for work” as a condition of UI eligibility. Restrictive rules about availability for claimants who must work less-than-full-time or wish to do so are certainly a major barrier to receipt of UI for part-time workers.

Availability rules require that UI claimants demonstrate their continuing willingness to work while claiming benefits (USDOL, 2015: 5-24). As a formal matter, availability includes both objective and subjective elements that are applied on an individual basis to each claimant. The objective element of availability concerns the days and hours of the week during which a claimant is willing to work, the geographic areas where the claimant is willing to work, and the kinds of jobs a claimant is willing to accept. In other words, “does a market exist for the services this claimant is offering?” The subjective element involves assessing a claimant’s willingness to work and diligence in seeking work based upon the individual’s statements and behavior. In sum, “Does the claimant want to work?” (Williams, 1955).

Limitations on overall work hours, times of day, or days of the week imposed by health, disabilities, caregiving responsibilities, or other factors can prevent claimants from receiving UI benefits in any state. In addition, most states have specific rules regarding part-time availability that add barriers to UI eligibility. Related to availability rules, all states define suitable work and require that claimants seek suitable work.

**Question: What is the breakdown of states concerning part-time availability rules?**

**Answer:** In 2015, only 10 states (listed in the first column of the table here) have broad availability rules that assess availability for part-time workers under the same policies as those applied to full-time workers. Of these ten, D.C. and Rhode Island permit workers with good cause to restrict their availability to part-time work. This is functionally equivalent to the practices of the other eight states permitting part-time availability on a parity basis with full-time workers. In all but these 10 states, significant restrictions on part-time availability remain.

Twenty states (listed in the second column of the table) have adopted an exception that gives claimants with a past history of part-time work an opportunity to limit their availability to part-time work when they are laid off.<sup>1</sup> However, this exception does not apply to individuals who previously worked full-time but due to changed circumstances need to restrict their availability. Examples of situations not covered by the past-history exception are women who worked full-time prior to having a child who would like to limit their search to part-time jobs upon reentering the labor market or full-time workers

---

<sup>1</sup>A number of states adopted past history exceptions under UI Modernization that was encouraged under the American Recovery and Reinvestment Act of 2009. Other states had previous versions of past history provisions. Any provision relating to part history availability is counted here.

---

who have a spouse or dependent who presents major caregiving obligation forcing them to leave work, but who wish to reenter the labor market on a part-time basis once that initial crisis has passed. In short, the past history exception is far from an answer to part-time availability limitations.

The remaining 21 states (listed in the third column of the table) require full-time availability. Full-time availability is imposed through a combination of statutory requirements, regulations and rules, and court decisions. In 2002, NELP determined that only 8 states had explicit full-time availability requirements in their state UI laws (Georgia, Indiana, Maine, Michigan, New Hampshire, New Mexico, Washington, and West Virginia) (McHugh, 2002: 4). The remaining restrictive states with statutory silence concerning full-time availability, administrative agencies and courts could, in theory, limit or abandon these requirements without legislative action.

**Question: What are the arguments against restrictive part-time availability requirements?**

**Answer:** There are good reasons why states should eliminate restrictive part-time availability requirements.

In terms of gender equity, restrictive part-time rules arose at a time when employers assumed that women workers were married and for that reason did not need health insurance, pensions, or other fringe benefits (Shaefer, 2009). Similar gendered assumptions; namely, that married women worked only to supplement family income and were less firmly attached to the labor market than men undergird concerns about part-time availability, pregnancy, and other special measure directed at female claimants (Haber and Murray, 1965: 271-276). Haber and Murray’s study of the issue rejected these concerns; reasoning that UI is an insurance program, is not paid on the basis of need, and is not dependent upon an individual’s reasons for working. They concluded their discussion by stating, “This means that women should continue to have equal rights to benefits.” (Id., p. 274).

In 1963, the President’s Commission on the Status of Women issued a comprehensive review of the political and social status of women in the U.S. In its analysis of social insurance it included this overview of the rationale for restrictions on UI eligibility directed against women:

[S]tatutory, administrative, and judicial limitations have, over the years, restricted the protection of women against loss of income that this program was originally intended to cover. The restrictive decisions seem to assume that all women are secondary workers, loosely attached to the job market, who work only to supply the household with extras. In this view, men are considered the primary workers, and concentrated attention is given to preventing women from drawing unemployment benefits on the ground that they work sporadically without seriously looking for continuous employment.

*(President’s Commission, 1963: 42.)*

Part-Time Availability 2015			
State	Part Time Availability Permitted or Permitted With Good Cause	Part Time Availability Permitted w/ Part Time Work History	Availability for Full Time Work Required
Alabama			●
Alaska			●
Arizona			●
Arkansas		●	
California	●		
Colorado		●	
Connecticut			●
Delaware	●		
Dist. of Columbia	●		
Florida	●		
Georgia		●	
Hawaii		●	
Idaho		●	
Illinois			●
Indiana			●
Iowa		●	
Kansas		●	
Kentucky			●
Louisiana	●		
Maine	●		
Maryland		●	
Massachusetts	●		
Michigan			●
Minnesota		●	
Mississippi			●
Missouri			●
Montana		●	
Nebraska		●	

<b>Part-Time Availability 2015</b>			
State	Part Time Availability Permitted or Permitted With Good Cause	Part Time Availability Permitted w/ Part Time Work History	Availability for Full Time Work Required
Nevada		●	
New Hampshire		●	
New Jersey		●	
New Mexico			●
New York		●	
North Carolina		●	
North Dakota			●
Ohio			●
Oklahoma		●	
Oregon			●
Pennsylvania	●		
Rhode Island	●		
South Carolina		●	
South Dakota		●	
Tennessee			●
Texas			●
Utah			●
Vermont		●	
Virginia			●
Washington			●
West Virginia			●
Wisconsin			●
Wyoming	●		
<b>TOTAL</b>	<b>10 states</b>	<b>20 states</b>	<b>21 states</b>

---

Although more than 50 years have passed since the President’s Commission report, its UI recommendation remains uncomfortably relevant today:

We believe that benefits should be afforded women on the same basis as men, with adoption of realistic measurements of attachment to the labor market which would prevent benefit payments to persons of either sex who seek work only sporadically. (Id., 43).

Additional equity concerns about special rules directed at part-time availability extend beyond their impact on part-time women workers. They include that part-time workers’ wages are subject to UI payroll taxes just as those of full-time workers, making restrictions upon their benefit receipt unfair. Their employers are paying premiums on their wages so denying UI raises a concern about equity for both part-time workers and their employers. This observation leads to another; that is, for every part-time worker there is a part-time employer who wishes to employ him or her on that basis. When the part-time worker becomes involuntarily unemployed, why should benefits be denied if they are payable under the same circumstances for full-time workers? Part-time workers are filling a need from employers in our economy and denying them benefits when laid off unduly punishes them simply for their part-time status. Next, since many part-time workers are disproportionately lower-income workers, part-time availability restrictions hurt workers who most need UI support for job searching and immediate household needs.

Rather than requiring full-time availability, a fairer policy is to consider all availability issues on an individual basis, and render those individuals who do not demonstrate available for a sufficient number of jobs ineligible while paying UI to those who do. Ten states employ this approach and that number should grow.

### **Resources:**

Bureau of Labor Statistics (BLS), “Charting the Labor Market: Data from the Current Population Survey,” (September 4, 2015a)(updated monthly), [http://www.bls.gov/web/empsit/cps\\_charts.pdf](http://www.bls.gov/web/empsit/cps_charts.pdf).

----- (BLS), “A Profile of the Working Poor, 2013,” Report 1055 (July 2015b), <http://www.bls.gov/opub/reports/cps/a-profile-of-the-working-poor-2013.pdf>.

Amy Chasanov, “Clarifying Conditions for Nonmonetary Eligibility in the Unemployment Insurance System,” U. Mich. J.L. Reform vol. 29, pp. 113-114,126-127 (1995-1996)

Margaret M. Dahm and Phyllis H. Fineshriber, “The Issue of Part-Time Employment,” National Commission on Unemployment Compensation, Studies and Research (Vol. I), p. 29 (1980), [http://workforsecurity.doleta.gov/dmstree/misc\\_papers/advisory/ncuc/uc\\_studies\\_and\\_research/ncuc-vol1.pdf](http://workforsecurity.doleta.gov/dmstree/misc_papers/advisory/ncuc/uc_studies_and_research/ncuc-vol1.pdf).

Government Accountability Office (GAO), “Unemployment Insurance: Low-Wage and Part-Time Workers Continue to Experience Low Rates of Receipt,” GAO-07-1147 (September 2007), <http://www.gao.gov/assets/270/266500.pdf>.

----- (GAO), “Unemployment Insurance: Role as Safety Net for Low-Wage Workers is Limited,” GAO-01-181 (December 29, 2000), <http://www.gao.gov/products/GAO-01-181>.

Rick McHugh, Nancy E. Segal, Jeffrey B. Wenger, “Laid Off and Left Out: Part Time Workers and Unemployment Insurance Eligibility,” Report, National Employment Law Project (2002), [http://nelp.3cdn.net/d25bef7d43091bea3a\\_3hm6i2tad.pdf](http://nelp.3cdn.net/d25bef7d43091bea3a_3hm6i2tad.pdf).

President’s Commission on the Status of Women, American Women: Report of the President’s Commission on the Status of Women, U.S. Superintendent of Documents (October 1963), <http://www.dol.gov/wb/American%20Women%20Report.pdf>.

- 
- H. Luke Shaefer, "Part-time workers: some key differences between primary and secondary earners," Monthly Labor Review (October 2009), <http://www.bls.gov/opub/mlr/2009/10/art1full.pdf>.
- Lee G. Williams, Eligibility for Benefits, Vanderbilt Law Review, vol. 8, pp. 286 at 294 (1955).
- U.S. Department of Labor, Office of Workforce Security, Comparison of State Unemployment Insurance Laws, Chapter 5, "Nonmonetary Eligibility," (July 2015), <http://workforcesecurity.doleta.gov/unemploy/pdf/uilawcompar/2015/nonmonetary.pdf>.

## Accommodating Compelling Family Circumstances

---

### **Question: What UI rules apply to individuals who must leave their jobs?**

**Answer:** All states have laws that disqualify individuals who leave work without good cause. Many non-UI experts assume that benefits are not available to individuals who quit their jobs. This is far from true. In fact, all state UI laws permit claimants to leave their jobs voluntarily with good cause as defined in state laws.

Good cause is defined as a compelling reason that would motivate a reasonable person to leave his or her job under similar circumstances. A majority of states have an additional limitation on good cause for leaving; they require that any valid cause for leaving work must involve reasons related to employment (usually by language limiting good cause to only those reasons “attributable to” employers, such as an employer-initiated change in work location or situations in which the employer requires workers to do something illegal). Non-work-related reasons are often called “personal reasons” for leaving in UI parlance.

The American Recovery and Reinvestment Act (ARRA) created incentives for states to adopt statutes allowing compelling family circumstances to count as good cause for leaving a job. This option was known as UI modernization. As a result, the concept of compelling family circumstances grew in popularity as several states adopted the three elements required to get federal incentives offered under the ARRA (Dixon, 2012). These elements were excusing quits due to reasons related to those leaving work due to consequences of domestic violence, individuals accompanying their spouses to new work locations, and people leaving work due to caregiving obligations (id.).

### **Question: What specific rules apply to individuals who leave work for compelling family circumstances?**

**Answer:** The table below shows the overall breakdown of states and their disqualification rules regarding quits. Only 9 states recognize all valid reasons as good cause for leaving a job. They do so by not limiting good cause under their UI laws to reasons related to work. These nine states (AK, CA, HI, NV, NY, OR, PA, RI UT) offer the best protection to individuals forced to leave work for the full range of compelling reasons. States can adopt this best practice by simply repealing this work-related language (usually the term “attributable to” the employer) in voluntary leaving disqualification provisions.

Four states (AZ, KS, MA, and UT) have special provisions that make compelling circumstances legitimate reasons for leaving in an emergency, but these laws do not offer the same broad protection as the nine states that recognize all valid reasons as good cause to leave work. Another 19 states recognize some compelling family circumstances as furnishing good cause for quitting a job, typically the 3 elements required for UI modernization (domestic violence, moving to accompany a spouse to a new job, and separating from work due to caregiving responsibilities).

In recent years, the number of states with specific “compelling family circumstances” exceptions grew, but even in these states there are other important personal reasons for good cause that fall outside the three specific circumstances listed in those states following UI modernization. The remaining 26 states retain the restrictive position that recognizes only work-related reasons as good cause for leaving work.

UI Rules on Good Cause for Quits				
State	All Valid Reasons for Good Cause Accepted to Work	Compelling Family Reasons Accepted	Other Favorable Family-Friendly Provisions	No Provision for Quits Unrelated
Alabama				●
Alaska	●	●		
Arizona			●	
Arkansas		●		
California	●	●		
Colorado		●		
Connecticut		●		
Delaware		●		
Dist. of Columbia		●		
Florida				●
Georgia				●
Hawaii	●	●		
Idaho				●
Illinois		●		
Indiana				●
Iowa				●
Kansas			●	
Kentucky				●
Louisiana				●
Maine		●		
Maryland				●
Massachusetts			●	
Michigan				●
Minnesota		●		
Mississippi				●
Missouri				●
Montana				●
Nebraska				●
Nevada	●			

UI Rules on Good Cause for Quits				
State	All Valid Reasons for Good Cause Accepted to Work	Compelling Family Reasons Accepted	Other Favorable Family-Friendly Provisions	No Provision for Quits Unrelated
New Hampshire		●		
New Jersey				●
New Mexico				●
New York	●	●		
North Carolina				●
North Dakota				●
Ohio				●
Oklahoma		●		
Oregon	●	●		
Pennsylvania	●			
Rhode Island	●	●		
South Carolina		●		
South Dakota				●
Tennessee				●
Texas				●
Utah	●		●	
Vermont				●
Virginia				●
Washington		●		
West Virginia				●
Wisconsin		●		
Wyoming				●
<b>Total</b>	<b>9</b>	<b>19</b>	<b>4</b>	<b>26</b>

---

**Question: What are the arguments for recognizing compelling family reasons for leaving work?**

**Answer:** UI good cause rules restricted to work-related reasons, both in their genesis and their evolution, give insufficient consideration to the needs of working families, and, in particular, the needs of women who are forced to leave work for personal reasons beyond their control. Increasingly, men also face these dilemmas as well. As a step toward gender equity and economic justice, states should expand the reasons recognized as good cause under their UI laws.

In addition to quits, workers are fired for missing work when they face family or other valid reasons for leaving work, potentially disqualifying them for misconduct discharges. To fully accommodate compelling family reasons, states can clarify that discharges for reasons outside the effective control of jobless claimants do not demonstrate willful or intentional conduct constituting misconduct.

Common “personal” reasons for leaving work frequently relate to family caregiving obligations, moving to accompany a spouse, or to escape domestic violence. When these choices are viewed as personal reasons in UI law, they fail the test of good cause in states that limit valid reasons for quitting to those related to employment. There is a definite gender-based impact in this approach as women report quitting for family-related reasons while men report leaving work for work-related reasons. This, in turn, results in higher rates of UI denial rates in states that restrict valid reasons for quitting to those related to work. (Smith, 2003).

For many decades, the conflicts between family obligations and UI rules have been subject to debate in legislatures and contested in court cases (Dahm, 1980). The emergence of feminism and its critique of the “male breadwinner” model underlying UI laws focused further attention on these issues (McHugh, 1994; Maranville, 1992). NELP reported early in the 2000s on this issue (NELP, 2003). Despite this sustained focus, there is still much room for progress for quits involving compelling family circumstances.

## **Resources**

- Elizabeth Ben-Ishai, Rick McHugh, and Claire McKenna, “Out of Sync: How Unemployment Insurance Rules Fail Workers with Volatile Job Schedules,” Report, National Employment Law Project and Center for Law and Social Policy (August 2015), <http://www.nelp.org/content/uploads/Out-of-Sync-Report.pdf>.
- Margaret M. Dahm & Phyllis H. Fineshriber, “Women in the Labor Force,” in National Commission on Unemployment Compensation, *Unemployment Compensation Studies & Research*, v. 3, p. 737 (1980), [http://www.ows.doleta.gov/dmstree/misc\\_papers/advisory/ncuc/uc\\_studies\\_and\\_research/ncuc-vol3.pdf](http://www.ows.doleta.gov/dmstree/misc_papers/advisory/ncuc/uc_studies_and_research/ncuc-vol3.pdf).
- Deborah Maranville, “Feminist Theory and Legal Practice: A Case Study on Unemployment Compensation Benefits and the Male Norm,” *Hastings Law Journal*, v. 43, p. 1081 (1992).
- Richard McHugh and Ingrid Kock, “Unemployment Insurance: Responding to the Expanding Role of Women in the Work Force,” *Clearinghouse Rev.*, v. 27, p. 1492 (April 1994).
- National Employment Law Project, *Between a Rock and a Hard Place: Confronting the Failure of State Unemployment Insurance Programs to Serve Women and Working Families*, Report (July 2003), [http://nelp.3cdn.net/ebba1e75e059fc749d\\_0um6idptk.pdf](http://nelp.3cdn.net/ebba1e75e059fc749d_0um6idptk.pdf).
- Rebecca Smith, Rick McHugh, and Andrew Stettner, “Unemployment Insurance and Voluntary Quits,” *Challenge*, v. 46 (May/June 2003), pp. 89-107.

# 1F

## Updating Partial Benefits to Encourage Work by Claimants and Fairness for Part-Time Workers

---

### **Question: What are partial UI benefits?**

**Answer:** Typically, workers receive unemployment insurance (UI) benefits to protect against hardship during periods of total unemployment and wage loss. However, all states permit workers to receive benefits during periods of partial unemployment, also known as underemployment. Generally, two categories of workers may be eligible for partial UI benefits: 1) employees who experience a significant, temporary reduction in their usual weekly hours and earnings with their regular employer because of a business slowdown; and 2) unemployed claimants who pick up intermittent part-time work with a new employer while they search for other work. State partial UI rules apply to both categories of workers, with some variations.

In general, state UI programs provide that otherwise eligible workers can claim partial benefits as long as they are working part time and earning less than a certain amount of wages each week. Individuals working full time cannot receive partial benefits, regardless of earnings. Weekly earnings limits vary significantly by state. Almost half of states require that weekly part-time earnings be less than the weekly benefit claimants would receive if totally unemployed. In roughly 27 states, the earnings threshold is greater than a worker's full benefit. The table at the end of this section provides a full listing of state partial UI rules.

### **Question: How do states calculate partial UI benefit amounts?**

**Answer:** To calculate partial weekly benefits, most states take the difference between the claimant's benefit for total unemployment and the value of weekly part-time earnings, after accounting for an *earnings disregard*. The purpose of a disregard is to hasten returns to work. In theory, a claimant is more likely to accept a part-time job if her UI benefit is not steeply offset by her earnings. Table 2 provides a summary of partial benefit rules in all states."

Earnings disregards also vary significantly by state. Most states disregard a certain percentage of the weekly benefit, while others allow a fixed (often low) dollar amount. Several other states define it as a share of part-time wages, while two others tie to minimum wages. The smaller the disregard, the greater the amount of wages that gets deducted from the full benefit (and vice versa). In many states, the disregard mirrors the value of permissible weekly part-time earnings in excess of the full benefit; while in others, the earnings threshold is capped at the full benefit (or slightly above), regardless of an earnings disregard.

Table 1 below shows how a claimant eligible for a full benefit of \$315 (roughly the current national average; or in Florida and Arizona, the maximum payments of \$275 and \$240, respectively), with weekly part-time earnings worth \$300, would fare in states with a range of partial UI rules. States are sorted according to their maximum benefit levels. Using Idaho as an example, a claimant eligible for a full weekly benefit of \$315 who earns \$300 for 20 hours of work meets the state's rule that claimants earn less than 1.5 times the full benefit (or \$473) working part time. The state disregards earnings worth half of the full benefit, which in this case is \$158. The remaining \$143 in earnings

is then deducted from the full \$315 benefit, leaving a partial benefit of \$173. The claimant takes home \$473 in total (a \$173 partial benefit plus \$300 in earnings). In states with outdated partial UI formulas (NY) or low maximum benefit levels (AZ, FL), the table shows that individuals with low earnings are nonetheless ineligible for partial UI.

