

**Testimony for the Public Hearing on the FY 2015 Budget of the
Department of Employment Services, Office of Unemployment Compensation**

**Committee on Business, Consumer & Regulatory Affairs
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**Drake Hagner, Staff Attorney
Legal Aid Society of the District of Columbia¹**

The Legal Aid Society of the District of Columbia submits this testimony on the FY 2015 Budget of the Department of Employment Services' Office of Unemployment Compensation respectfully requesting that the Council:

- (1) Strengthen the penalty for nonresponsive employers in proposed Sec. 267, given the harm non-responsiveness causes DOES and claimants; and,
- (2) Add additional language to the fraud provision in D.C. Code § 51-119(e) to safeguard vulnerable claimants.

I. Deter employer abuse of the unemployment claims process by strengthening the penalty for non-responsiveness.

Legal Aid supports the amendment to the Budget Support Act that penalizes employers who abuse the unemployment claims process. *See* Unemployment Insurance Benefits Modernization and Federal Conformity Amendments Act of 2014, Sec. 267. This amendment penalizes employers with a pattern of failing to respond to DOES's requests for information. However, this amendment does not go far enough: the definition of "pattern," requiring four failures to respond within a 36 month period, is far too lenient when compared to other state statutes and should be strengthened.

The proposed penalty is necessary because, under the current system, employers or third-party representatives have no incentive to respond quickly to requests for information by DOES. If employers or their representatives fail to respond, a claims decision is often delayed. These delays significantly impact low-income claimants. Unemployment benefits can prevent a free-fall into poverty for individual workers, but only if benefits are received quickly. Legal Aid has represented many clients who face credit card debt, termination of utility services, and even eviction proceedings before their initial claims process is complete.

However, even if benefits are eventually granted without the employer responding to DOES, the employer can ultimately appeal that decision. If the employer succeeds in overturning the award of benefits on appeal, an overpayment is assessed against the claimant, which the claimant must repay or else DOES absorbs the cost.

¹ The Legal Aid Society of the District of Columbia was formed in 1932 to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs." Over the last 80 plus years, tens of thousands of the District's neediest residents have been served by Legal Aid staff and volunteers. Legal Aid currently works in the following priority areas: public benefits (including unemployment insurance), consumer, family law, housing, and appellate.

It is a tremendous hardship when a low-income claimant is charged with an overpayment due to an employer's abuse of the system. One of Legal Aid's clients, Mr. Johnson,² was assessed an overpayment after receiving eight weeks of benefits when the employer did not supply information about his job loss to DOES. But, the employer appealed the initial award of benefits and won; therefore, his benefits ceased and he was assessed an overpayment for the benefits he had received. Mr. Johnson has some developmental delays that impacted his ability to understand the unemployment process. When he came to Legal Aid, he did not understand why his benefits ended or that he was required to pay back the eight weeks of benefits. Because he was without fault and remained extremely low-income, Legal Aid filed a waiver request on his behalf, which is still pending.³ Without a waiver of his overpayment, Mr. Johnson's tax returns or future unemployment benefits could be seized to pay back this debt.

While this amendment is crucial, it does not go far enough: the "pattern" needed to trigger the penalty in the amendment to the BSA is far too lenient when compared to that of other states. This amendment proposes that an employer receive written notice of four failures within a 36-month period before a penalty is assessed. Of the states that define "pattern" in their statute (as opposed to leaving the definition to the regulations), the District would be an outlier with only Virginia⁴ and Arizona⁵ allowing such a lenient standard. Most states require a pattern of only two or more failures to respond or even no pattern at all.⁶ In order to deter employer abuse of the unemployment claims process, the penalty must be meaningful.

Recommendation:

- Amend the definition of "pattern" to include two or more failures to respond timely to requests for information by DOES.

² The individual's name has been changed, and some non-essential facts have been changed or omitted, to protect the client's identity.

³ Unless they receive legal advice or counsel, few claimants seek waivers when they are assessed overpayments. According to data obtained by DOES in a 2013 FOIA request, out of 5,274 Notices of Overpayment issued by the agency in 2012, only 14 claimants requested a waiver.

⁴ Virginia S.B. 775 (assessing penalty after a pattern of four or more failures to respond in 48 months).

⁵ Arizona H.B. 76 (assessing penalty after a pattern of five or more than 5% of requests).