**Table 1. How an average claimant earning \$300 fares in states with different partial UI rules**

State	Part-time earnings must be less than:	Earnings disregard	Amount full WBA reduced	Partial WBA	Total income	Total income/ full WBA
Connecticut	\$473	\$100	\$200	\$115	\$415	1.3
Vermont	\$630	\$150	\$150	\$165	\$465	1.5
New York*	\$425, < 4 days	\$0	\$315	\$0	\$300	1.0
Idaho	\$473	\$158	\$143	\$173	\$473	1.5
Florida	\$275	--	\$275	\$0	\$300	1.1
Arizona	\$240	--	\$240	\$0	\$300	1.3

\*Note: New York’s formula is based on “effective days” of any work; the table models four days of work

**Question: Which states have the strongest partial UI rules?**

**Answer:** By comparing the more generous and more restrictive states’ partial UI formulas in some detail, we can best illustrate how the partial benefit formulas summarized in Table 2 function. First, states with more generous partial UI rules will generally deem as partially unemployed anyone working less than full time, and earning less than at least 100 percent of his or her full benefit. For example, claimants in Montana and Vermont who earn less than twice the full weekly benefit are partially unemployed. The threshold in Connecticut, Delaware, and Idaho is 1.5 times the full weekly benefit, and in Arkansas and Pennsylvania, 1.4 times.

Second, these states generally disregard a percentage of part-time wages, rather than a flat dollar amount. This ensures benefits keep up with wage growth. For example, Idaho and Delaware disregard earnings worth 50 percent of a claimant’s full benefit, while Arkansas disregards 40 percent (meaning it deducts from the full benefit wages worth 60 percent of that amount). Vermont deducts just half of a claimant’s part-time earnings from the full benefit, while Connecticut deducts two-thirds.

In ranking partial UI formulas, a state’s maximum weekly benefit plays a key role. Since all states tie the maximum earnings threshold to the claimant’s full benefit, those with higher maximum benefits will have more eligible cases. Further, claimants in states with above-average maximums where the disregard is linked to the full benefit may earn relatively higher wages before seeing a deduction in benefits. NELP recommends statutes in Idaho and Connecticut when asked to provide good models for partial UI benefits. Links to these statutes are provided below under the Resources heading.

---

**Question: Which states have the most restrictive partial UI rules? What problems arise for claimants in these states?**

**Answer:** States with less generous partial benefits will generally cap part-time earnings at the claimant’s full weekly benefit. Claimants in states with this rule in place and that pay relatively low benefits are especially disadvantaged. Alabama, Arizona, Florida, Louisiana, Mississippi, and Tennessee all have maximums below \$300. This means that claimants with reasonable part-time earnings cannot receive any benefits at all, even though their total income may be significantly lower than it was before they first lost their job or experienced a work-hours reduction. This restrictive approach discourages claimants from taking interim jobs while claiming UI benefits. Fortunately, Alabama legislators approved legislation in May 2015 that raises the disregard from just \$15—then the second-lowest of all 53 UI jurisdictions—to part-time earnings worth one-third of the claimant’s full benefit, effective July 2015. The remaining states in this group also have among the weakest disregard formulas, usually preferring a flat dollar amount to a portion of wages. Arizona and Mississippi disregard \$30 and \$40, respectively. In spite of potentially high benefits for claimants with dependents, Maine caps earnings at the full benefit plus \$5 and disregards just \$25 of earnings. Michigan deducts a full week of benefit entitlement for each week of partial benefits.

States with low part-time earnings thresholds force claimants offered a part-time job paying more than what their state deems as partially unemployed to choose between accepting the job and earning a fraction more than their full UI benefit, or turning down the interim job. Similar issues emerge as a result of low or no disregards. Unemployed claimants anticipating a steep benefit cut, or its elimination, may elect to stay totally unemployed while they search for permanent full-time work, because the financial incentive to do so is outweighed by the risk of trying a new part-time job.

**Question: Why is it important for states have strong partial UI rules?**

**Answer:** The share of employed people working part time for economic reasons (because hours were reduced by their employer or they couldn’t find full-time work), exceeded 6 million individuals in August 2015. These individuals are referred to as underemployed or as involuntary part-time workers. While the number of underemployed people continues to decline from a peak during the Great Recession, it remains elevated compared to levels before the recession. Updating partial UI formulas can assist underemployed workers by increasing their overall income and extending their benefits.

When structured properly, partial UI benefits encourage claimants to work part time while they continue searching for a permanent, full-time replacement. If they accept work, claimants receive lower benefit payments in combination with their earnings. This reduces UI benefit payments. In addition, there is evidence from Norway that part-time employment by UI recipients serves as a bridge to full-time employment as well as reducing UI benefit payments (Godøy, 2014).

---

Strong partial UI rules also protect workers in low-wage sectors, like retail and restaurants, contending with volatile job schedules in the name of employer “flexibility.” Even if employees experience reduced hours, and low earnings as a result, strong partial benefits can provide continued spending on basic necessities throughout the period of instability. The movement to eliminate unfair scheduling practices is gaining momentum; but it will be a long time before workers, especially low-wage workers, can exert complete control over their job schedules. In the meantime, partial UI benefits are a potentially important source of economic security for part-time workers (Ben-Ishai, 2015).

**Resources:**

- Liz Ben-Ishai, Rick McHugh, Claire McKenna, “Out of Sync: How Unemployment Insurance Rules Fail Workers with Volatile Jobs Schedules,” Report, National Employment Law Project and Center for Law and Social Policy, Report (August 2015), <http://www.nelp.org/publication/out-of-sync-how-unemployment-insurance-rules-fail-workers-with-volatile-job-schedules/>.
- Connecticut Unemployment Compensation Act, Chp. 567, Sec. 229, <https://www.cga.ct.gov/2011/pub/chap567.htm#Sec31-229.htm>.
- Idaho Employment Security Law, Sec. 72-1312, <http://legislature.idaho.gov/idstat/Title72/T72CH13SECT72-1312.htm>.
- Anna Godøy and Knut Røed, “Unemployment Insurance and Underemployment,” Institute for Study of Labor (IZA) Discussion Paper No. 7913 (January 2014), <http://ftp.iza.org/dp7913.pdf>.
- NELP, New Alabama Unemployment Insurance Law Makes Part-time Work Pay, Blog, National Employment Law Project, <http://www.nelp.org/blog/new-alabama-unemployment-insurance-law-makes-work-pay/>.
- U.S. Department of Labor, “Chapter 3: Monetary Entitlement,” Comparison of State Unemployment Insurance Laws, 2015, <http://www.unemploymentinsurance.doleta.gov/unemploy/pdf/uilawcompar/2015/monetary.pdf>.
- U.S. Department of Labor, Significant Provisions of State Unemployment Insurance Laws, Effective July 2015, <http://www.unemploymentinsurance.doleta.gov/unemploy/content/sigpros/2010-2019/July2015.pdf>.

**Table 2. State Partial Unemployment Insurance Rules**

State	Earnings from week of less than full-time work must be less than:	Earnings Disregard Amount or Formula:
Alabama	WBA	1/3 WBA
Alaska	WBA*1-1/3+(\$50)	1/4 wages over \$50+(\$50)
Arizona	WBA	\$30
Arkansas	WBA*1.4	2/5 WBA
California	WBA+(Greater of \$25 or 1/3 WBA)	Greater of \$25 or 1/4 wages
Colorado	WBA (and less than 32 hours of work)	1/4 WBA
Connecticut	WBA*1.5	1/3 wages
Delaware	WBA+(Greater of \$10 or WBA*0.5)	Greater of \$10 or 1/2 WBA
District of Columbia	WBA*1.25+(\$20)	1/5 wages+(\$20)
Florida	WBA	8 times federal MW
Georgia	WBA+\$50	\$50
Hawaii	WBA	\$150
Idaho	WBA*1.5	1/2 WBA
Illinois	WBA	1/2 WBA
Indiana	WBA	Greater of \$3 or 1/5 WBA (from other than base period employer)
Iowa	WBA+\$15	1/4 WBA
Kansas	WBA	1/4 WBA
Kentucky	WBA*1.25	1/5 wages
Louisiana	WBA	Lesser of 1/2 WBA or \$50
Maine	WBA+\$5	\$25
Maryland	WBA	\$50
Massachusetts	WBA*1-1/3	1/3 WBA
Michigan	WBA*1.5	For each \$1 earned, WBA reduced by 50 cents (benefits and earnings cannot exceed 1.5 WBA). For every week of partial UI benefits claimed, total weeks of benefits payable are reduced by one full week.
Minnesota	WBA (and less than 32 hours of work)	1/2 wages
Mississippi	WBA+\$40	\$40
Missouri	WBA+(Greater of \$20 or WBA*0.2)	Greater of \$20 or 1/5 WBA
Montana	WBA*2	1/2 wages over 1/4 WBA
Nebraska	WBA	1/4 WBA
Nevada	WBA	1/4 wages

**Table 2. State Partial Unemployment Insurance Rules**

State	Earnings from week of less than full-time work must be less than:	Earnings Disregard Amount or Formula:
New Hampshire	WBA*1.3	3/10 WBA
New Jersey	WBA+(Greater of \$5 or WBA*0.2)	Greater of \$5 or 1/5 WBA
New Mexico	WBA	1/5 WBA
New York	Work occurring on less than four days in a week and/or paying less than \$425.	None. Any work on a single day reduces WBA by 25%.
North Carolina	Week of less than three customary scheduled full-time days	1/5 WBA
North Dakota	WBA	3/5 WBA
Ohio	WBA	1/5 WBA
Oklahoma	WBA+\$100	\$100
Oregon	WBA	Greater of 1/3 WBA or 10*state MW
Pennsylvania	WBA*1.3	Greater of \$6 or 3/10 WBA
Puerto Rico	WBA*1.5	WBA
Rhode Island	WBA	1/5 WBA
South Carolina	WBA	1/4 WBA
South Dakota	WBA	1/4 wages over \$25
Tennessee	WBA	Greater of \$50 or 1/4 WBA
Texas	WBA+(Greater of \$5 or WBA*0.25)	Greater of \$5 or 1/4 WBA
Utah	WBA	3/10 WBA
Vermont	WBA*2 (and less than 35 hours of work)	1/2 wages
Virgin Islands	WBA*1.5+(\$15)	1/4 wages over \$15
Virginia	WBA	\$50
Washington	WBA*1-1/3+(\$5)	1/4 wages over \$5
West Virginia	WBA+\$61	\$60
Wisconsin	\$500 (and less than 32 hours of work)	\$30+(1/3 wages over \$30)
Wyoming	WBA	1/2 WBA

Sources: U.S. Department of Labor, Comparison of State Unemployment Insurance Laws, 2015, Chapter 3, Monetary Entitlement, Tables 3-8, Partial Unemployment and Earnings Disregarded When Determining Weekly Benefit," available at <http://www.unemploymentinsurance.doleta.gov/unemploy/pdf/uilawcompar/2015/monetary.pdf>, and state workforce agency websites.

## Using Work Sharing to Prevent Layoffs

---

### **Question: What is work sharing?**

**Answer:** Work sharing, also known as short-time compensation, is a special UI program in which a UI payment (usually for 1 or 2 days) is used to partially compensate employees facing reduced hours of work imposed to avoid temporary layoffs. Under work sharing laws, participating employers submit a work sharing plan to their state UI agency explaining its proposed new work schedule. The plan affirms that using work sharing will avoid layoffs and that participating workers' fringe benefits will continue. Under a typical plan, workers take a day off each week and are paid a UI benefit for that day while receiving wages for their other 4 days of work. In this way, instead of 20 percent of the affected workforce being laid off entirely, every member of the affected workforce is laid off for one day. As a result of this work sharing arrangement, individuals receive a combination of wages and UI benefits that approximates up to 90 percent of their typical weekly take-home pay. If the layoff is two days a week, then workers would get two days of UI benefits and three days of wages with a somewhat higher wage loss.

Under work sharing, UI benefits are calculated for days off work using the same formula as used with weekly UI benefits—typically replacing 50 percent of lost wages up to the state's maximum weekly benefit. However, wages earned that week are not deducted as they would be under typical partial benefit formulas. As a result, UI benefits supplement wages for the group of workers while none of the workers suffer the impact of getting fully laid off (that is, at least a 50 percent wage reduction with loss of fringe benefits in some cases).

### **Question: What states have work sharing laws?**

**Answer:** There are currently 27 states (including DC) with work sharing laws on their books. While some of these laws were passed in the 1980s, recent Congressional action increased interest in work sharing. The Layoff Prevention Act of 2012 was passed as part for federal extensions legislation in February 2012. It encouraged states to adopt work sharing programs by providing \$100 million in federal cost sharing funds for states with conforming work sharing programs enacted by August 22, 2014. These federal funds can be used to pay for administrative start-up costs related to work sharing, outreach/marketing for new programs, and reimbursing trust funds for initial years of work sharing benefits. (USDOL, 2012).

Following implementation of this initiative, 22 states remain without work sharing programs (AK, AL, DE, GA, HI, ID, IN, KY, LA, MS, MT, NC, ND, NE, NM, NV, SC, SD, TN, UT, WV, WY). (Illinois passed a law near the 2014 deadline and it remains unclear whether the state will implement work sharing.)

### **Question: What are the main arguments for work sharing?**

**Answer:** Work sharing is a tool that can be used in the case of temporary layoffs to avoid full-blown layoffs of a portion of an affected workforce by using UI benefits to cushion the economic blow caused by having all workers in the affected unit work fewer hours.

---

It is totally voluntary; no employer is required to use work sharing as an alternative to traditional layoffs. Employers who have used work sharing report that the need to keep a skilled or experienced workforce intact is the main reason they wanted to avoid layoffs and chose work sharing. By using work sharing these employers found that they avoided costs of recruitment, hiring, and training of replacements for laid off workers finding jobs elsewhere.

**Question: What are the arguments made against work sharing?**

**Answer:** Opposition to work sharing has largely been conducted as a “whisper campaign,” in the sense that there is rarely open opposition to work sharing. To a great extent, recent opposition to work sharing was based upon misunderstandings about what the program is about and how work sharing is used by employers in states that have the program. Once those unfounded questions were addressed, most states moved forward. We suspect that some opponents simply oppose the spread of any element of UI programs that are helpful to employers.

**Question: What are the costs of work sharing to UI trust funds?**

**Answer:** Some critics have claimed that work sharing creates higher costs for UI trust funds. Since all benefits paid under work sharing are subject to the same experience rating mechanism as those applying to benefit payments to individuals who have been totally unemployed, the logic of this argument is less than self-evident. That is, the cost in benefit payments for laying each of 100 employees off for one day per week is roughly equal to the benefit cost of laying off 20 employees for a full week.) To date, there is no evidence that work sharing is more costly than layoffs, but there is likewise no evidence that the impact of work sharing on UI trust funds is identical to the costs of layoffs.

**Resources:**

- National Employment Law Project, “Work Sharing Website,” (accessed August 21, 2015), <http://www.nelp.org/page/content/WORK-SHARING/>.
- Neil Ridley and George Wentworth, “Seizing the Moment: A Guide to Adopting State Work Sharing Legislation after the Layoff Prevention Act of 2012,” Report, Center for Law and Social Policy and National Employment Law Project (December 2012), <http://www.nelp.org/content/uploads/2015/03/Seizing-Moment-Work-Sharing-State-Legislation-Guide.pdf>.
- Neil Ridley and George Wentworth, “A Breakthrough for Work Sharing Programs,” Factsheet, Center for Law and Social Policy and National Employment Law Project (April 2012), <http://www.nelp.org/content/uploads/2015/03/BreakthroughForWorkSharing.pdf>.
- U.S. Department of Labor, “Short-Time Compensation Provisions in the Middle Class Tax Relief and Job Creation Act of 2012,” Unemployment Insurance Program Letter No. 22-12 (June 18, 2012a), [http://wdr.doleta.gov/directives/corr\\_doc.cfm?DOCN=9382](http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=9382).
- \_\_\_\_\_, Unemployment Insurance Program Letter No. 22-12, Change 1 (Model Legislation) (December 21, 2012b), [http://wdr.doleta.gov/directives/corr\\_doc.cfm?DOCN=5754](http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5754).
- \_\_\_\_\_, “Short Time Compensation Website,” <http://stc.workforce3one.org/> (accessed August 18, 2015).
- George Wentworth, Claire McKenna, and Lynn Minick, “Lessons Learned: Maximizing the Potential of Work-Sharing,” Report, National Employment Law Project (October 2014), <http://www.nelp.org/content/uploads/2015/03/Lessons-Learned-Maximizing-Potential-Work-Sharing-in-US.pdf>.

# 2

## Protecting UI as Earned Benefits for Claimants

---

Those creating the UI program in the 1930s deliberately decided to tie payment of UI benefits to prior participation in the workforce and to involuntary unemployment. They consciously differentiated UI benefits from needs-based “relief” or “work relief.” They believed that this distinction would create higher levels of public support for UI programs and relieve stigma associated with need-based welfare programs of that era. As a result, the program’s founders made clear that UI benefits were paid as an earned right to jobless workers and not as a handout.

Perhaps the founders of UI should have saved themselves the trouble. In the 21st century a large proportion of the general public and public officials put UI benefits in the same boat as food assistance or “welfare.” Accepting any government safety net assistance is termed “dependence” by critics (although apparently corporate subsidies and tax loopholes do not create similar impacts on corporations and wealthy individuals). Without giving in to the opprobrium heaped upon programs assisting the poor—which are worthy of support and cost far less than most critics believe—defenders of UI programs must address the central questions about the vital role of UI in our labor market. In Chapter 2, we cover four major avenues being used to attack UI’s role as an earned benefit for involuntarily unemployed individuals: rote weekly work-search requirements, expanded disqualification penalties for misconduct, drug testing, and occupational exclusions for seasonal workers, especially employees of private contractors of public educational entities. We also discuss waiting weeks, a common feature that results in paying one fewer week of UI to all claimants who find work before drawing their last week of benefits.

In the current environment, too many public officials and editorial boards favoring limits on UI programs show clearly that they don’t accept that jobless workers have earned UI through their work prior to becoming involuntarily unemployed. These proposals are put forward as “helping” the unemployed, but they do not involve using greater public resources and proven tools to help jobless workers find scarce jobs. Instead, they focus on presumed flaws in the skills or work search efforts of jobless workers by proposing drug testing as well as strict job search or online registration requirements.

In response, we recommend that advocates focus on proven tools that states can use to improve reemployment opportunities as alternatives to flawed approaches that will largely keep claimants from getting UI as opposed to helping them find work. Recent reports by NELP and others offer real answers to helping individuals find reemployment as alternatives to less effective approaches like drug testing. A number of states use state resources to provide job matching assistance for UI claimants. These positive options are discussed along with the arguments against more restrictive proposals. Ultimately the federal government needs to step up and provide greater resources for reemployment services and UI administration if real world help is going to assist jobless workers find work. In the absence of positive measures we can expect the spread of barriers (in the guise of assistance) that will not improve outcomes, but will reduce access to UI.

---

**Resources:**

- Rebecca Dixon, “State of Disrepair,” Report, National Employment Law Project (November 2013), <http://www.nelp.org/page/-/UI/2013/NELP-Report-State-of-Disrepair-Federal-Neglect-Unemployment-Systems.pdf?nocdn=1>.
- Rick McHugh, George Wentworth and Claire McKenna, “Getting Real: Time to Invest in the Public Employment Service,” Report, National Employment Law Project (October 2012), [www.nelp.org/page/-/UI/2012/NELP-Report-Investing-Public-Reemployment-Services.pdf?nocdn=1](http://www.nelp.org/page/-/UI/2012/NELP-Report-Investing-Public-Reemployment-Services.pdf?nocdn=1).
- Claire McKenna, “The Job Ahead: Advancing Opportunity for Unemployed Workers,” National Employment Law Project, Report (February 2015), <http://www.nelp.org/page/-/UI/Report-The-Job-Ahead-Advancing-Opportunity-Unemployed-Workers.pdf?nocdn=1>.
- Stephen A. Woodbury, “Unemployment Insurance.” Upjohn Institute Working Paper 14-208, W.E. Upjohn Institute for Employment Research (2014), [http://research.upjohn.org/up\\_workingpapers/208](http://research.upjohn.org/up_workingpapers/208).

# 2A

## Assisting Claimants with Job Searches and Reemployment

---

### **Question: What are the general UI rules pertaining to work search?**

**Answer:** All states have work search requirements and suitable work definitions that are intended to ensure 1) that claimants remain attached to the labor market and 2) that claimants are not forced to accept substandard jobs by UI program requirements. (Related to these two requirements are the requirement that individuals are able and available for work to maintain UI eligibility discussed in [Chapter 1](#).) These related provisions are sometimes termed together as the *UI work test*.

Currently, two parallel developments in reemployment services are taking place at the federal and state levels; one primarily dealing with carrots and the other emphasizing sticks. At the federal level, federal grants are encouraging all states to implement Reemployment and Eligibility Assessments and Reemployment Services (REA/RES) program. The distinction between these two is that REAs are directed at ensuring that UC claimants are conducting job searches that meet UI eligibility requirements while RES helps participants with job-search counseling, assessments, testing, and referrals to job openings and/or training (Hobbie, 2015).

Clearly, the REA/RES formulation contains elements that use positive efforts to assist claimants linked with the possibility of UI benefit terminations. At the state level, Nebraska, North Carolina, and other states have moved toward higher numbers of required weekly “job contacts” combined with stricter documentation requirements. They have not chosen to provide broader positive RES services. In short, the enforcement of UI work test provisions can serve either as a carrot encouraging claimants to find work, or as a stick that primarily focuses on cutting individuals off benefits. Fortunately, there is good evidence that the carrot approach works. Unfortunately, there is trend toward using sticks without carrots in a growing number of states.

### **Question: What is “suitable work”?**

**Answer:** When a jobless worker is collecting unemployment insurance federal regulations provide that an individual may limit their availability to jobs that are considered suitable for the individual as defined by state law (20 CFR Sec. 604.5). While states have varied definitions of what is considered “suitable work”, their laws generally consider factors such as the risk to a worker’s health, safety, and morals; the individual’s education, prior training, and earnings; duration of unemployment and potential for obtaining work in one’s customary occupation; and commuting distance of available work. States generally apply an analysis of these factors to each individual worker’s case in determining if there is a refusal of work. If a claimant refuses a suitable job without good cause, a disqualification from UI is applied.

### **Question: Are there limits to how states may define suitable work rules?**

**Answer:** Yes. Federal UI law provides guidelines related to the kinds of jobs that workers can be made to accept as suitable. The Federal Unemployment Tax Act (FUTA) provides that states must consider labor market conditions and comply with certain labor

---

standards in designing their suitable work laws. During times of high unemployment when state UI trust funds are strained, there can be political pressure to reduce costs by re-defining suitable work laws to make them more restrictive. Section 3304 (a) (5) of FUTA limits the type of work an individual must accept when receiving unemployment compensation. It says in relevant part:

Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

- (A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;
- (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;
- (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

The second of these labor standards provisions, is known as the “prevailing conditions of work” standard. It was designed to ensure that the UI program does not undermine existing labor standards by exerting downward pressure on wages and other conditions of work. In other words, if unemployed workers were forced, through potential denial of benefits, to take work whose conditions were less favorable than what is generally available in the locality, this could easily lead to a race to the bottom in terms of wages, hours and other working conditions.

Some newer suitable work definitions definitely violate long-accepted understandings of the intent of the prevailing standards of work provision, but, to date, no court or administrative rulings have challenged any of the new work search requirements on state benefits.

**Question: What are the most common suitable work restrictions?**

**Answer:** The most common way that states make their suitable work laws more restrictive is by expanding the types of work that are considered suitable as the duration of a claimant’s unemployment increases. Most commonly, this is done by restricting consideration of suitability to a comparison of only wages and lowering the wage that would be considered suitable as weeks of unemployment pass. These revised wage comparisons can be based on the individual’s prior wage, their weekly benefit amount, or even the minimum wage.

As shown in the table below, state restrictions vary widely in their specificity and severity. For example, in Idaho, individuals are required to expand their work search beyond their customary occupation and accept a lower wage as their unemployment spell drags on, without the law detailing any week or wage parameters. On the other hand, Wyoming has one of the most severe restrictions in that it considers a job that pays

50 percent of a worker’s prior earnings as suitable work after only 4 weeks on unemployment. See below for more detail.

Table: Suitable Work Laws by Duration of Unemployment	
State	Duration of Unemployment Suitable Work Laws
Florida	After 25 weeks, suitable work is minimum wage and 120% of weekly benefit amount
Georgia	After 10 weeks, suitable work is minimum wage and 66% of high quarter earnings
Idaho	Individual is expected to expand search beyond customary occupation and accept a lower pay rate as unemployment weeks increase
Iowa	Suitable work 100% of high quarter wage for first 5 weeks, 75% for weeks 6 – 12, 70% for weeks 13 – 18, and 65% of high quarter wage after 18 weeks
Louisiana	Suitable work is 60% of highest wage during base period
Maine	After 12 weeks, prior wage is not considered for suitable work
Michigan	Suitable work is 70% of gross pay prior to unemployment; after 10 weeks > minimum wage, prevailing mean local wage, and 120% of weekly benefit amount
Mississippi	After 8 weeks, minimum wage or prevailing wage in customary occupation
Montana	After 13 weeks, suitable work is 75% of prior wage, but not less than minimum wage
North Carolina	After 10 weeks, any job paying 120% or more of weekly benefit amount
North Dakota	After 18 weeks, suitable work is equal to maximum weekly benefit amount
Tennessee	After 13 weeks, suitable work is 75% of prior wage; after between 26 to 38 weeks, is 70% of prior wage; after 38 weeks, is 55% of prior wage.
Utah	Work more likely to be considered suitable as the individual remains unemployed for a longer period of time and as prospects of securing local employment in his or her customary occupation diminish
Wyoming	After 4 weeks, suitable work is 50% of prior compensation

Source: USDOL Comparison (2015b) at pp. 5-33 to 5-34.

**Question: How do states enforce work search requirements for UI?**

**Answer:** At one time, some states did not have explicit work search requirements for regular state UI programs relying upon availability requirements for this element of the work test. However, job search is now a federal requirement for state UI laws and those few states that did not have an explicit job search requirement have been brought into line.

One development during and since the Great Recession is that many more states have adopted specific requirements for weekly job search contacts or activities. In the past,

---

most states required claimants to make a reasonable effort to find work and to affirm that when claiming UI. Now, many states have adopted an approach to work search that was first applied to extended benefits in the 80s; namely, that a claimant make a required number of job contacts each week. Some states accept other job search or reemployment activities, but several accept only job contacts with employers. Nebraska and North Carolina are requiring 5 weekly contacts, while North Dakota, South Carolina, Utah, and Wisconsin require 4 (USDOL, 2015b: Table 5-15).

**Question: What reasons are given for requiring stricter suitable work or job search requirements?**

**Answer:** Proponents of stricter suitable work laws and job search rules often believe that UI benefits are preventing workers from accepting available work. They contend that tightening these rules help workers to get back to work even if it means taking lower paying work. For this reason, these restrictions are touted as UI cost-saving measures.

**Question: What are the arguments against requiring strict suitable work laws and job search rules?**

**Answer:** Strict suitable work provisions go hand in hand with stricter job search rules to undermine the ability of UI to both mitigate the economic blow of involuntary unemployment and preserve the laid-off workers bargaining ability in the labor market. UI was designed to allow workers a reasonable period of time to find replacement work that supports their standard of living and utilizes their highest level of skill and education. There is little evidence that these sorts of rote employer job contact rules actually increase job finding in weak labor markets. These requirements do, however, permit states to kick non-compliant individuals off UI benefits.

For UI claimants who were previously employed in higher wage professions, the prevailing wage rate may be two to three times that worker's weekly benefit amount. Nationally, the average weekly UI benefit is just under \$300, while the average weekly wage is nearly \$900. By requiring a worker to accept work paying a fraction of their prior wage or risk disqualification, states indirectly depress labor standards and drive down wages for all workers. Indeed, a study in Great Britain of jobless workers before and after new work search requirements were introduced in 1996 found a negative impact on wages of those subjected to the tighter job search requirements while participating in the Jobseekers Allowance (JSA) program (a needs-based unemployment assistance program). The stricter requirements did succeed in reducing JSA benefits (Petrongolo, 2008).

**Question: What is the role of the Employment Service and local one-stop Job Centers in assisting jobseekers and employers?**

**Answer:** The public federal-state Employment Service (ES) was established in 1933, two years before the UI program was created under the Social Security Act. At its core ES is a

---

free, public labor exchange function in which trained ES counselors help jobseekers and employers fill information gaps. Additionally, the ES ensures that UI claimants maintain an active job search, and connects workers at greatest risk of exhausting benefits to reemployment services under the Worker Profiling and Reemployment Services program. In many states, UI claimants must register for work with ES to maintain UI eligibility. Supplementing the state ES staff, many staffers at Job Centers (one-stops), authorized under the Workforce Innovation and Opportunity Act, provide services to jobseekers as well. In summary, local one-stops, ES staff, and UI agencies are the public agencies that share responsibility both for enforcing the UI work test and facilitating reemployment of jobseekers in the U.S.

As seen earlier in this section, recent developments show renewed interest in both enforcing the UI work test and increasing reemployment services, but the mixture of sticks and carrots is left to states. A major priority for UI advocates in the coming years is developing policies that avoid excessive emphasis on the using sticks against claimants and jobseekers and instead ensure that proven tools for reemployment offer substantive assistance for these individuals.

**Question: What public services have proven effective in assisting claimants find work?**

**Answer:** Although official unemployment levels have fallen during the recovery, the current U.S. labor market features persistent levels of permanent layoffs and above-average long-term unemployment. Many older workers have left the labor market and many younger workers have failed to fully find a place in the labor market. These realities create a compelling need for updating and renewing our retraining and reemployment programs. Carrying out this renewal will help jobseekers as well as head off the spread of misguided measures that will further reduce UI reciprocity without providing concrete help to jobseekers.

Reemployment services for jobseekers can include skills assessments, assistance developing a job-search plan, provision of relevant labor market and occupational information, and referrals to training and job interviews. Services are generally delivered in one of three ways—self-service, facilitated self-help, and staff assisted (McHugh, 2012). Controlled evaluations dating back to the 1980s show that early provision of staff-assisted services in combination with claimant eligibility assessments can significantly shorten UI durations and reduce benefits charges for employers (Wandner, 2010: Chapter 5).

Louis Jacobson, a long-time analyst of reemployment programs, speaks of reemployment services as fulfilling the “honest broker” role, filling information gaps for both workers and employers (Jacobson, 2009: 5). Jacobson finds that “[T]here is overwhelming evidence that One-Stops positively affect the speed of returning to work without adversely affecting the quality of new jobs. . . .” (id.: 11 n.6). (See also the discussion of job finding and job matching in Chapter 4 for further details.) These older studies have been reaffirmed in more recent program evaluations focused on Nevada REA/RES programs that proved effective during the recession (Michaelides, 2013).

---

Employers are the other side of the reemployment equation. And, while Jacobson's observation is mainly focused on the needs of job seekers, labor economist Peter Cappelli finds that many employers, like job seekers, need accurate information and guidance in shaping a more realistic approach to filling job openings and finding employees with sought-out skills (Cappelli, 2012). A properly resourced Employment Service can provide such assistance to employers as well as jobseekers.

**Question: Doesn't contemporary job finding happen online and through social media?**

**Answer:** While some jobseekers do fine with online job finding tools, others need help finding suitable employment and can benefit from staff guidance in their job search and individual reemployment plans. Particularly for individuals who have been displaced after long periods of steady employment, searching for work in the current market may present unprecedented challenges. Many jobseekers confront information gaps about the job search process itself. For instance, they must know about open positions, the degree to which their skills and background match the requirements of openings, and how best to present themselves to prospective employers. Some jobseekers also lack computer literacy and Internet access. Some face language barriers. All of these individuals need staff-assisted reemployment services. Services delivered solely through self-directed or online methods cannot help these jobseekers and a public labor exchange should be a significant element in assisting them.

Employers frequently complain of difficulties filling job openings. A robust public employment service can match qualified workers with openings with those employers who are seeking job matching and candidate assessment tools. Again, online resources can facilitate some job matching for employers, but in many cases employers need personal help as well. Many small employers or individual business owners can run their businesses, but they do not know how to write a job posting, where to look for qualified workers, or how to assess applicants. They can choose temp firms or other private services, but a viable public ES should be an option for employers with job openings.

As a final point, in-person job counseling services can be more effective in checking unwarranted expectations about the realities of finding work, delivering motivation, and cushioning the blow of job losses for unemployed individuals. Video, online, and classroom methods simply cannot deliver effective messages to all jobseekers.

**Question: Why don't public reemployment services play a more prominent place in the U.S. labor market?**

**Answer:** Public job matching and reemployment tools have been seriously underfinanced since the early 1980s in the U.S. In the reemployment field, economists divide policies into two main categories; passive and active. UI benefits are known as *passive labor market policies* in that they do not directly impact job finding by claimants. Another examples of passive policy would be encouraging early retirement. In contrast, job search assistance, wage subsidies, and job training are termed *active labor market*

---

*policies* because they are focused is to increase employability of jobseekers (Nie, 2014: 36-41). In the U.S., the mix between active and passive labor market has shown a higher reliance upon passive policies, and overall lower spending on both sorts of policies (id.: 41-42).

In a 2012 report, the Organization for Economic Cooperation and Development (OECD) found that spending for active labor market programs in the U.S. is less than 0.2 percent of GDP, “far lower than the levels of up to 1% of GDP observed in many other OECD countries . . .” (OECD Survey, 2012: 62). While supporting the much-needed cushion provided by benefit extensions during the Great Recession, the OECD added that these “passive” forms of unemployment assistance would provide greater value if “offered in tandem with a more ‘active’ set of reemployment services that can connect job seekers with job opportunities, facilitate job search, and guide individuals towards training and education.”

Beyond lack of resources, the federal-state nature of UI agencies (along with ES) makes them political orphans. Neither Governors nor Presidents view reemployment services as trendy or current, and agencies are not really located fully within the responsibilities of either level of government. UI and reemployment services are rarely seen as priorities, especially when recessions are not taking place. In addition, since the early 80s an alternative structure—the one-stop Job Centers—that operate local job programs under the WIOA law—have a separate funding stream and separate governance.

**Question: How can states get resources needed to provide more effective forms of reemployment services?**

**Answer:** Lack of sufficient federal funding and limitations on uses of those funds have led at least 25 states to develop their own sources of reemployment services and workforce training funds through small state payroll taxes. A majority of these state resources are used for agency administration, reemployment services, or limited forms of training. Employers in these states have accepted state taxes for these activities because this added state funding addresses priorities set within each state without the restrictions that accompany federal UC and ES administrative dollars and Workforce Innovation and Opportunity Act (WIOA) funds.

A common way to implement these state taxes is to “piggyback” a small, state payroll tax on top of the existing state UC payroll tax. (The size and use of each of these piggyback taxes is discussed in the U.S. Department of Labor’s Comparison of State UC Laws at Table 2-17 of its financing chapter (2015a).) As a review of this table shows, at least 25 states use these supplemental state taxes to augment UI and/or ES administrative funding and most fall in the range of 0.1 to 0.2 percent of taxable payroll.

Richard Hobbie of the Heldrich Center and Yvette Chocolaad of NASWA (the state association of employment security agencies) calculated that states provided \$222 million in funding to augment federal administrative funds for UC and ES in fiscal year 2013 (Hobbie, 2015: 57). This is a considerable amount and shows that many states find these services significant enough to tax their own employers for funding reemployment services and UI administration.

---

In terms of using these state resources for providing RES services, Oregon is a state that has long used state resources to provide reemployment services focused on UC claimants. In program year 2012, Oregon referred 31% of its claimants to employment, not quite doubling the national average for claimant job referrals (17%). Other states currently using state resources for RES for UC claimants include DE, NV, NY, and RI. Additional states, including GA, WA, and WI use existing federal funds to provide RES focused on UC claimants.

### **Resources:**

- Peter Cappelli, *Why Good People Can't Get Jobs: The Skills Gap and What Companies Can Do About It*, MIT Press (2012).
- Rebecca Dixon, "State of Disrepair," Report, National Employment Law Project (November 2013), <http://www.nelp.org/page/-/UI/2013/NELP-Report-State-of-Disrepair-Federal-Neglect-Unemployment-Systems.pdf?nocdn=1>.
- Richard Hobbie and Yvette Chocolaad, "Reemploying Unemployment Insurance Claimants," Chapter 3 in Carl Van Horn, Tammy Edwards, Todd Greene, *Transforming U.S. Workforce Development Policies*, Upjohn Institute (2015).
- Jacobson, Louis. 2009. "Strengthening One-Stop career centers: Helping more unemployed workers find jobs and build skills." Discussion Paper 2009-01. Brookings Institution, Hamilton Project, [http://www.hamiltonproject.org/files/downloads\\_and\\_links/Strengthening\\_One-Stop\\_Career\\_Centers\\_Helping\\_More\\_Unemployed\\_Workers\\_Find\\_Jobs\\_and\\_Build\\_Skills.pdf](http://www.hamiltonproject.org/files/downloads_and_links/Strengthening_One-Stop_Career_Centers_Helping_More_Unemployed_Workers_Find_Jobs_and_Build_Skills.pdf).
- Rick McHugh, George Wentworth and Claire McKenna, "Getting Real: Time to Invest in the Public Employment Service," Report, National Employment Law Project (October 2012), [www.nelp.org/page/-/UI/2012/NELP-Report-Investing-Public-Reemployment-Services.pdf?nocdn=1](http://www.nelp.org/page/-/UI/2012/NELP-Report-Investing-Public-Reemployment-Services.pdf?nocdn=1).
- Marios Michaelides, "Are Reemployment Services Effective in Periods of High Unemployment? Experimental Evidence from the UI System," (April 2013), <http://www.sole-jole.org/13417.pdf> (updated and posted as University of Missouri Economics Working Paper with Peter Mueser, (July 2015), [https://economics.missouri.edu/working-papers/2015/wp1509\\_mueser.pdf](https://economics.missouri.edu/working-papers/2015/wp1509_mueser.pdf)).
- Jun Nie and Ethan Struby, "Would Active Labor Market Policies Help Combat High U.S. Unemployment?" Paper, Federal Reserve Bank of Kansas City (2011), <https://www.kansascityfed.org/publicat/econrev/pdf/11q3Nie-Struby.pdf>.
- Barbara Petrongolo, "Tackling long-term unemployment: the research evidence," Centre for Economic Performance, Article, CentrePiece (Winter 2013/14), [cep.lse.ac.uk/pubs/download/cp416.pdf](http://cep.lse.ac.uk/pubs/download/cp416.pdf).
- "The Long-Term Effects of Job Search Requirements," Centre for Economic Performance, London School of Economics (December 2007), <http://eprints.lse.ac.uk/3659/1/longtermeffectsofUI.pdf>, later published as "The long-term effects of job search requirements: Evidence from the UK JSA reform," *Journal of Public Economics*, vol. 93 (11–12), pp. 1234–1253 (2009).
- U.S. Department of Labor, *Comparison of State Unemployment Insurance Laws*, 2015, Chapter 2 "Financing" (2015a), <http://workforcesecurity.doleta.gov/unemploy/pdf/uiLawcompar/2015/financing.pdf>.
- U.S. Department of Labor, *Comparison of State Unemployment Insurance Laws*, 2015, Chapter 5 "Nonmonetary Eligibility" (2015b), <http://workforcesecurity.doleta.gov/unemploy/pdf/uiLawcompar/2015/nonmonetary.pdf>.
- U.S. Department of Labor, *Unemployment Insurance Program Letter No. 101, Principles Underlying the Suitable Work Disqualification*, (1945).
- U.S. Department of Labor, *Unemployment Compensation Program Letter No. 130, Principles Underlying the Prevailing Conditions of Work Standard*, (1947).
- U.S. Department of Labor, *Unemployment Insurance Program Letter 41-98* (1998), and *UIPL 41-98, Change 1* (2000).
- Stephen A. Wandner, *Solving the Reemployment Puzzle: From Research to Policy*, Upjohn Institute (2010), [http://research.upjohn.org/up\\_press/205/](http://research.upjohn.org/up_press/205/).

## Defining Misconduct Fairly

---

U.S. workers are virtually all “at will” employees. This means that they can be discharged by employers for any reason that is not otherwise prohibited by statute, contract, or public policy. In 2012, there were 2.7 million UI claims that included a determination involving a discharge. Payment of UI benefits to these discharged individuals is based upon the definition of “misconduct” applied in most states. In a minority of states, “just cause” or “willful misconduct” or similar words are employed in a state’s UI law applying to disqualifications for discharges.

### **Question: How do UI disqualification rules apply to discharged workers?**

**Answer:** At their core, the purpose of unemployment insurance involves compensating “involuntary unemployment,” and, for that reason, the focus in discharge cases is on voluntary unemployment defined as misconduct. When individuals are “at fault” for their unemployment—because their discharges arose from intentional or reckless conduct that was related to work—UI benefits are properly denied. In other words, most states recognize that while many discharged workers may have given employers a valid reason for firing them; they have not taken willful actions serious enough to justify treating them as voluntarily unemployed and denying them unemployment benefits.

The recognition of the importance of “willful” actions in establishing disqualifying misconduct was first articulated by the Wisconsin Supreme Court in the leading case of *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 259-260, 296 N.W. 636 (1941):

The term ‘misconduct’ \*\*\* is limited to conduct evincing such wilful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed ‘misconduct’ within the meaning of the statute.

In summary, those individuals protected by the *Boynton Cab* standard are those who are properly fired, but who nonetheless should be treated as “involuntarily” unemployed and not disqualified from UI.

### **Question: Why do some employer associations support broader definitions of misconduct?**

**Answer:** Many employers (and legislators) wrongly believe that if employers fire someone, then that individual should not get unemployment benefits. The employer’s right to discharge an employee is not, and should not be, determinative as to payment

---

of unemployment insurance benefits. Common areas of concern expressed by employer groups seeking broader definitions of misconduct involve payment of benefits following discharges for absenteeism, employer rule violations, and poor work performance. These are exactly the types of discharges that are not defined as misconduct under standards following *Boynton Cab*.

In 2013, there were a number of state legislative proposals seeking to expand the definition of misconduct in order to deny benefits to more individuals who have been fired. Indeed, Wyoming Governor Matthew Mead and Missouri Governor Jay Nixon both vetoed bills expanding the misconduct definition that passed legislatures in those states. Both vetoes were upheld. In addition, bills concerning discharges for conduct away from the worksite and denying benefits entirely in discharge cases have been considered in recent years. We expect further efforts to expand misconduct in future years.

**Question: What are the arguments against broader definitions of misconduct?**

**Answer:** In discharge cases, employers oppose payment of benefits in part because when discharged individuals later draw unemployment benefits, those benefits are charged to their former employers' experience rating accounts and result in higher UI payroll taxes. Despite higher employer costs, denying benefits to more of those among the ranks of the discharged would represent a significant departure from long-accepted practices in the administration of UI programs. Unemployment benefits are paid to accomplish many purposes that are broader than providing temporary income to jobless workers. More importantly, they are not paid as a penalty imposed upon employers. Unemployment benefits support continued purchasing of goods and services by jobless workers from other businesses. Denying benefits to those who do not commit misconduct as traditionally defined will only punish those workers while shifting the costs of their unemployment to their families, social service agencies, charities, and faith-based organizations.

Payment of unemployment benefits in discharge cases that involve involuntary unemployment complements—rather than undercuts—employers' power to discharge workers freely. As noted by law professors Michael Graetz and Jerry Mashaw in their 1999 book *True Security*, social insurance protections are “crucial to a society’s ability to structure economic risks in ways that are energizing rather than demoralizing,” and they “sustain and bolster a market economy.” In other words, employer power to discharge workers “at will” must be balanced by a reasonable safety net that pays unemployment benefits for those fired for reasons that fall short of intentional conduct that can be deemed equivalent to voluntary unemployment.

**Question: What limits exist upon states' ability to expand disqualifications for discharges beyond the Boynton Cab definition?**

**Answer:** While states have broad discretion in matters of eligibility and disqualification, there are some limits reflected in U.S. Department of Labor interpretations of UI law that can constrain states considering amending their misconduct definitions. First,

---

the Labor Department has long stated that the structure and design of the federal-state UI programs evince a limit preventing states from considering factors unrelated to the “fact or cause” of an individual’s unemployment, since the intent of UI is to pay UI benefits to those unemployed “through no fault of their own.” This interpretation means that states cannot deny unemployment benefits based upon wealth, for example, since the fact that an involuntarily unemployed individual doesn’t financially need UI is unrelated to the fact or cause of his or her unemployment.

In the realm of misconduct, USDOL advised Oklahoma in unpublished letters that expanding misconduct to include poor work performance was improper because it might lead to benefit denials where there was no showing that poor performance was due to willful intent on the part of the individual. The Labor Department, in turn, cited the *Boynton Cab* definition of misconduct as flowing from the distinction between discharges based upon the fault of the individual and those where there was no such fault and benefits cannot be denied.

Similarly, the Labor Department cautioned Tennessee not to define the failure of employees to obtain a license or certification as disqualifying misconduct. There are some cases in which the failure to get a license is potentially misconduct; namely where the employee fails to take an examination or submit documentation to the employer. However, in other cases, as when the employee fails the examination despite doing his or her best, no misconduct can be established.

Second, the Labor Department notes that Section 3304(a)(10) of FUTA mandates that a state UI law cannot deny benefits due to a cancellation of wage credits or total reduction of benefit rights, except in cases involving “discharge for misconduct connected with his (sic) work, fraud in connection with a claim for compensation, or receipt of disqualifying income . . . .” Again, unpublished letters say this language means that states may fully cancel benefit rights for reasons of misconduct and that misconduct must be for reasons connected with work. As a result, a proposed Missouri amendment denying benefits for any violation of an employer work rule was questioned because it required a misconduct finding in the absence of any showing that the rule was related to job performance or that claimant’s behavior was connected with work.

Finally, USDOL has frequently told states that they cannot effectively delegate the decision to grant or deny benefits to either the employer or an outside entity, but have an obligation to take factual input from the parties in a claim involving a contested separation from work (as in a quit or discharge) and make a prompt determination. An example of problematic proposals running afoul of this requirement include requiring a misconduct finding when an individual is arrested or convicted of a crime. Instead of relying upon the fact of conviction, UI agencies must investigate the facts surrounding the discharge and make an independent assessment of whether misconduct applies.

### **Resources:**

Saul Blaustein, *Unemployment Insurance in the United States: The First Half Century* (Upjohn Institute, 1993), p. 283-285.

*Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 296 N.W. 636 (1941).

## Limiting Drug Testing for UI

---

**Question: What are the current federal rules regarding states' authority to use drug testing for UI?**

**Answer:** The Middle Class Tax Relief and Job Creation Act of 2012 (Pub. L. 112-96) amended federal law to permit states to conduct drug testing as a condition of initial UI benefit eligibility in two circumstances: if the individual was discharged from employment for unlawful drug use, or if the only suitable work available to the individual is in an occupation that regularly conducts drug testing. States are permitted to deny benefits to individuals who test positive for drugs under these circumstances.

The U.S. Department of Labor was required by the 2012 law to define in regulations those occupations that conduct regular drug tests. The Department did so in proposed regulations issued October 2014. The occupations included jobs that require carrying a firearm, aviation flight crews, air traffic controllers, commercial drivers and railroad crews covered by the motor carrier safety administration or railroad administration, pipeline crew members, and commercial maritime crew members. In addition, occupations subject to drug testing under state law (as defined prior to October 2014) are properly subject to UI drug testing. Once these regulations are made final, then states can implement UI drug testing for occupations within these listings. Currently, three states (Mississippi, Texas, and Wisconsin) have UI drug testing laws that are based on this federal law.

**Question: What approaches have states taken to drug testing for UI?**

**Answer:** A number of states have seen bills that require every claimant to pass a drug test in order to qualify for benefits. This is prohibited by federal law because states may not restrict initial benefit eligibility based upon conditions unrelated to the “fact or cause” of a worker’s unemployment. (See the discussion of this limit on state authority in the prior section on misconduct.) In addition, there are likely constitutional limits on conditioning UI eligibility upon passing a drug test, as two federal courts of appeals have rejected similar efforts in the context of drug testing for welfare recipients.

States can pass legislation equating a failed or refused pre-employment drug screen with refusing suitable work. If prospective employers report this information to the state agency, it then provides a basis to disqualify claimants. At least six states (AZ, AR, IN, SC, TN, and WI) have passed these laws. To date, these provisions have not been widely utilized by employers, presumably because they fear repercussions from furnishing drug testing results to state agencies.

States can already restrict eligibility for workers whose job loss is related to drug use. A number of states impose misconduct penalties to claimants for failing a drug test and this option remains permissible. 20 states currently have provisions that classify discharges connected to drug use or a failed drug test as misconduct. It is important to note that the remaining states would also likely treat a drug-related discharge as disqualifying misconduct even though it is not explicitly referenced in their misconduct discharge statutes.

---

**Question: What limits apply to states that wish to move forward on broad UI drug testing?**

**Answer:** Implementing an overbroad UI drug testing program that exceeds federal authority would trigger costly penalties for a state and its employers. The Federal Unemployment Tax Act (FUTA) and the Social Security Act (SSA) establish the basic federal framework for the UI system including the consequences of state noncompliance. When state law meets minimum federal requirements, employers receive a 5.4 percent credit against the 6.0 percent federal payroll tax that is levied on covered employers on wages up to \$7,000 a year paid to an employee. In states that meet federal requirements, employers pay an effective federal tax rate of 0.6 percent, or a maximum \$42 per covered employee, per year. If a state does not comply with the FUTA standards, the Secretary of Labor is required to withhold approval of the state law for employer tax credit within that state. If a state were to enact and implement a noncompliant law to drug test UI claimants, it could result an increase in the federal payroll tax for employers of up to \$378 per covered employee, per year.

States are also entitled to federal grants to cover the necessary costs of administering the UI program. If a state does not meet the requirements of Title III of the SSA, it could result in denial by the Secretary of Labor of grants for costs of administration, which must also be withheld if the state law is not approved under FUTA.

**Question: Are there constitutional barriers to drug testing for UI claimants?**

**Answer:** Yes. Two federal courts of appeals have struck down drug testing laws that subjected welfare recipients to warrantless drug testing that was not based upon a reasonable suspicion that a specific individual was using illicit drugs. There is reason to think that similar rulings will result if suspicion-less drug testing is imposed upon UI applicants or recipients.

In response to these court decisions, proponents of broader drug testing of public assistance programs and UI have advocated screening tools that supposedly furnish a reasonable suspicion justifying testing of those who fail the screenings. Whether these screening options will address constitutional limits awaits their actual implementation and court tests of their constitutionality.

**Question: What reasons are given for drug testing of UI claimants?**

**Answer:** State lawmakers often claim this legislation is designed to deter drug use among the unemployed. They cite the prevalence of employer drug-free workplace policies and the use of a drug test as a pre-employment screening tool as evidence of the need for unemployed workers to be screened as a condition of receiving benefits. The other reason states have given is cost. They assume there will be significant savings from benefits that are not paid to workers who fail the tests.

---

Moreover, there is confusion about the UI policy options states already have available to them to address programs of drug abuse and employment readiness. As an illustration, in instances where a worker loses a job for a drug-related reason, states have long been free to disqualify that individual from UI benefits based on misconduct. Public Law 112-96, further gives states the authority to drug test these individuals for benefits. States also have many policy levers to identify individuals who may need drug treatment and do not need to use the UI program as a drug treatment program.

Some policy makers blamed workers for their record spells of long-term unemployment during the recent downturn. Drug testing was one of many mean-spirited proposals that aimed to do the wrong kind of problem-solving. Proponents have engaged in mean-spirited efforts to paint the unemployed as lazy drug abusers or addicts in need of treatment, but there is no reason to think that someone who was just working and is otherwise eligible for UI benefits deserves either of these characterizations. It is important to note that the unemployment insurance program is designed to assist workers who have lost their jobs involuntarily, generally for economic reasons. If policy makers are genuinely concerned with helping unemployed workers return to work they can work on providing more state funding for some of the options detailed earlier in this chapter in the section, [Assisting Claimants with Job Searches and Reemployment](#).

**Question: What are the arguments against drug testing UI claimants?**

**Answer:** The limited options available to states for drug testing do not bode well for the cost effectiveness or efficacy of such a program. States would need to use their strained UI administrative funds to run such a program. With such a small population to be tested, the cost of administering the program could easily outweigh any benefit. A member poll by the Society for Human Resource Management found that nearly 60 percent of employers perform pre-employment drug testing. Testing is expensive and it is redundant for states to take over this function from employers.

While addressing drug abuse and employment readiness is a laudable goal, these goals are outside purposes of the UI program. A worker's eligibility for UI benefits is underwritten by their work history and involuntary unemployment. There is no convincing evidence connecting involuntary job loss with drug use to justify singling jobless workers out for special scrutiny. In fact, Congress avoided potential constitutional concerns by limiting this law to a small population of workers who must submit to drug testing as a part their continued employment relationship. Legislators should use other evidence-based policy levers to assist workers with reemployment.

**Resources:**

Rebecca Dixon, "Drug Testing and Unemployment Insurance," Fact Sheet, National Employment Law Project (April 2015)(unpublished).

Middle Class Tax Relief and Job Creation Act of 2012, Public Law 112-96 (February 22, 2012).

U.S. Department of Labor, "Unemployment Compensation: The Federal-State Partnership," Office of Unemployment Insurance, Division of Legislation (April 2015), <http://workforcesecurity.doleta.gov/unemploy/pdf/partnership.pdf>.

---

U.S. Department of Labor, “Permissible Drug Testing of Certain Unemployment Compensation Applicants,” Unemployment Insurance Program Letter No. 1-15 (October 9, 2014), [http://workforcesecurity.doleta.gov/dmstree/uipl/uipl2k15/uipl\\_0115.pdf](http://workforcesecurity.doleta.gov/dmstree/uipl/uipl2k15/uipl_0115.pdf).

U.S. Department of Labor, “Decision of the Secretary of Labor in South Dakota Conformity Proceeding,” Unemployment Insurance Program Letter No. 787 (October 2, 1964), [http://workforcesecurity.doleta.gov/dmstree/uipl/uipl\\_pre75/uipl\\_787.htm](http://workforcesecurity.doleta.gov/dmstree/uipl/uipl_pre75/uipl_787.htm).

## Seasonal Work and Occupational Exclusions Overview

---

### **Question: Do all employees falling within UI coverage rules have UI protection?**

**Answer:** No. There are a wide variety of statutory rules that exclude employees from UI programs. For example, most states have special rules regarding students. Federal law mandates that states exclude many categories of immigrant workers from UI. Professional athletes are largely excluded, again a mandate of federal law. Insurance and real estate agents are excluded in many states. For our purposes, discussion in the Toolkit is focused on limitations that impact large numbers of lower-wage workers and that have been the subject of ongoing legislative and administrative discussion.

In this section of the Toolkit, we will first discuss special rules that apply to seasonal workers in some states. We next discuss special federal-state rules that impact public school employees. These are known as the “between and within terms” school denial rules. Next, we cover specific state UI rules that, in effect, have expanded school denial rules to cover employees of private-sector contractors in Indiana, Georgia, Michigan, and Wisconsin. Based upon recent legislative activity on these subjects, we anticipate that further proposals will arise in other states in the coming years.

### **Question: What is seasonal work?**

**Answer:** Seasonal work involves jobs that exist for a specific time period, usually defined by the impact of weather or underlying business conditions on the business. For example, ski resorts operate in the winter and agricultural work is concentrated in the warmer seasons in many states. Construction and retail employers often have seasonal employees as well.

Seasonality provisions in state UI laws vary. Despite calls for seasonal exclusions by some employers, most states have no specific statutes or regulations outside of what is mandated by federal unemployment insurance law. As a result, seasonal employees draw UI benefits on the same basis as other employees in most states.

### **Question: How do states with UI seasonal restrictions determine which employers are seasonal?**

**Answer:** The first step in developing a seasonality provision requires that states define “seasonal.” Currently states with seasonality provisions rely upon one, or a combination of the following factors:

- Industry, employer, or occupation type;
- Length of employer operating period;
- Types of worker.

Industries generally receive seasonal classification based on the length of operation as defined by state laws. Employees in seasonal industries receive the same designation by fact of employment in that industry. However, some states have additional requirements for both industries/employers and workers affected by seasonal classifications. In

---

some instances, employers must also verify that certain proportions of their workforce or payroll is reserved exclusively for a seasonal operating period. States may also require employees to earn specified amount of wages in seasonal work before drawing UI benefits during the designated seasonal period.

**Question: How many states have UI seasonal work laws?**

**Answer:** In 2015, 17 states (AZ, AR, CO, DE, IN, ME, MA, MI, MS, NM, NC, OH, PA, SC, SD, WV, WI) have seasonal work provisions. Tennessee has adopted a seasonal work provision that goes into effect in 2016.

Seasonality provisions remain an active area for proposed legislation. In 2011, 10 states introduced some type of seasonal work legislation. Most of the bills sought to implement a new law or amend an existing one. In Maryland, a bill was passed to formally study the issue. The one bill to successfully pass was in the state of South Carolina. That state passed legislation that makes it easier for employers, and their employees, to be classified as seasonal. Seasonal workers in South Carolina do not receive benefits during the off-season if there is a reasonable assurance of work at the beginning of the next season.

In most states with seasonal UI rules seasonal workers cannot draw UI benefits outside the “season” based upon wages earned during the season. Depending upon the specific work record of these individuals, this means they are not monetarily eligible for any benefits when laid off at the end of the season, or that they draw low weekly benefits based upon non-seasonal wages.

These seasonal work provisions vary greatly in terms of their definitions of seasonal work or occupations, their scope, and how they operate. Some are quite narrow. For example, New Mexico’s seasonal work provision only applies to ski area operators, while Mississippi’s excludes cotton ginning. On the opposite end of the scale, Ohio covers employers who operate up to 40 weeks a year, and South Dakota deems some employers seasonal so long as they operate for 7 months or less a year.

**Question: What is the basic argument about seasonal employment and UI?**

**Answer:** Because seasonal employment is not offered year round, seasonal workers typically experience unemployment during the “off season” period when their seasonal employers cannot offer them work. As a result, seasonal employers face higher unemployment insurance (UI) tax rates under “experience rating” mechanisms that raise UI payroll tax rates whenever former employees of a firm draw jobless benefits. However, because seasonal work by its nature is limited in duration (and states often have low taxable wage bases and modest maximum tax rates), seasonal employers’ payroll taxes do not fully compensate trust funds for UI benefits drawn by their employees. In effect, seasonal employers use off-season UI benefits to subsidize their limited labor utilization patterns. In response, some states have enacted seasonality provisions that limit seasonal workers’ ability to draw UI benefits during the off season.

---

Since the early days of UI, seasonal work has been a subject of debate. The overall number of states with seasonality provisions has declined over the decades. According to Saul Blaustein, author of a leading UI history, during the beginning years of UI programs as many as 33 states adopted special laws limiting benefits for workers laid off from seasonal work. Blaustein said that these seasonal work limitations were motivated by fears that UI benefits paid to seasonal workers would be a drain on state trust funds and concerns that seasonal employers would face unduly high tax rates under experience rating. By 1971, more than half the states that had experimented with seasonality provisions had abandoned them. The number dropped to only 13 states with seasonality provisions in 1990.

**Question: What are the main arguments in favor of UI seasonal work laws?**

**Answer:** Saul Blaustein reports that early seasonal work limitations were motivated by fears that UI benefits paid to seasonal workers would be a drain on state trust funds and concerns that seasonal employers would face unduly high tax rates under experience rating. Similar concerns motivate contemporary advocates of seasonality provisions. Experience rating produces two related objections to seasonal work from employers. First, seasonal employers complain of their higher UI payroll tax rates. Second, non-seasonal employers complain about the degree to which they bear social costs for seasonal benefits that are not recovered directly from seasonal employers. While initially plausible, neither rationale for restricting UI benefits for seasonal workers holds up under serious scrutiny.

The objections of seasonal employers to higher costs are based upon the false assumption that since they are not “at fault” for seasonal work patterns, they should not bear higher costs related to that pattern of seasonal layoffs. However, experience rating is not based upon a concept of employer fault. In fact, the central rationale for experience rating is higher tax rates for employers that have laid off employees due to economic conditions. Proponents of experience rating do not characterize employers forced to lay off employees as bearing “fault” for those layoffs. But, under experience rating their UI tax rates increase without respect to their fault. If states wish to address limitations of experience rating directly, rather than putting new burdens on seasonal employees, they can do so by raising taxable wage base levels and increasing low maximum tax rates.

Objections to seasonal workers getting UI benefits arising from non-seasonal employers concern the fact that no experience rating mechanism captures 100 percent of costs, including those originating from seasonal employment. And, in the case of seasonal employment, this cost shifting is often even more prevalent than with layoffs from other types of employment. But, the fact that some social costs are created as part of a social insurance program is not a compelling reason for denying UI benefits to seasonal workers. Seasonal workers are involuntarily unemployed when laid off at the end of a season, no less so than those laid off by employers for other economic reasons. And, for this reason, limiting their rights to UI benefits is bad policy.

---

Finally, it is worth noting that while the degree to which social costs are shifted to other employers is dictated by the experience rating mechanism created by each state law, 100 percent effective charging is neither practical nor desirable. Indeed, 100 percent experience rating would put some employers, both seasonal and non-seasonal, out of business. (For more details on [experience rating](#), see our discussion of this topic.)

**Question: What are the main arguments against seasonal work laws?**

**Answer:** Practical experience in the majority of states indicates that seasonality provisions are not necessary to deal with seasonal workers. Expert opinion agrees. The Advisory Council on Unemployment Compensation (ACUC, 1995), a Presidentially-appointed, bipartisan group that met from 1993 through 1995, studied state seasonality provisions. In its report, the ACUC recommended that states repeal seasonal work exclusions and subject seasonal employees “to the same eligibility requirement as all other unemployed workers.” (Page 18.) Saul Blaustein (1990) concludes his discussion of seasonal work with a similar recommendation as did Merrill Murray (1972). Weighing all these competing considerations, NELP believes that the best approach to state seasonality provisions is not having any specific seasonal work provisions.

In short, involuntary unemployment is what UI programs are primarily concerned with, and seasonal employment involves involuntary unemployment that should be compensated under UI programs. In some cases, employers are required to have seasonal employment patterns and they need to employ workers in those seasonal jobs. Limiting UI benefits to seasonal employees shifts too much of the burden of seasonal employment upon the employees, who are no more responsible for their seasonal unemployment than other laid off employees who are unquestionably eligible for UI benefits.

**Question: What are the special rules governing UI benefits for educational employees?**

**Answer:** Although federal law does not generally control state UI law on the overall question of covered employment, there are significant occupational exceptions mandated in federal law for educational employees. Federal law requires both coverage of public educational employees (K-12 as well as post-secondary employees) and the denial of UI benefits during customary vacations and breaks in the school calendar. This federal mandate results in special school denial rules in all state UI laws. In the UI field, these rules are known as the *between and within terms* denial provisions, or school denial rules.

The history and evolution of the school denial rules is key to understanding them. Prior to 1970, FUTA did not cover state and local government employees, including public education employees. Between 1970 and 1983, Congress passed a number of FUTA amendments that extended UI coverage to various public and nonprofit employees, including higher education and K-12 public school employees. As Congress extended FUTA’s reach, it also passed legislation that denied UI benefits to educational employees laid off during summer vacations or other customary school breaks. After

---

1976, these amendments gradually expanded the scope of school denial rules. These provisions are now codified as 26 U.S.C. § 3304(a)(6)(A).

The intent of the school denial rules is to deny UI benefits to educational employees who are unemployed during school vacations or breaks, but who have “reasonable assurance” that they will return to work as soon as school resumes. Initially, the rules applied to administrators and tenured teachers, many of whom were paid on a 12-month basis. However, Congress soon expanded the rules to cover non-professional public school employees for both higher education and K-12 employers, including educational service agencies. Ultimately, six clauses of Section 3304(a)(6)(A) were put in place.

As a practical matter, Congress’ motivation for passing the expanded school denial mandates was avoiding the expense of paying UI benefits to school employees during summer breaks. Since public educational entities are reimbursing employees, they are billed directly for any benefits paid to former employees. Although Congress wished to bring these employees within the scope of UI, at the same time it did not wish to saddle these employers with new obligations.

The main legal controversy regarding the application of the between and within terms denial rules involves the meaning of “reasonable assurance.” A considerable body of state case law has developed about meaning and application of the between and within terms school denial rules. This state case law is consistent with the U.S. Department of Labor’s broad interpretation of reasonable assurance and its longstanding resistance to state limitations on reasonable assurance. The Department’s broad interpretation of reasonable assurance has been reflected in many UI program letters through the years.

In 1992, Congress made certain clauses of the federal school denial rules optional for purposes of federal law. The 1992 changes mainly permit states to pay UI benefits to non-professional employees. They also give states some additional flexibility regarding denial periods and placing restrictions upon reasonable assurance requirements for employees subject to the optional denials (Labor Department, 1993). No state has acted to lift school denial rules for school employees covered by the denial rules since Congress gave them this option. This lack of action by states again most likely falls back on concerns by public educational entities about the costs of providing UI benefits to employees during school breaks.

As a result of these developments, educational occupations like school bus drivers, cafeteria workers, adjunct faculty, and classroom aides are denied UI during summer vacations and school breaks. These non-professional educational employees are usually not paid on a 12-month basis and they would work during school vacations if work was made available to them. Ideally, a distinction between employees paid on an annual basis who have tenure or another tangible assurance of reemployment should have benefits denied during summer breaks. However, non-professional employees who are paid monthly or hourly are without income and would work during school breaks if work was available. Denying benefits to these individuals is unjust and a cause of significant hardship. Other than outright repeal at a state level, which is politically unlikely, there is no good solution for these workers other than Congressional action.

---

A partial solution which remains within state discretion is paying retroactive claims for employees who are not hired the next school session despite receiving reasonable assurance. Retroactive payments are explicitly authorized by federal law, but much more could be done to ensure that affected employees know about these rules and that mechanisms for filing retroactive claims are easily accessible.

**Question: How are special seasonal work rules developed for public school employees laid off during summer vacations and school breaks getting applied to private sector employees?**

**Answer:** Because employees of private contractors providing services to K-12 and post-secondary educational institutions have private employers subject to UI payroll taxation, they should not be subject to special rules that apply only to school employees laid off during school breaks and vacations. By their own terms, the school denial rules only apply to public educational entities and non-profits providing services to public educational entities.

Starting in 2011, state-level efforts emerged to extend the “between and within terms denial rules” mandated by federal law from public school employees to private-sector employees who are working for firms who have contracted with schools to provide services (for example, cafeteria workers, school bus drivers, crossing guards, etc.). Since employees of these private firms have similar layoff patterns during breaks in the school year, advocates of more restrictive rules argue that the same school denial rules should apply.

Two approaches expanding school denials to private employers have become law. First, in Georgia, the legislature statutorily extended its school denial rules to employees of private contractors. The legislation, effective in 2015, amends Georgia’s school denial rules to include private employers contracting to provide services to educational entities. Georgia Code Sec. 34-8-196(b)(1)(B). Second, Indiana amended its definition of “unemployed,” which is a condition of eligibility, to exclude individuals on an “unpaid vacation,” an Orwellian concept. Instead, if employees are out of work because of a vacation period and have a reasonable assurance of returning to work, they are deemed “not unemployed.” Indiana Code Sec. 22-4-3-5. These amendments took place in 2011 and 2012. In addition to these provisions, Wisconsin and Michigan have specific amendments applying to private school bus contractors.

**Question: What are the arguments against extending school denial rules to employees of private contractors?**

**Answer:** Extending school denial rules to non-public employees ignores the fact that the mandated school denial rules were designed for public and nonprofit agencies—who do not pay UI payroll taxes, but instead reimburse trust funds directly for any benefits paid to their employees. In addition, these rules were developed in reaction to teachers and others with an assurance or reemployment drawing UI benefits during summer school vacations. For this reason, school denial rules have no proper applicability to

---

for-profit, non-educational employers whose employees are subject to experience-rated taxes and whose employees are typically “at will” employees.

School contractor employees generally work as much as 39 weeks a year, and to advocate special seasonal treatment for these involuntarily jobless workers goes well beyond the normal scope of seasonal work provisions. Their wages are subject to UI payroll taxes, and, since employers have paid premiums on those wages, they should be insured when laid off.

**Resources:**

Advisory Council on Unemployment Compensation, Unemployment Insurance in the United States: Benefits, Financing, Coverage (February 1995), [http://workforcesecurity.doleta.gov/dmstree/misc\\_papers/advisory/acuc/February\\_1995/adv\\_council\\_0295.pdf](http://workforcesecurity.doleta.gov/dmstree/misc_papers/advisory/acuc/February_1995/adv_council_0295.pdf).

Saul Blaustein, Unemployment Insurance in the United States: The First Half Century. (Upjohn Institute (1993).

Merrill G. Murray, The Treatment of Seasonal Unemployment Under Unemployment Insurance (Upjohn Institute, 1972).

U.S. Department of Labor, “Optional Between and Within Terms Denial Provisions of Section 3304(a)(6)(A) of the Federal Unemployment Tax Act,” Unemployment Insurance Program Letter No. 43-93, (April 23, 1993), [http://workforcesecurity.doleta.gov/dmstree/uipl/uipl93/uipl\\_4393.htm](http://workforcesecurity.doleta.gov/dmstree/uipl/uipl93/uipl_4393.htm).

## Avoiding Waiting Weeks

---

### **Question: What is a “waiting week” in state unemployment insurance laws?**

**Answer:** The “waiting period” or “waiting week” is a common feature of unemployment insurance (UI) laws. A waiting week occurs during the first week of a new spell of unemployment when a jobless worker satisfies all the requirements for eligibility, but does not receive any benefit payment for his/her first week of unemployment. As a result, unemployed workers that exhaust UI benefits draw their last payment (often the 26th and final payment) in their 27th week of unemployment in states with a waiting week. Claimants who do not exhaust benefits (varying in duration, but usually 26 weeks) are effectively denied one week of benefits in states with waiting weeks. This reduces benefit payment costs.

For the 12 months ending in August 2015, 60 percent of benefit recipients found work prior to exhausting benefits. In states with a waiting week this is tantamount to reducing 60 percent of claimants’ UI benefits by one week. The average duration of a UI claim in 2015 was 15.8 weeks.

### **Question: How many states have waiting weeks?**

**Answer:** Eight states had no waiting week in 2015, meaning that 43 states have waiting weeks (USDOL, 2015: Table 3-7). All but one of the remaining states have a waiting period of one week’s duration. North Carolina has an initial waiting week, but also imposes an additional waiting week each time a claimant reactivates a claim following new employment within a benefit year. In a few states, if a worker remains out of work past some specified number of weeks, the week of benefits withheld during the waiting week is paid.

### **Question: What reasons are given for having waiting weeks?**

**Answer:** The main argument for waiting weeks is as a means of reducing costs of UI programs. Those supporting waiting weeks typically point out that workers get a paycheck in the week following their layoffs and can better afford a week without income at that stage in their period of unemployment. Another argument is administrative convenience. In the early days of unemployment insurance, there was concern that paying benefits for longer durations would not be affordable, so waiting periods of two, and even four weeks, were found in state UI laws. In addition, it was not possible to pay claims rapidly in the early days of UI programs, so the delay was administratively necessary.

By the 1960s, no state had a waiting period over one week in length and a few states had no waiting week. As prompt claims payment became more important and states became better equipped through automation to issue monetary determinations more expeditiously, more states repealed waiting weeks. By 1980, a majority of states did not have waiting weeks.

Congress passed an amendment to the federal-state Extended Benefits law in 1980. At that time, states without waiting weeks became financially responsible for paying 100

---

percent (rather than 50 percent as usual) of the first week of Extended Benefits. In the next year, 16 states adopted a waiting week. Since the early 1980s, there has been limited legislative activity on waiting weeks. Wisconsin added a waiting week in 2011. Vermont and Delaware added waiting weeks in recent years, but both are scheduled to sunset in 2017.

**Question: What are the arguments against waiting weeks?**

**Answer:** Waiting weeks have outlived their intended purposes. Waiting weeks were originally adopted primarily because states required a delay at the start of a new claim during which agencies processed UI claims manually to determine the wages needed to calculate a benefit rate. There is no continued vitality to this rationale. All states, have wage information available electronically and it is administratively feasible to timely pay UI benefits for the first week of unemployment.

Most individuals working for a living do not have sufficient savings to sustain their families' spending for essential goods and services in the event of job loss. It runs counter to the purpose of the program to start every worker's bout of unemployment by destabilizing their family finances. The purpose of UI is to provide prompt replacement of lost wages, not to drive jobless workers deeper into financial crisis. While waiting weeks may generate substantial savings to a UI trust fund, jobless workers get no waiting week on their rent payments, mortgages or utility bills. Jobless individuals and their families already wait 21 days or more to get their first UI check with an uncontested claim.

Most state UI programs replace only half of worker's pre-layoff wages at most, with workers who receive maximum weekly benefits getting even lower wage replacement. As a result, weekly benefits replaced on average less than one third of pre-layoff wages for US workers. Therefore, asking families to suffer the additional burden of losing even that meager level of income replacement for an additional week is a recipe for hardship in many cases.

The public policy underlying UI programs is to boost the economy by maintaining consumer spending during layoffs. Reducing benefits by one week for all workers who do not exhaust benefits means that more than half of the individuals who drew unemployment benefits lost one week of benefits.

Finally, the argument that states without a waiting week must fully finance the first week of Extended Benefits (EB) has also lost its vitality since 1980. The EB program has been largely ineffective since the 1980 changes because the economic thresholds to trigger benefits have been set too high. As a result, EB seldom triggers on and the vast majority of extension benefits during recessions have been paid from special programs enacted by Congress and have been fully federally funded. In short, the financing advantage promised to states with waiting weeks has seldom come into play in the 35 years since it was enacted.

**Resource:**

U.S. Department of Labor, Comparison of State Unemployment Insurance Laws, Chapter 3 "Monetary Eligibility" (2015), <http://workforcesecurity.doleta.gov/unemploy/pdf/uilawcompar/2015/monetary.pdf>.

# 3

## Understanding UI Financing, Business Climate, and Employee Coverage Issues

---

For better or for worse, UI contains several areas of legal and policy complexity. Advocates frequently find that they must become instant experts as technical UI issues arise out of the blue in states. This chapter covers a number of issues that arise as a direct result of a proposed change in UI taxes, or indirectly when a proposed change makes underlying knowledge of UI financial issues essential for engaging on a related issue. Unfortunately, the severe financial strain put on state UI trust funds during the Great Recession and its aftermath have made greater understanding of UI financing and payroll taxation issues explained here relevant to many UI benefit discussions. We also include helpful information for use in recurring business climate debates surrounding UI programs.

In addition, recent years have seen state legislative activity in somewhat arcane areas like statutory definitions for covered employees and measures that exclude groups of employees from UI eligibility. Chapter 3 of the Toolkit furnishes readers with a technical but accessible overview of these issues.

### Resources:

Saul Blaustein, *Unemployment Insurance in the United States: The First Half Century*. Upjohn Institute 1993).

William Haber and Merrill G. Murray, *Unemployment Insurance in the American Economy*. (Richard D. Irwin, Inc. 1966).

Stephen A. Woodbury, "Unemployment Insurance." Upjohn Institute Working Paper 14-208, W.E. Upjohn Institute for Employment Research (2014), [http://research.upjohn.org/up\\_workingpapers/208](http://research.upjohn.org/up_workingpapers/208).

# 3A

## UI Financing Basics

---

### **Question: How are regular state UI benefits financed?**

**Answer:** Benefits for employees of private employers are paid for by state UI payroll taxes. UI payroll taxes are not imposed on all wages. The portion subject to taxation is referred to as the “taxable wage base.” During 2015, state taxable wage bases ranged from \$7,000 (the federal minimum for states) to \$42,100. Seventeen states have taxable wage bases over \$20,000 (USDOL, 2015b.). All states have maximum and minimum UI tax rates. In 2015, minimum tax rates ranged from zero or near zero, to 2.8 percent of taxable wages. Maximum UI tax rates ranged from 10.89 percent of taxable wages to 5.4 percent (the lowest maximum state rate permitted under federal law) (USDOL, 2015c).

For historical and constitutional reasons, state and local governments and non-profits do not pay UI taxes. Instead, they are billed by state agencies on a quarterly basis for any UI benefits paid to their former employees. For this reason, they are known as “reimbursable employers.” In addition, three states (Alaska, New Jersey, and Pennsylvania) have small employee contributions that finance their UI programs. (Further details below.)

Regardless of their source, all forms of state UI contributions are required by federal law to be deposited in an account maintained for each state within the U.S. Treasury. States then draw down those deposits for the payment of UI benefits. Under this mechanism, UI financing is kept separate from state budget and tax policy disputes. The federal government pays interest on trust fund balances. In the event a state trust fund is insolvent, states can draw federal trust fund loans which they repay with interest. In recent years, several states have borrowed at lower interest rates in the bond market to repay federal UI debts.

### **Question: Is there a federal UI payroll tax?**

**Answer:** There is a separate federal tax (called the Federal Unemployment Tax Act, or FUTA) that is paid annually to the Internal Revenue Service on a taxable wage base of \$7,000 by taxable employers. The current FUTA rate is 0.6 percent, or \$42 per covered employee earning \$7,000 or more in a calendar year. This small tax generates a few billion dollars, which is used to provide administrative funding to state UI agencies and the UI activities of the U.S. Department of Labor, and to build up funds for future federal benefit extensions. The FUTA tax does not finance regular state UI benefits. In addition, reimbursable employers do not pay the FUTA tax.

### **Question: Why is UI financing important to workers and advocates?**

**Answer:** There is clear evidence that trust fund reserves protect UI benefits from attack by avoiding solvency crises, which triggered many negative changes in state UI programs since 2011. Advance funding of UI is much more important to jobless workers than generally believed in terms of the long-term viability and adequacy of UI programs. And, this belief has been reinforced by events in recent years where the worst state benefit cuts took place in states that had trust funds that were unprepared for the recession.

---

There is also clear evidence that states can prepare for recession by building trust fund reserves. In 2012, NELP published a new analysis confirming that states can avoid the worst impacts of trust fund insolvency by accumulating adequate trust fund reserves prior to recessions (Evangelist, 2012).

**Question: How is UI trust fund solvency assessed?**

**Answer:** “Solvency” concerns the assessment of a state’s accumulated trust fund reserves. The assessment of solvency is a combination of objective factors, risk evaluation, and value judgments. While somewhat obscure and technical, solvency is important in determining the overall health of UI programs. Less solvent states have incentives to adopt less generous benefits and more restrictive UI program eligibility. When faced with financial challenges during a recession, less solvent states are more likely to be tempted to restrict their UI programs in conjunction with any tax increases they are forced to impose on their employers. For these reasons, adequate UI trust fund solvency is a significant issue for protecting the interests of unemployed workers and the health of UI programs.

The Average High Cost Multiple (AHCM) was adopted in 1995 as a measure of UI solvency by the Advisory Council on Unemployment Compensation, a federal advisory panel. In essence, AHCMs compare the size of a state’s UI trust fund with past benefit payments—which represent the actuarial risk faced in future recessions. A state’s AHCM is calculated as the average of the three most recent high cost calendar years that include either three recessions or at least 20 years’ of benefit payment history. An AHCM of at least 1.0 was recommended by the Advisory Council. The AHCM figure can be translated into a time period that a state’s UI trust fund will cover its benefit costs without relying upon current revenue. For example, an AHCM of 1.0 means a trust fund has one year of reserves to cover its average highest benefit costs. An AHCM of 0.3 would translate to 4 months of reserves.

The U.S. Department of Labor publishes a helpful annual report, called Significant Measures of State UI Tax Systems that calculates an “adequate financing rate” for each state. The adequate financing rate is a concrete way to translate the 1.0 AHCM standard of solvency to a state’s tax effort, and shows how much higher taxes must be to reach solvency in five years. The adequate financing rate is calculated by comparing the past 10 years of benefits costs in terms of total wages and comparing those to the level of taxation required for each state’s trust fund to reach an AHCM of 1.0 within five years. (Details of the adequate financing rate calculation are found in the report’s Definitions section.)

**Question: What is experience rating of UI payroll taxes?**

**Answer:** Experience rating is a process through which UI payroll tax rates on contributing employers are adjusted in relation to layoffs of individual firms’ employees or former employees. In other words, as UI benefit payments to a firm’s laid off employees rise, tax rates on the firm are increased in subsequent years. Conversely, in the absence of

---

UI benefit payments, UI payroll tax rates on employers fall. Thus, based upon the firm’s “experience” with unemployment, its tax rate is more or less determined between the limits set by minimum and maximum rates in state UI law. (In addition to individual firms’ experience rates, many states adjust UI payroll taxes according to other factors, including the overall health of trust fund reserves.)

The U.S. is the only nation with an advanced economy to use experience rating to finance UI (Vroman, 2012: 7-8). All states have adopted experience rating in order to meet federal requirements providing a FUTA tax credit for employers whose wages are subject to a state UI experience-rated tax. While all states have UI experience rating in order to satisfy this requirement, there is considerable variation in how states implement it. First, states vary according to the portion of wages subject to UI taxes (known as a taxable wage base), their minimum and maximum UI tax rates, how fast their tax rates adjust within the resulting range of rates (usually from three to five years), and the experience rating formula used. Second, the mix of these state policies impacts the degree to which a state’s experience rating method “effectively charges” benefit costs to a particular firm and recovers those costs for its trust fund.

In the real world, “perfect” or “complete” experience rating—where every benefit dollar is collected from the specific employer involved—is not possible. Nor is perfect experience rating desirable. The simplest explanation for this is that some firms with high experience would be hurt competitively by UI taxes if they were required to bear the full costs of UI benefits paid to former employees. On the other end of the experience rating scale, since all employers have employees insured by UI programs, all employers should pay some minimum UI tax (in effect, an insurance premium) to reflect the social benefits of UI programs to each firm, their employees, and the overall economy. For this reason, zero or near-zero minimum tax rates are bad policy.

In sum, with respect to experience rating, a reasonable goal is to determine the mix of tax policies that a state’s policymakers and interest groups find acceptable in order to finance its UI program. An unreasonable goal is to try to keep adjusting UI taxes in a futile effort to reach complete or perfect experience rating or to avoid upward tax adjustments required to properly finance UI programs.

**Question: What is an “indexed” taxable wage base?**

**Answer:** Seventeen states automatically adjust their taxable wage bases with growth in state wages, a practice called “indexing” (USDOL, 2015a). Having a higher taxable wage base and indexing that tax base are two important policies that have contributed significantly to states’ UI trust funds remaining solvent over the years. In addition, having a higher taxable wage base permits more effective charging under experience rating, something that many employers and economists claim is a worthwhile policy, but often oppose in practice by arguing for lower rates and lower taxable wage bases.

Indexing or raising a state’s taxable wage base is the single most important UI financing step that a state can take to move toward responsible UI financing. In some states with low taxable wage bases, less than one third of total wages are even subject to UI taxes. This makes it virtually impossible for UI experience rating mechanisms to adjust

---

to higher benefit payments, meaning that UI trust funds do not rebuild during economic recovery periods in time for the next recession.

**Question: What is the role of employee contributions in UI financing?**

**Answer:** In the U.S., states have always had the option of imposing UI employee payroll taxes, but very few have done so. Currently, three states (Alaska, New Jersey, and Pennsylvania) have state employee contributions for UI financing. In Alaska and New Jersey, the employee UI tax is imposed on each state’s UI taxable wage base (in 2014, Alaska, \$37,400; New Jersey, \$31,500). In Alaska, the employee tax rate is set at 27 percent of the average benefit cost rate imposed on employers, and falls between 0.5 percent and 1.0 percent (or a maximum \$37.40 per employee a year). In New Jersey, the employee tax for UI is currently 0.3825 percent (or \$120.50 a year for an employee earning \$31,500 or more), and is a smaller component of a larger combined employee tax that funds workers’ compensation and Temporary Disability Insurance in addition to UI benefits. In recent years, employee contributions have provided about 20 percent of UI trust fund revenues in New Jersey. In Pennsylvania, the last state to adopt UI employee contributions in the 1980s, the contribution is imposed on total wages and ranges from zero to 0.08 percent, depending upon the solvency of the state’s trust fund. The employee rate for 2014 in Pennsylvania was 0.07 percent, or \$31.50 for an employee earning average wages of \$45,000.

**Question: What are the arguments for employee contributions for UI benefits?**

**Answer:** There is general agreement that a significant portion of any employer portion of payroll taxes effectively fall on employees in the form of lower wages (Fullerton, 2002: 1), although economists debate the exact degree to which this happens. Despite this economic reality, under the current U.S. UI funding mechanism, employers largely rule politically simply because they write the checks for state UI taxes. And, in the eyes of employers and legislators, employers “own” the UI program. Paying a portion of the UI payroll taxes directly will make employees partial owners of the UI program, which would be an advance over the current political climate around UI issues. In addition, the burden of paying part of the costs of UI benefits is more easily shared among all working employees, rather than the smaller group of jobless workers who “pay” by suffering from low benefits or cuts in duration.

---

## Resources:

- Advisory Council on Unemployment Compensation, Unemployment Insurance in the United States: Benefits, Financing, Coverage (February 1995), pp. 73-89.
- Mike Evangelist, “Lessons Left Unlearned: Unemployment Insurance Financing After the Great Recession,” Policy Brief, National Employment Law Project (July 2012).
- Don Fullerton and Gilbert E. Metcalf, “Tax Incidence,” NBER Working Paper 8829 (March 2002), <http://www.Nber.org/papers/8829>.
- Phillip B. Levine, “Financing Benefit Payments,” in O’Leary, C.J. and Wandner, S. A., Unemployment Insurance in the United States: Analysis of Policy Issues (Upjohn Institute, 1997), pp. 347-353.
- Wayne Vroman, “The Challenge Facing the UI Financing System,” Urban Institute Working Paper 3 (August 2012), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412629-The-Challenge-Facing-the-Unemployment-Insurance-Financial-System.PDF>.
- U.S. Department of Labor (USDOL), Comparison of State Unemployment Insurance Laws, Chapter 2, “Financing.” (2015a), <http://workforcesecurity.doleta.gov/unemploy/pdf/uilawcompar/2015/financing.pdf>.
- Significant Provisions of State UI Laws, Effective July 2015 (2015b), <http://workforcesecurity.doleta.gov/unemploy/content/sigpros/2010-2019/July2015.pdf>.
- Significant Measures of State UI Tax Systems 2014, (2015c), <http://workforcesecurity.doleta.gov/unemploy/pdf/sigmeasuitaxsys14.pdf>.

# 3B

## UI Taxes and Business Climate

### Question: Have state UI payroll taxes risen over the decades?

**Answer:** No. Employer UI contribution rates reached an all-time low prior to the start of the Great Recession in 2008. The recession was preceded by a period of neglect for UI financing. Between 1995 and 2005, 31 states reduced UI taxes by at least 20 percent. As a result of these tax cuts, and an overall failure to keep state taxable wage bases aligned with growth in wages, state UI payroll taxes as a percentage of wages fell to an all-time low during the first decade of the 2000s (Table 1). Compared to the 1990s, the percentage of unemployed workers who actually receive regular benefits remained below 40 percent, and the generosity of benefits relative to wages (i.e., the wage replacement rate) was unchanged for decades. As we've noted elsewhere, in 2014 the reciprocity rate for regular UI programs reached its lowest levels in UI program history (27 percent).

Decade	Reciprocity Rate (% of unemployed receiving UI)	Replacement Rate (average weekly benefit as a % of average weekly wages)	Employer Contribution Rate (% of total wages)
1950s	49%	33%	0.98%
1960s	42%	35%	1.10%
1970s	38%	36%	1.00%
1980s	35%	36%	1.11%
1990s	36%	35%	0.76%
2000s	39%	35%	0.65%

Source: Employer contribution and replacement rates are from the U.S. Department of Labor, Financial Data Handbook 394. Reciprocity rate is for regular state UI from the U.S. Department of Labor, Unemployment Insurance Chartbook.

UI payroll taxes have increased in most states since the Great Recession. These increases were a result of the increased claims arising from the economic downturn and the failure of some states to accumulate trust fund reserves during the years prior to the Great Recession. In CY 2014, average state UI taxes on total wages were 0.81 percent, well within the range of UI taxes in prior decades. Taxes or surcharges were notably higher in recent years in those states that are repaying federal UI loans or using municipal bonds to replenish their UI trust funds.

---

**Question: How do the costs of unemployment insurance stack up with other employer costs for wages and benefits?**

**Answer:** Unemployment insurance costs are modest relative to wages and employee benefits. For each dollar of wages earned by workers, businesses pay less than one cent in federal and state UI taxes. On average, private sector workers earn \$33 of wages and benefits for each hour worked (Table 2). Of this total amount, UI accounts for only 23 cents an hour. Compared with other benefits, such as health care and paid leave, UI makes up a small fraction of total compensation. The portion of compensation attributable to UI increased since the start of the recession as a result of automatic tax increases resulting from insolvent state trust funds. But because UI costs are minor relative to wages and other benefits, the UI-related increase accounted for only four cents of a total compensation increase of \$2.17 between 2007 and 2011. And, cost increases for UI payroll taxes leveled off after 2011, and remained only 23 cents in 2014.

	2007	2011	2014
<b>Total compensation</b>	\$26.09	\$28.26	\$33.49
Wages and salaries	\$18.44	\$19.93	\$22.88
Total Benefits			\$10.61
Insurance (i.e., health, life, and disability)	\$1.99	\$2.28	\$2.97
Paid leave	\$1.78	\$1.92	\$2.33
Social Security and Medicare	\$1.55	\$1.66	\$1.84
Retirement and savings	\$0.91	\$1.02	\$1.78
Federal and state unemployment insurance	\$0.19	\$0.23	\$0.23

Source: U.S. Department of Labor, Bureau of Labor Statistics, National Compensation Survey, Table 1- Employment Cost Trends, for March 2008, 2012 and 2015, accessed August 4, 2015. Note that not all benefit subgroups are listed.

**Question: How have corporate profits fared since the economic downturn?**

**Answer:** Corporate profits remain near all-time highs as a percentage of GDP and in comparison to personal (individual) income. As a result of rising corporate profits and lagging employment, the share of national income going to corporations increased substantially during the post-recession recovery period, and remained close to record levels in 2014. In comparison, employee compensation including wages and benefits, as a percentage of national income, has fallen steadily from a historical peak in 1980 to a 45-year low.

---

As discussed above in our [UI financing](#) section, most UI experts recommend that states build UI trust fund reserves during years when the economy is growing and corporate profits are higher. Failure to finance trust funds in advance of recessions means that UI payroll taxes will be raised during or soon after a recession. This approach reduces the counter-cyclical role expected from UI programs.

**Question: Are unemployment insurance payroll taxes important to a state's business climate?**

**Answer:** The entire discussion of business climate is fraught with overheated arguments and unsupported claims. Nonetheless, business groups and their allies certainly believe (or act like they believe) there is some reality underlying their arguments that creating a “good business climate” impacts business location and economic development in each state. And, UI programs are frequently caught up in this argument with many public officials, pundits, and other participants in these discussions viewing UI as a key component of state business climate. Since state officials accept this concept, UI advocates need some familiarity with it.

To begin, readers can get good background about business climate debates in Greg LeRoy's book, [The Great American Job Scam: Corporate Tax Dodging and the Myth of Job Creation](#) as well as in Peter Fisher's “Grading Places: What Do the Business Climate Rankings Really Tell Us?” These and other works cast doubt on the whole idea that business site selection or job creation can be pegged to something falling under the category of business climate.

Generally, employer groups focus on average UI payroll tax rates and maximum tax rates when making their business climate arguments about UI taxes. In most states, large majorities of employers pay the minimum state UI tax, so getting information about the distribution of state payroll taxes is one key step in countering these arguments. Regardless of the dollar amount of a state's average tax rate, that average rate matters much less if 70 percent of a state's employers pay a lower minimum UI tax rate. Similarly, in most states a minority of employers pay the maximum UI rate. State UI tax distribution information can be obtained from the U.S. Department of Labor's Significant Measures of State UI Systems.

In addition, UI taxes should be discussed in terms of total wages, rather than the much lower level of taxable wages (as noted in our UI financing discussion, state taxes are imposed only on a smaller amount called the “taxable wage base”). Finally, some attention to the direction or trend of state UI taxes is important. Although UI taxes naturally increased as a result of the Great Recession, in the majority of states, UI tax levels are trending toward or have returned to pre-recession levels.

Comparisons between a state's UI taxes to other factors included in the business climate argument will show that UI is not as significant a factor as many others. Nearly all these comparison items will be much larger than UI taxes, whether you compare UI taxes with other state taxes, typical costs of production, utilities, or other employment-related costs. As shown above, state UI taxes average less than 25 cents of total hourly employment costs (or 0.69 percent). It should be harder for critics of UI to make a

---

credible business climate case against UI once they are forced to discuss specifics, rather than just making abstract claims.

**Resources:**

Mike Evangelist, "Lessons Left Unlearned: Unemployment Insurance Financing After the Great Recession," Policy Brief, National Employment Law Project (July 2012).

Peter Fisher, Grading Places: What Do the Business Climate Rankings Really Tell Us? Washington, DC: Economic Policy Institute (2005).

Greg LeRoy, The Great American Job Scam: Corporate Tax Dodging and the Myth of Job Creation. San Francisco, Barret-Koehler (2005).

U.S. Department of Labor, Significant Measures of State UI Tax Systems 2014, (posted August 2015), <http://workforsecurity.doleta.gov/unemploy/pdf/sigmeasuitaxsys14.pdf>.

Wayne Vroman, Topics in Unemployment Insurance Financing. Kalamazoo, MI: Upjohn Institute for Employment Research (1998).

Wayne Vroman, Unemployment Insurance Trust Fund Adequacy in the 1990s. Kalamazoo, MI: Upjohn Institute for Employment Research (1990).

Wayne Vroman, "Financing Unemployment Insurance after the Great Recession," Brief, Urban Institute (August 2012).

## Employee Misclassification as Independent Contractors

---

### **Question: What is employee misclassification?**

**Answer:** Participation in many statutory employment laws is governed by an individual's status as an "employee." A wide range of laws conditioned upon formal employment status includes federal and state anti-discrimination laws, wage and hour laws (including minimum wage and overtime), and social insurance programs (including Social Security, unemployment insurance, and workers' compensation). "Misclassification" involves purposefully treating individuals providing services to businesses as non-employees in order to avoid coverage of workplace laws (Bauer, 2015). The most common method of employee misclassification is to treat individuals as independent contractors; although, in reality, they are employees.

Mechanisms commonly used in employee misclassification include boilerplate contracts disclaiming an employment relationship, requiring individuals to create a limited liability corporation as a condition of payment for work, and paying individuals "off the books" (NELP, 2015). In addition, the growing "on-demand economy" has developed new mechanisms to avoid creating employee relationships with those providing services to customers (NELP, 2015b). By whatever means, employers engage in employee misclassification to avoid liability for employee conduct as well as Federal Insurance Contributions Act (FICA) and other payroll taxes, insurance premiums, and other costs.

The excluded employee, if self-employed, becomes responsible for the employer portion of FICA taxes and loses coverage under UI laws in the event of job loss. In addition, if the employee operates "off the books," he or she will lose quarters of FICA coverage toward Social Security eligibility, with potentially deleterious impact upon retirement or if disability occurs. In addition, workers treated as independent contractors usually lose coverage under otherwise applicable workers' compensation laws. Misclassification not only impacts the affected individuals, but law-abiding employers are undercut by misclassifying competitors.

### **Question: How does employee misclassification affect UI?**

**Answer:** As a social insurance program financed by payroll taxes, UI experiences significant revenue losses from employee misclassification. This impact is well documented. A 2000 federal USDOL study conducted by Planmatics focused specifically upon UI rules. Many of state-level studies of misclassification have relied upon state UI agency auditing data as well. A 2015 fact sheet by NELP, "Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries," summarizes federal studies and state-level task forces and commissions that have studied misclassification. These studies have consistently found that significant percentages of employers engage in misclassification. Currently, New Hampshire and Georgia have study committees on misclassification issues, which will add two newer studies in the next year or so and may result in UI legislation.

---

**Question: What legal rules apply to employee misclassification in UI?**

**Answer:** Our federal-state UI programs have two layers of rules for determining who is subject to UI payroll taxes. As explained earlier, the Federal Unemployment Tax Act (FUTA) imposes a federal excise tax on wages of employees. FUTA revenues are used to pay both federal and state UI agency administrative costs and finance benefit extensions.

FUTA determines coverage of workers through its definition of “employee.” FUTA explicitly adopts the common-law definition of “employee” under FICA, which governs contributions to Social Security. These two related federal provisions read:

For purposes of this chapter [FUTA], the term “employee” has the meaning assigned to such term by section 3121(d), except that subparagraphs (B) and (C) of paragraph (3) shall not apply. (26 U.S.C. § 3306(i).)

For purposes of this chapter [FICA], the term “employee” means—(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. (26 U.S.C. §3121(d)(2).)

The “common law” test for employment is also known as the 20-factor test, or the IRS test. It involves applying a list of factors to the facts of each potential employment relationship. These factors revolve around the question of who controls what work will be done and how that work is done (IRS, 2015.)

In addition to satisfying FUTA’s definition of employee, FUTA has a threshold definition of “employer” that includes employing units who have paid wages of \$1,500 in a calendar quarter OR employing units with at least one employee on each of 20 days during the past calendar year. A separate definition applies to employers of agricultural or domestic labor. For agricultural employment, an employing unit that pays \$20,000 or more for agricultural labor in any calendar quarter in the current or preceding calendar year, or who employed 10 or more workers on at least one day in each of 20 different weeks in the current or immediately preceding calendar year meets the agricultural employer test under FUTA. Domestic employers are defined as an employing unit paying \$1,000 in wages for domestic service during any calendar quarter in the current or preceding calendar year. While a majority of states use all three of the FUTA standards, they are not required to do so and several states have more inclusive standards for employers (23 states, USDOL, 2015: Table 1-1), agricultural labor (10 states, id., Table 1-2), and domestic services (six states, id., Table 1-3).

In summary, the common law test is generally considered the strictest legal test for employment relationships; that is, the common law test enables employers to more easily escape a finding of an employment relationship and treat potential employees under some different classification than employee. In recent years, employer groups have asked states to move toward the common law test under their UI laws, and Michigan has recently done so. Nonetheless, only a minority of states use the common law test of employment for state UI coverage.

---

**Question: How do states determine employee status under their UI laws?**

**Answer:** States are free to adopt their own statutory standards defining covered employment. While Congress has adopted a common law test for the employment relationship under FUTA, the states use a number of other statutory tests to determine employer-employee relationships under their UI laws (USDOL, 2015: Table 1-4). About one dozen states use the common law test for UI coverage.

Most states currently use the so-called “ABC test” to define employment or a variant of the test with two of its three subtests (Labor Department, 2015: Table 1-4). The test is called the ABC test because its three paragraphs, each containing one element of the test for exclusion from employment, are typically numbered A,B, and C. The ABC test was developed in Wisconsin’s UI law (which pre-dated the adoption of the federal law in 1935) and was proposed to the states by the Social Security Board in its model state UI legislation. As a result, its use became prevalent in the first decade of the UI program (Asia, 1945).

Here is the typical definition of employment under the ABC test as found in current Massachusetts UI law:

Service performed by an individual, except in such cases as the context of this chapter otherwise requires, shall be deemed to be employment subject to this chapter irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the commissioner that—

- (a) such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
- (b) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
- (c) such individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

Mass. General Laws, Chp. 151A §2.

As can be seen from its text, the approach taken under the ABC test is a presumption of employment for any personal services contract that is only rebutted when all three of its subtests are found inapplicable. As a result, the test is more difficult to manipulate than the common law test and is generally considered more likely to result in a finding of employment by agencies and courts assessing a potential employment relationship. Because the ABC test accurately distinguishes between independent contractors and employees, NELP recommends that states retain this test or consider its adoption.

---

**Resources:**

- Benjamin S. Asia, "Employment Relation: Common-Law Concept and Legislative Definition," Yale L.J. v. 55, p. 76 (1945).
- David Bauer, "The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem," Rutgers J. of Law & Policy, v. 12, p. 138 (Spring 2015).
- Internal Revenue Service, "Employers Supplemental Tax Guide," IRS Publication 15-A (2015).
- National Employment Law Project, "Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries," Fact Sheet (July 2015a).
- National Employment Law Project, "Rights On Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy" (2015b), available at <http://www.nelp.org/publication/rights-on-demand/>.
- Planmatics, Inc., Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs. U.S. Department of Labor (UI Occasional Paper 2000-05)(February 2000), [http://workforcesecurity.doleta.gov/dmstree/op/op2k/op\\_05-00.pdf](http://workforcesecurity.doleta.gov/dmstree/op/op2k/op_05-00.pdf).
- U.S. Department of Labor, Comparison of State Unemployment Insurance Laws, Chapter 1: "Coverage." (2015), <http://workforcesecurity.doleta.gov/unemploy/pdf/uilawcompar/2015/coverage.pdf>.

# 4

## Influencing UI Policy Debates

---

From their beginning, UI policy debates have divided UI’s supporters and critics along recurring lines. The divide falls between supporters who see UI as a helpful social program protecting jobless workers from wage loss while boosting the economy—from critics who view UI as hurting the economy and jobless workers by prolonging unemployment spells and increasing the costs of doing business. Underlying this divide is a difference in perception about who bears primary responsibility when an individual is out of work. Critics of UI assume that the behavior of jobless workers largely determines when they lose or find a job, while supporters give broader forces in the economy overall responsibility for unemployment. And, this fundamental distinction in judgments about unemployment and UI runs back even before the program’s creation in 1935.

The voices of those who view UI as encouraging sloth and discouraging reemployment have grown louder in recent years. Opposition to UI ranges from academic critics who cloak their opposition in mathematics and economic theory to charges based on crude stereotypes of jobless workers as avoiding work or engaging in fraud. In our view, to an increasing degree, many critics of UI are not interested in a debate based upon facts. They are very unlikely to change their minds. Rather than convincing critics, though, UI supporters must defend the role of UI among those with open minds or those who are unfamiliar with the program or only rarely tune into these recurring debates.

A silver lining rising from the Great Recession was renewed interest from academic researchers and government in unemployment insurance. A significant number of studies have re-examined questions like the disincentive effects of UI benefits, the role of UI in supporting job matching, and the effectiveness of reemployment services in job placement. And, to a significant degree, mainstream economic thinking about UI has shifted from its narrow focus on moral hazard in the 1970s and 80s toward a fuller recognition that UI promotes overall economic welfare.

In Chapter 4, we furnish advocates with an overview designed to inform readers who are engaging with recurring policy debates concerning the impact of UI on jobless workers and the economy. In particular, we cover common public policy arguments about UI and furnish an overview of relevant social science research.

### Resources:

Claire McKenna, “The Job Ahead: Advancing Opportunity for Unemployed Workers,” National Employment Law Project, Report (February 2015), <http://www.nelp.org/page/-/UI/Report-The-Job-Ahead-Advancing-Opportunity-Unemployed-Workers.pdf?nocdn=1>.

Chad Stone and William Chen, “Introduction to Unemployment Insurance,” Center on Budget Policy and Priorities (July 2014), <http://www.cbpp.org/research/introduction-to-unemployment-insurance>.

Wayne Vroman, “Unemployment Insurance: Problems and Prospects,” National Academy of Social Insurance, Brief #2 (2011), [http://www.nasi.org/sites/default/files/research/UI Brief No 2.pdf](http://www.nasi.org/sites/default/files/research/UI%20Brief%20No%202.pdf).

# 4A

## Economic and Social Impacts of UI

---

### **Question: What is the current state of economic thinking about UI?**

**Answer:** Since economics underlies most policy debates, some familiarity with what economists and social scientists are saying is useful when participating in UI policy debates. Readers should keep in mind that the Toolkit is not written for or by economists. We start by saying that, in our experience, peer-reviewed economic journals furnish only a narrow window on the UI world, economic models are only accurate if their assumptions closely approximate the real world, and sometimes assumptions in papers are obscure or only loosely connected to reality.<sup>1</sup> Economists understand these limitations, but those relying upon economists' findings among editorial board writers or in legislative debates rarely acknowledge them.

Much of the economics debate about UI revolves around moral hazard. This is a term used in economics and insurance for the change in behavior that arises from shifting incentives when a third party assumes some risk for the behavior of an individual. As a result, the individual is more likely to engage in the insured risk and shift the costs to the insurer (Marmor, 2014: 10-11). In the context of UI, moral hazard recognizes that since UI lessens the hardships associated with unemployment, unemployment spells will last longer than they would if a UI claimant had no protection from wage losses. This impact is referred to as a disincentive to work. UI programmatically deals with moral hazard concerns by limiting eligibility to those demonstrating an attachment to the labor market, disqualifying those who are not involuntarily unemployed, and only partially replacing lost wages. (In the next section of the Toolkit, we examine UI and disincentives more closely.)

While “economics” sounds like one discipline to outsiders, there are different approaches within the field and different approaches reflected among economists. For our purposes, noting the distinctions between theoretical models and empirical studies is a key factor. Studies of theory, such as “optimal UI,” or macroeconomic models of UI are not designed for immediate application in the real world. They are concerned with theoretical disputes within economics.<sup>2</sup> In addition, microeconomists have different approaches than macroeconomists, and the micro approach based upon government survey or administrative data is often more relevant to UI policy debates in our experience.

In this section of the Toolkit we furnish an overview of selected economic studies, as well as useful papers by other relevant disciplines which throw light on questions that frequently arise during UI policy debates. The following is a short—and by no means comprehensive—account of unemployment insurance research with an emphasis on

---

<sup>1</sup>In a highly-cited paper reviewing theoretical models casting doubt on the utility of UI, the authors stated “With some notable exceptions . . . the theoretical literature on unemployment benefit largely ignores important institutional features of actual social security schemes.” Atkinson and Micklewright (1991: 1688).

<sup>2</sup>See, for example, leading economist Lawrence Summers (1991: 144), who said that “Modern scientific macroeconomics sees a (the?) crucial role of theory as the development of pseudo world’s . . . and explicitly rejects the view that ‘theory is a collection of assertions about the actual economy.’” (Parenthetical (the?) in original.)

---

recent studies and those that support UI as a worthwhile social insurance program. To a considerable degree, mainstream economists have shifted their views, not only in response to recent studies about the Great Recession, but as they have developed newer theoretical models of the labor market with more nuanced assumptions over the last 25 years or so. Many economists now have a more sanguine view of UI than in the past. More studies find that UI increases overall welfare. Many economists accept that UI has a positive impact on the economy during economic downturns.

Fine examples of newer models of UI are found in papers by economists Daron Acemoglu of MIT and Robert Shimer of Princeton (1999, 2000). These authors used models of the labor market where increases in productivity occur because UI claimants can look for better jobs due to the support they get from UI benefits. In turn, firms are induced to create higher productivity jobs, and this feedback mechanism improves overall welfare or output. This approach reverses the traditional moral hazard/work disincentive perspective on UI and turns the income support function of UI into a virtue, rather than a shortcoming.

This positive perspective on UI contrasts with the neoclassical view of unemployment. Under this neoclassical view, there is no such thing as involuntary unemployment, since the supply and demand for labor should adjust automatically, producing a “market-clearing wage” and full employment. If jobless workers are out of work under this economic theory, it is because their “reservation wages”—in other words, the lowest wages for which someone would work a job—are too high. A 2011 paper by Chris Edwards and George Leef for the Cato Institute (cited below) is one illustration of this theoretical approach. Under this orthodox view, UI has no positive impact for jobless workers or the economy. Indeed, UI causes unemployment by “paying people to be unemployed” as many of UI’s critics claim.

There are many practical (and moral) objections to viewing labor purely as just another commodity whose price is determined by supply and demand. Further, understanding the labor market as operating in the same way as markets for other goods and services is plainly inaccurate. Job seekers and employers are not always rational decision-makers. Discrimination based on race, sex, age, or other characteristics as well as nepotism exist. Information about jobs and job seekers is not equally available to all participants. Labor itself is characterized by differing skills, experience, and education. As a result, the labor market is composed of many occupational segments and geographic regions that prevent truly competitive market conditions.

Useful papers by Morris Altman (2014) and David Howell and Bert Azizoglu (2011), cited below, critique the orthodox views of unemployment, job search, and labor markets. Both reexamine the role of UI in light of those critiques. In doing so, they make useful observations about the gaps between orthodox economic thinking and how unemployment and UI work under more realistic assumptions.

---

## Resources:

- Daron Acemoglu and Robert Shimer, "Efficient Unemployment Insurance," *Journal of Political Economy*, vol. 107 (no. 5), pp. 893-928 (1999), <http://down.cenet.org.cn/upfile/67/200544132322148.pdf>.
- Daron Acemoglu and Robert Shimer, "Productivity Gains from Unemployment Insurance," *European Economic Review*, vol. 44 (issue 7), pp. 1194-1244 (2000), <http://www.newyorkfed.org/research/conference/1999/shimer.pdf>.
- Anthony Atkinson and John Micklewright, "Unemployment Compensation and Labor Market Transitions: A Critical Review," *Journal of Economic Literature*, Vol. 29, No.3, 1679-1727 (1991), <http://info.worldbank.org/etools/docs/library/230305/Vodopivec2.pdf>.
- Morris Altman, "Insights from behavioral economics on how labor markets work." School of Economics and Finance, Victoria University of Wellington (NZ), Working Paper (2014). <http://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/3466/Working%20paper.pdf?sequence=1>.
- Ha-Joon Chang, *Economics: The User's Guide*, Chapter 10, "I've Known a Few People That Worked." Bloomsbury Press (2014), pp. 251-270.
- Chris Edwards and George Leef, "Failures of the Unemployment Insurance System," Cato Institute (June 2011), <http://www.downsizinggovernment.org/labor/failures-of-unemployment-insurance>.
- David R. Howell and Bert M. Azizoglu, "Unemployment Benefits and Work Incentives: The U.S. Labor Market in the Great Recession." *Oxford Review of Economic Policy* vol. 27, no. 2, 221-240 (2011), [http://www.peri.umass.edu/fileadmin/pdf/working\\_papers/working\\_papers\\_251-300/WP257.pdf](http://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_251-300/WP257.pdf).
- Theodore Marmor, Jerry L. Mashaw, John Pakutka, *Social Insurance: America's Neglected Heritage and Contested Future*. Sage Foundation Book (2014).
- Lawrence H. Summers, "The Scientific Illusion in Empirical Macroeconomics." *Scandinavian J. of Economics*, vol. 93(2), pp. 129-148 (1991), <http://www.uh.edu/~bsorense/SummersScandinavian.pdf>.

# 4B

## UI and Disincentive Effects

---

**Question: Does unemployment insurance (UI) encourage jobless workers to avoid work and increase unemployment?**

**Answer:** A disincentive impact of UI benefits is well accepted. Acknowledging that UI benefits influence claimants' behavior means only that unemployed individuals are not unique when it comes to economic incentives. The contested points about incentives are the degree to which UI increases the duration of unemployment and how disincentive effects are balanced by positive impacts flowing from UI's income support for jobless workers. A fair reading of the many studies shows that disincentive impacts of UI are modest and balanced by other positive impacts on job finding and economic stimulus.

The impact of federal benefit extensions on job finding and unemployment durations are examined in a series of papers issued during and after the Great Recession. UI recipients who exhausted their regular benefits were entitled to additional federal emergency benefits between July 2008 and December 2013. These recent papers furnish important observations about how UI receipt affected job finding and labor market participation. A paper by Bivens, Smith, and Wilson of the Economic Policy Institute (2014) provides an overview of microeconomic research concerning the relationship between UI benefits and the duration of unemployment. Bivens observes that this recent research had undercut the vitality of traditional concerns by economists focused upon moral hazard.

One important empirical paper written since Bivens is by Katharine Bradbury (2014). Bradbury uses CPS data from 2005 to 2013 to look at monthly flows between employment, unemployment, and non-participation. She finds that job finding by UI recipients was distributed throughout their time on benefit extensions. In Bradbury's words, "There is no discernible relationship between . . . UI availability and transitions from unemployment to employment." Overall, benefit exhaustion did not lead to more job finding, but rather to higher rates of exit from the labor force. In plainer English, UI extensions did not significantly impact job finding rates, but did support workers' continued labor force participation. Upon exhaustion, workers did not find work; they finally dropped out of the labor force.

A similar conclusion based upon a somewhat different approach to CPS data was reached by Henry Farber, Jesse Rothstein, and Rob Valetta (2015). This paper is a follow up to earlier studies by each of these authors about UI effects during the recession years. They summarize their earlier work and then go on to update their analysis for months involving the phase-down and eventual expiration of federal benefit extensions between mid-2012 and the end of 2013. The authors conclude: "A stronger implication of our results is that the UI extensions have not had large moral hazard effects on recipients' job finding rates, either during the worst period of the Great Recession or during the subsequent recovery."

In an earlier study, Farber and Valetta (2013) used CPS data covering the Great Recession and the milder recession of the early-2000s to estimate disincentive effects of extensions. They found that UI induced modest increases in two types of exits from unemployment; finding employment and ending work search. They estimate an increase in the unemployment rate due to the availability of extensions of 0.12 percentage points in 2003 and 0.4 percentage points in 2010. In an earlier study for Brookings

---

Institution, Jesse Rothstein used CPS data on job flows to assess the role of benefit extensions in increasing unemployment during the Great Recession (2011). Rothstein found disincentive effects caused by extensions, with higher levels shown by the ranks of the longest-term unemployed recipients. He estimated that unemployment rates were 0.1 to 0.5 percentage points higher in 2011, but found that about half that effect was because UI delayed recipients' exit from the labor force—something that is positive from a policy perspective.

In a 2010 paper for the San Francisco Federal Reserve Bank, Rob Valletta and Katherine Kuang compared the duration of spells of unemployment of involuntary job losers, voluntary job leavers, new labor force entrants, and re-entrants to the labor force. Valletta and Kuang's paper showed that involuntary job losers during the recession remained unemployed for approximately the same length of time as unemployed workers ineligible for benefits. The paper estimated that benefit extensions contributed only 0.4 percentage points to the 6.0 percentage-point total increase in unemployment that the U.S. had experienced by that point in the recession.

Figura and Barnichon (2014) extend their similar analysis of job finding and labor force participation to include the availability of federal benefit extensions during recessions dating back to the late-1970s. They confirm that UI benefits had only a small effect on rates of unemployment rates and labor force participation during the Great Recession and earlier recessions.

In short, recent microeconomic studies indicate that macro models that predicted higher disincentive effects were not confirmed, at least in the extremely weak labor markets during and following the Great Recession. In addition, these recent studies showed that many jobless workers maintained connections to the labor market by searching for work while on UI, and that many give up their connection once their benefits were exhausted.

**Question: Doesn't the "spike" of individuals observed exiting UI when exhausting UI benefits prove that jobless workers prefer getting benefits and waiting to find work?**

**Answer:** Within the field of UI experts, a commonly known phenomenon is the "spike" of job finding by UI recipients observed near the time their benefits run out. (The observed "spike" appears on a line graph of exits from unemployment near the time of benefit exhaustion.) For example, Robert Moffitt (1985), using state UI wage records, looked at the relationship between exits from unemployment and exhaustion of UI benefits. Moffitt found that the exit rate from UI benefits was three times the average observed exit rate in the month prior to benefit exhaustion. For those workers eligible for a 13-week extension, the exit rate was roughly twice the regular exit rate. He concluded that this spike in exit rates was largely explained by the moral hazard created by UI benefit receipt.

Later commentators have observed that Moffitt assumed that exiting unemployment represented job finding, but some individuals he counted as job finders likely stopped their work-search and exited the labor force instead. These individuals dropping out

---

of the labor force do not show moral hazard for UI, but show that UI's requirement that claimants maintain an active search for work prolonged their job searches. In addition, claimants on temporary layoffs necessarily exit unemployment when they return to their former employers, but their exits from unemployment show us nothing about moral hazard effects of UI, as the length of their unemployment spell and UI claim was determined by recalls initiated by their employers. As a result of these questions, what appears to be a straightforward finding becomes more difficult to interpret.

A 2007 paper by David Card, Raj Chetty, and Andrea Weber shows that the magnitude of the "spike" is much smaller when spells of unemployment are measured from the time of job loss to the next job, as opposed to time spent on UI benefits. As Card et al. noted, using data on durations of benefit receipt is adequate for determining direct program costs. However, using data regarding the full length of time between job loss and reemployment is a better measure of the disincentive impacts of UI. After surveying the literature, the authors concluded, "Overall, our reading of the existing literature is that spikes in hazards around benefit exhaustion are generally smaller when duration is measured as time to next job rather than time unemployed." Using data from Austria's Social Security registry, Card and his co-authors then conducted a new analysis of the spike at benefits exhaustion based on time from job loss to reemployment, finding that fewer than one percent of unemployed workers wait to accept a job until around the time they run out of unemployment benefits.

David Card was lead author of a 2015 NBER paper that used Missouri administrative data to estimate the magnitude of disincentive effects of UI for a 10-year period from 2003 through 2013. The investigation found that duration elasticities were about 0.35 prior to the recession and ranged from 0.65 to 0.9 during the recession. These findings fall into the lower range of prior estimates of disincentive effects, and show that UI benefits were extending the duration of unemployment by somewhere between three percent and nine percent in Missouri during the period of study.

Meyer and Mok (2014) provide a recent overview of the earlier studies regarding spikes. In addition, they present results from their new study of disincentive effects arising from significant maximum weekly benefit increases (of 36 percent) taking effect in 1989 and 1990 in New York. They report duration elasticities between 0.1 and 0.2. Relatively larger effects were found for workers older than 40 and for women. In other words, jobless individuals do react to increases in benefit amounts with slightly longer spells, but the magnitude of that reaction is modest. As noted below, Young (2012) also found no spike in job search activities near benefit exhaustion in his statistical review of UI administrative records.

In summary, questions regarding spikes near benefit exhaustion and what they tell us about disincentive effects of UI don't give us the full story about disincentive effects. Study design has clearly affected findings, and more recent studies have tended to find impacts of a smaller magnitude. At this point, the certainty expressed by UI critics based upon earlier papers is no longer warranted. Disincentive effects are smaller than previously thought and claimants' observed behavior is more consistent with what should be expected from individuals who want reemployment.

---

## Resources:

- Josh Bivens, Joshua Smith, and Valerie Wilson, "State Cuts to Jobless Benefits Did Not Help Workers or Taxpayers," Economic Policy Institute, Briefing Paper #380 (2014), <http://www.epi.org/publication/state-unemployment-insurance-cuts/>.
- Katharine Bradbury, "Labor Market Transitions and the Availability of Unemployment Insurance." Federal Reserve Bank of Boston Working Paper No. 14-2 (2014), <http://www.bostonfed.org/economic/wp/wp2014/wp1402.pdf>.
- David Card, Andrew Johnston, Pauline Leung, Alexandre Mas, and Zhuan Pei, "The Effect of Unemployment Benefits on the Duration of Unemployment Insurance Receipt: New Evidence from a Regression Kink Design in Missouri, 2003-2013." NBER Working Paper No. 20869 (January 2015), [http://chaire-securisation.fr/SharedFiles/43\\_Card%20et%20al%20Unemployment%20benefits%20NBER%20jan2015.pdf](http://chaire-securisation.fr/SharedFiles/43_Card%20et%20al%20Unemployment%20benefits%20NBER%20jan2015.pdf).
- David Card & Raj Chetty & Andrea Weber, 2007. "The Spike at Benefit Exhaustion: Leaving the Unemployment System or Starting a New Job?" American Economic Review, vol. 97(2), pp. 113-118 (2007), <http://www.nber.org/papers/w12893>.
- Farber, Henry S., Jesse Rothstein, and Robert G. Valetta, "The Effect of Extended Unemployment Insurance Benefits: Evidence from the 2012-2013 Phase-Out," Institute for the Study of Labor (IZA) Discussion Paper No. 8784 (January 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2558363](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2558363).
- Andrew Figura and Regis Barnichon, "The Effects of Unemployment Benefits on Unemployment and Labor Force Participation: Evidence from 35 Years of Benefits Extensions," Federal Reserve Board Finance and Economics Discussion Series Working Paper 2014-65 (August 2014), <http://www.federalreserve.gov/pubs/feds/2014/201465/201465pap.pdf>.
- Bruce D. Meyer and Wallace K.C. Mok, "A Short Review of Recent Evidence on the Disincentive Effects of Unemployment Insurance and New Evidence from New York State." National Tax Journal, v. 67, p. 219 (March 2014), [www.dichoha.net/sites/default/files/MeyerMokNTJ2014.pdf](http://www.dichoha.net/sites/default/files/MeyerMokNTJ2014.pdf).
- Robert Moffitt, "Unemployment Insurance and the Distribution of Unemployment Spells," Journal of Econometrics, vol. 28, pp. 85-101 (1985), [http://www.researchgate.net/publication/4856297\\_Unemployment\\_Insurance\\_and\\_the\\_Distribution\\_of\\_Unemployment\\_Spells](http://www.researchgate.net/publication/4856297_Unemployment_Insurance_and_the_Distribution_of_Unemployment_Spells).
- Jesse Rothstein, "Unemployment Insurance and Job Search in the Great Recession," Brookings Papers on Economic Activity (Fall 2011), pp. 143-196, [http://www.brookings.edu/~media/projects/bpea/fall-2011/2011b\\_bpea\\_rothstein.pdf](http://www.brookings.edu/~media/projects/bpea/fall-2011/2011b_bpea_rothstein.pdf).
- Rob Valetta and Katherine Kuang, "Extended Unemployment and UI Benefits," Federal Reserve Bank of San Francisco Economic Letter (April 2010), <http://www.frbsf.org/economic-research/publications/economic-letter/2010/april/extended-unemployment-insurance-benefits/>.

# 4c

## UI: Preventing Poverty, Supporting Job Search, and Helping the Economy

---

### **Question: What is known about the impact of unemployment on individuals?**

**Answer:** Common sense tells us that having no income is distressing not only for economic reasons, but because work is central to identity and status in the American culture. Anyone who knows someone unemployed, or who has personally suffered a period of unemployment, knows that lack of work for most individuals is an unpleasant state. As economist Robert Solow observed 25 years ago, “A job is a source of self-respect that even moderately cushy unemployment could never be.” (1990: 40).

Economists often refer to those without work as experiencing “leisure.” Leisure is a technical term to economists, but advocates can and should point out that unemployment, even for those getting UI benefits, is unpleasant and provides most jobless workers with ample motivation to find new work. And, since the majority of jobless workers typically don’t get UI benefits, jobless workers without UI have even greater incentives to find jobs. Theoretical models of UI are too often based upon assumptions regarding work as more onerous than unemployment and that all jobless workers are getting UI benefits. In short, viewing unemployment as leisure is inconsistent with common sense, the views of sensible economists, and findings of many social scientists (Schwartz, 2015). Nonetheless, this unrealistic view of unemployment lies at the heart of many economists’ focus on moral hazard when examining UI.

There is abundant evidence that unemployment is a bad experience for affected workers from an economic, psychological, and health perspective. Here we mention three. Henry Farber (2015) uses the BLS dislocated worker survey data to assess the impact of dislocation in the Great Recession years in the United States. Not surprisingly, Farber finds record levels of job losses, that those losing jobs experienced “unusually large” wage losses, and that jobless individuals faced low rates of reemployment years after the recession’s end. Jennie Brand, a sociologist at UCLA, produced a 2014 paper summarizing research on the impact of unemployment, finding that “job loss is an involuntary disruptive life event” followed by a host of negative impacts. Connie Wanberg of the University of Minnesota has a useful review of a decade’s worth of research on psychological health (2012). Other studies find unemployment results in increased mortality, adverse effects on health, and a higher incidence of social problems (for example, see Nichols, 2013) Another recent review of many studies also finds that more generous UI benefits mitigate these negative impacts of unemployment. (O’Campo, 2015).

Advocates need not resolve theoretical disputes among economists in order to point out that economists do differ as to the role moral hazard plays in UI. Clearly, consideration of competing economic factors can exaggerate or reduce this role based upon the model’s assumptions, and, certainly, more complex models of job finding and more nuanced assumptions are now producing results that undercut the older consensus that UI is little more than a subsidy for leisure.

---

**Question: How does partially replacing lost wages with UI benefits help jobless workers?**

**Answer:** The primary function of UI is to provide partial wage replacement for eligible workers. UI benefits have a variety of positive impacts, but for claimants, the most important impact is that UI helps them meet their basic needs. Maintaining some spending in turn reduces poverty in households experiencing unemployment, supports job search by claimants, and boosts the overall economy. We discuss these positive impacts of UI in our last series of questions and answers in this chapter.

Income replacement helps reduce poverty among jobless workers. A 2012 report by the Congressional Research Service examined 25 years of Census data in order to assess the anti-poverty effects of UI (Gabe, 2012). This study period included the three most recent U.S. recessions. The report found that UI appears to reduce poverty significantly among its recipients and their family members, estimating that UI benefits lifted 2.3 million individuals out of poverty in 2011.

**Question: Does UI boost the economy?**

**Answer:** Many economists acknowledge that UI has a positive role in maintaining a healthy economy, especially during a recession. Simply put, by partially replacing lost wages for UI claimants household spending continues at higher levels than they could afford without those benefits. This spending cushions the macro economy and helps break the recessionary cycle of layoffs, reduced consumer spending, and further layoffs that might otherwise occur (Vroman, 2010: iii).

A number of reports estimate the positive impact of UI spending on the economy. Wayne Vroman, in a 2010 report commissioned by the Labor Department, reviews prior research relying upon economic models to estimate the impact of UI. These earlier studies, overall, estimated that UI reduced GDP declines in past recessions by about 15 percent. Following a similar approach, Vroman used an econometric model maintained by Moody's Economy.com to estimate the role of UI during the heart of the Great Recession (from the third quarter of 2008 through the second quarter of 2010). To take account of state-level variation in UI programs, Vroman used 51 separate regressions to model the impact of UI on individual state's economies and then summed the totals. He estimated that UI reduced the decline in economic activity by 18 percent during the time period examined. Expressed in more common terms of an economic multiplier, Vroman found that a dollar of UI benefits produced about two dollars of economic impact during the recession (Vroman, 2010: 68-70). Vroman noted that it was likely that UI had a greater impact during the recent recession because of the unprecedented level of benefit extensions and delays in state UI payroll tax increases that will pay for state benefits in future years.

For state-level advocates, Vroman's report offers some unique resources. First, by estimating positive economic benefits for individual states (and regions) he shows that states with more generous UI programs received greater anti-recession impacts than states with stingy UI programs. In concrete terms, he finds that the 10 states with the

---

lowest rates of reciprocity got economic benefits that were only 70 percent of the benefit effects in the 10 highest-reciprocity states. Additional state-level findings can be found in the report's Appendices.

Additional papers recognizing UI as economic stimulus are summarized in the Center for Budget and Policy Priorities helpful background summary, "Introduction to Unemployment Insurance" (Stone and Chen, 2014).

**Question: Does UI support job search and positively impact job matching?**

**Answer:** For many years, economists accepted that UI claimants didn't really look for work. This viewpoint was consistent with their belief that people prefer not to work and that unemployment is largely voluntary (for additional background on this issue, see "Unemployment Insurance and Disincentive Effects" earlier in this chapter). In addition, economists believed that state workforce agencies did not effectively enforce work-search rules for UI, known as the "work test. This skepticism about work search was based on work undertaken by Paul Burgess, Robert St. Louis, and Jerry Kingston in the 1970s (Burgess and Kingston, 1976; Kingston, Burgess, and St. Louis, 1981, 1986). They then wrote other studies in the next several years regarding job search and overpayments (reviewed in Burgess and Kingston, 1990). These studies led to benefit quality control mandates from the U.S. Department of Labor to require states to measure eligibility on a continuing basis (id., 1990: 143-145).

Perhaps because the analysis of Burgess and Kingston fit easily into the standard narrative, there was little effort by economists to test their results until a 2000 paper written by Orley Ashenfelter, David Ashmore, and Olivier Duschêne of Princeton University. Their research consisted of field testing a random selection of claimants. Both claimant groups participated in an initial meeting at which UI eligibility was reviewed and job search requirements were emphasized. The treatment group's work search reports were then verified while the control group's work search reports were not verified. Surprisingly, there was very little difference in initial benefit payments or duration of benefits between the two groups. If shirking was happening, presumably those having their work search verified would have lost benefits sooner. Because both groups were in fact seeking work, there was no statistical difference between the two groups. In summary, the authors stated that their results "provide no support for the view that the failure to actively search for work has been a cause of overpayments in the UI system."

Sociologist Cristobal Young of Stanford has a helpful 2012 paper that looked at nearly 400,000 UI administrative records. Young's study confirmed that UI claimants looked for work. Importantly, he also finds that higher UI benefits increased the likelihood of active job search, especially among low-wage workers. Finally, the paper found that there was no spike in job searches near benefit exhaustion, undercutting claims that UI benefits help claimants delay their job searches until later in a spell of unemployment.

Common sense and economic theory indicates that UI's income replacement role could assist workers with job searches, and positively impact their ability to find jobs that better match their skills. However, over the years, economists have not had much success in finding statistical evidence that UI positively impacts wages or job tenure

---

upon reemployment. Recent papers make progress on answering this question. One of these takes a highly statistical and theoretical approach, while the other relies upon state UI administrative data.

An April 2015 paper by Arash Nekoei and Andrea Weber found that extensive administrative data from Austria discloses two small, but significant, impacts from UI benefits. They relied upon the fact that jobless workers over 40 years old with employment in six of the past ten years have eligibility for 39 weeks of benefits, while younger workers are only eligible for 30 or 20 weeks of UI. This enabled them to study job finding and reemployment wages among these groups. They found that older workers with eligibility for added weeks of benefits remained unemployed for two days longer, but upon reemployment, older claimants found jobs that paid 0.5 percent higher wages. The authors note the significance of their findings for policy—namely, that taking into account the higher quality of jobs found “could significantly change the optimal generosity of UI.” (Nekoei, 2015: 5).

An August 2015 paper for the Labor Department for the Upjohn Institute re-examines a late 80s evaluation of the work search requirement in Washington state (Lachowska, Meral, and Woodbury, 2015). Rather than focusing upon the short-term effect of eliminating the work test as in an earlier study, Lachowska, et al. instead focused on measuring the effect of the work test over an added nine years of administrative data. In addition, the new paper specifically focused on the impact of the work test of those permanently laid off, since the impact of the work test on those temporarily laid off has less salience to UI policy as they are typically recalled to their former employers. The paper finds that for claimants overall, there was little impact of eliminating the work search requirement, but for permanent job losers the work search requirement resulted in shorter times to reemployment, higher earnings, and longer tenure at the first post-claim employer. While these positive impacts were modest, they were nonetheless statistically significant.

A recent evaluation using random assignment confirms the theoretical and empirical findings of Nekoei and Weber. In a follow-up to two earlier papers evaluating reemployment assistance programs in Nevada, Marios Michaelides (2013) finds that UI claimants who received personalized, staffed reemployment assistance not only had shorter unemployment spells because they found jobs more quickly than those not provided these services, but that those individuals found jobs at 18 percent higher wages than claimants not provided with personalized services. Michaelides concludes that the Nevada program was effective in promoting reemployment of claimants as well as “helping them get placed in jobs that paid higher wages than the jobs they would have obtained in the program’s absence.” (p. 24). Unfortunately, not many states have the resources to provide the sort of personalized services that Nevada used during this study. Advocating for these effective sorts of personalized services is certainly worthy of consideration. An earlier NELP report summarizes earlier research on individualized job search assistance for UI claimants through the public Employment Service, and makes a similar recommendation (NELP, 2012). Interested advocates should note the discussion in Chapter 2 involving state resources for effective reemployment practices.

---

Mario Centeno (2002) took a somewhat different approach to assessing UI impact on job matching. Using National Longitudinal Survey of Youth data from 1979 to 1998, Centeno found that UI generosity improved the quality of reemployment when measured by tenure in recipients' newly-found employment.

In conclusion, theory certainly supports the idea that UI (through both carrots and sticks) supports job search. Confirmation of that theory is not yet robust, but certainly is more evident than many UI critics acknowledge. And, the Nevada evaluations show that high quality reemployment services is a worthwhile investment for both UI trust fund savings and workers benefitting by finding jobs through those services.

### Resources:

- Orley Ashenfelter, David Ashmore, and Olivier Duschêne, "Do Unemployment Insurance Claimants Actively Seek Work? Evidence from Randomized Trials in Four U.S. States." IZA Discussion Paper 128 (March 2000), <ftp://ftp.iza.org/SSRN/pdf/dp128.pdf> (later published in *Journal of Econometrics*, vol. 125, pp. 53–75 (2005)).
- Paul L. Burgess, and Jerry L. Kingston, "The Impact of Unemployment Insurance Benefits on Reemployment Success." *Industrial and Labor Relations Review*, vol. 30 (1) pp. 25–31 (1976).
- Paul L. Burgess and Jerry L. Kingston, "Monitoring Claimant Compliance with Unemployment Insurance Eligibility Criteria," Chp. 5 in W. Lee Hansen and James F. Byers, eds., *Unemployment Insurance: The First Half Century* (1990), Univ. of Wisc. Press, pp. 136-172.
- Raj Chetty, "Moral Hazard versus Liquidity and Optimal Unemployment Insurance," NBER Working Paper 13967 (2008), <http://www.nber.org/papers/w13967.pdf>, (later published in *Journal of Political Economy*, 2010, 116 (2), 173–234).
- Mario Centeno, "The Match Quality Gains from Unemployment Insurance." Banco de Portugal Economic Research Department WP 9-02 (July 2002), [http://www.bportugal.pt/en-US/BdP\\_Publications\\_Research/WP200209.pdf](http://www.bportugal.pt/en-US/BdP_Publications_Research/WP200209.pdf) (later published in *Journal of Human Resources*, vol. 39(Summer) pp. 839–863 (2004)).
- Thomas Gabe and Julie M. Whittaker, "Antipoverty Effects of Unemployment Insurance," CRS Report for Congress 7-5700 (October 2012), <https://www.fas.org/sgp/crs/misc/R41777.pdf>.
- Jonathan Gruber, "The Consumption Smoothing Benefits of Unemployment Insurance," *The American Economic Review*, vol. 87 (1), p. 192 (March 1997), [http://economics.sas.upenn.edu/~hfang/teaching/socialinsurance/readings/Gruber97\(4.15\).pdf](http://economics.sas.upenn.edu/~hfang/teaching/socialinsurance/readings/Gruber97(4.15).pdf).
- Jerry L. Kingston, Paul L. Burgess, and Robert D. St. Louis, "Overpayment in the Unemployment Insurance System in the United States," *International Social Security Review*, vol. 34 (4), pp. 462–476 (October 1981).
- , "Unemployment Insurance Overpayments: Evidence and Implications," *ILR Review*, vol. 39 (no. 3) pp. 323-336 (April 1986).
- Marta Lachowska, Merve Meral, and Stephen A. Woodbury, "The Effects of Eliminating the Work Search Requirement on Job Match Quality and Other Long-Term Employment Outcomes," Upjohn Institute External Papers and Reports (2015), <http://research.upjohn.org/cgi/viewcontent.cgi?article=1073&context=externalpapers>.
- Claire McKenna, Rick McHugh, and George Wentworth, "Getting Real: Time to Re-Invest in the Public Employment Service," NELP (October 2012), <http://www.nelp.org/content/uploads/2015/03/NELP-Report-Investing-Public-Reemployment-Services.pdf>.
- Marios Michaelides, "Are Reemployment Services Effective in Periods of High Unemployment? Experimental Evidence from the UI System," (April 2013), <http://www.sole-jole.org/13417.pdf> (updated and posted as University of Missouri Economics Working Paper with Peter Mueser, (July 2015), [https://economics.missouri.edu/working-papers/2015/wp1509\\_mueser.pdf](https://economics.missouri.edu/working-papers/2015/wp1509_mueser.pdf)).
- Arash Nekoei and Andrea Weber, "Does Extending Unemployment Benefits Improve Job Quality?" Institute for the Study of Labor (IZA) Discussion Paper No. 9034 (April 2015), <http://ftp.iza.org/dp9034.pdf>.
- Austin Nichols, Josh Mitchell, and Stephan Lindner, "Consequences of Long-Term Unemployment," Urban Institute (July 2013), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412887-Consequences-of-Long-Term-Unemployment.PDF>

- 
- Patricia O'Campo, Agnes Molnara, Edwin Nga, Emilie Renahya, Christiane Mitchella, Ketan Shankardassa, Alexander St. John, Clare Bamba, and Carles Muntanera, "Social welfare matters: A realist review of when, how, and why unemployment insurance impacts poverty and health," *Social Science & Medicine*, vol. 132, pp. 88–94 (May 2015), <http://www.sciencedirect.com/science/article/pii/S0277953615001690>.
- Edmund Phelps, "What is wrong with the West's Economies?" *New York Review of Books* (August 13, 2015 issue), [www.nybooks.com/articles/archives/2015/aug13/what-wrong-wests-economies/](http://www.nybooks.com/articles/archives/2015/aug13/what-wrong-wests-economies/).
- Barry Schwartz, "Rethinking Work," *New York Times* (Sunday Review), August 30, 2015, <http://www.nytimes.com/2015/08/30/opinion/sunday/rethinking-work.html>.
- Robert M. Solow, *The Labor Market as a Social Institution*, Basil Blackwell (1990).
- Chad Stone and William Chen, "Introduction to Unemployment Insurance," Center on Budget Policy and Priorities (July 2014), <http://www.cbpp.org/research/introduction-to-unemployment-insurance>.
- Wayne Vroman, "The Role of Unemployment Insurance as an Automatic Stabilizer During a Recession," U.S. Department of Labor, July 2010, [http://wdr.doleta.gov/research/FullText\\_Documents/ETAOP2010-10.pdf](http://wdr.doleta.gov/research/FullText_Documents/ETAOP2010-10.pdf).
- Connie R. Wanberg, "The Individual Experience of Unemployment." *Annual Rev. of Psychology*, v. 63, p 369 [www.researchgate.net/publications/51460306\\_The\\_Individual\\_Experience\\_of\\_Unemployment](http://www.researchgate.net/publications/51460306_The_Individual_Experience_of_Unemployment) (2012).
- Cristobal Young, "Unemployment Insurance and Job Search Activity: Evidence from Random Audits," Stanford University Sociology Department (July 2012), [http://web.stanford.edu/~cy10/public/UI\\_and\\_Job\\_Search\\_Activity.pdf](http://web.stanford.edu/~cy10/public/UI_and_Job_Search_Activity.pdf).







[www.nelp.org](http://www.nelp.org)

**NELP National Office**

75 Maiden Lane  
Suite 601  
New York, NY 10038  
212-285-3025 tel  
212-285-3044 fax

**Washington DC Office**

2040 S Street NW  
Lower Level  
Washington, DC 20009  
202-683-4873 tel  
202-234-8584 fax

**California Office**

405 14th Street  
Suite 401  
Oakland, CA 94612  
510-663-5700 tel  
510-663-2028 fax

**Washington State Office**

317 17th Avenue South  
Seattle, WA 98144  
206-324-4000 tel