⁶ States that assess a penalty after two or more failures to respond include: Alabama (S.B. 201), Alaska (H.B. 76), California (A.B. 1845), Idaho (H.B. 44), Kansas (H.B. 2105), Maine (S.B. 454), Minnesota (S.F. 2224), Missouri (H.B. 611), Texas (S.B. 1537), and Wyoming (S.B. 73). Some states do not define "pattern" in their statute. *See* Arkansas (S.B. 575), Colorado (H.B. 1124), Illinois (H.B. 5632), North Dakota (H.B. 1111), Oregon (S.B. 192). Others require no pattern before an employer penalty is assessed. *See* Connecticut (S.B. 909), Delaware (H.B. 91), Hawaii (H.B. 915), Iowa (S.F. 110), Louisiana (S.B. 676), Maryland (S.B. 583), Mississippi (H.B. 932), Montana (H.B. 127), Nebraska (L.B. 1058), Nevada (S.B. 36), New York (bill unknown), Pennsylvania (H.B. 1127), Rhode Island (S.B. 683), South Dakota (H.B. 1055).

II. Clarify the “15% fraud penalty” by increasing protections for claimants with limited education, literacy, or English proficiency.

The Budget Support Act includes another amendment to this section,⁷ which assesses a 15% penalty on claimants who commit fraud to receive additional unemployment benefits.⁸ *See* D.C. Code § 51-119(e). While some overpayments involve dishonest or fraudulent conduct by claimants, the majority of workers Legal Aid meets have been overpaid through no fault of their own. In fact, claimants across the country are more likely to lose benefits from improper denials or underpayments than to be overpaid due to fraud.⁹

Legal Aid’s experience representing some of the most vulnerable workers in the District demonstrates that at least two kinds of protections are needed: (1) DOES should consider the personal circumstances that demonstrate whether a claimant “knew” he or she committed fraud; and, (2) prior to initiating a criminal investigation of fraud, DOES must advise a claimant of his or her right to remain silent and seek legal advice or counsel.

First, the BSA language is consistent with D.C. Court of Appeals precedent providing that DOES must support any finding of claimant fraud with specific evidence that the individual “*knowingly* made a false statement for the purpose of obtaining benefits” (emphasis added).¹⁰ However, the language should be amended to require that in making this determination, DOES must consider specific vulnerabilities that make it less likely a claimant “knowingly” committed fraud. These include a claimant’s limited education, intelligence, low literacy, or limited English proficiency.

Legal Aid routinely advises and represents low-income claimants with limited education and low literacy skills. Our experience suggests that a worker who cannot properly read his DOES Weekly Claim Card, and has not been orally notified of his duty to report any wages earned during weeks claimed, may not have the requisite state of mind to later “knowingly” withhold wage information and commit fraud. Similarly, an Amharic-speaking worker who only receives English-language documents from DOES may not know he has not supplied all the necessary information to assess his claim. In such cases, while the agency may request repayment, DOES should not be permitted to assess the punitive 15% penalty for fraud.

Second, Legal Aid asks the Council to require DOES to notify claimants of their right to remain silent and seek legal advice or counsel before fraud investigation meetings begin. We understand that agents from the Inspector General’s Office attend some investigation meetings but do not advise the claimant about the possibility of criminal fraud proceedings until the interview has concluded. If true, this practice raises significant due process concerns.

⁷ The current proposal extends the one year disqualification for unemployment benefits due to fraud to two years. *See* Unemployment Insurance Benefits Modernization and Federal Conformity Amendments Act of 2014, Sec. 266.

⁸ In December 2013, this same section was amended to allow DOES to assess a penalty of 15% to individuals who committed fraud and received benefits erroneously. *See* D.C. Code § 51-119(e)(3).

⁹ 2010 Audit Data, ETA 581 Contributions Operations Report (finding that claimants lost \$2.18 billion in calendar year 2010 compared to being overpaid \$1.56 billion in benefits due to fraud).

¹⁰ *See Jacobs v. District Unemployment Compensation Board*, 382 A.2d 282, 289 (D.C. 1978).

Recommendations:

- Amend D.C. Code § 51-119(e) to include safeguards for vulnerable claimants using the unemployment regulations from Maine as a model:

In determining whether a claimant is at fault [or has committed fraud], the [Director] shall consider all pertinent circumstances, including the claimant's age and intelligence, as well as any physical, mental, educational, or linguistic limitations (including lack of facility of the English language).

Unemployment Insurance Reporter, Regulation, Maine, 2(B) (Definitions); *see also* New Hampshire, Emp. 502.03 (Overpayment Without Fault).

- Amend D.C. Code § 51-119(e) to require that claimants be advised of their rights and given time to find counsel at the start, not the conclusion, of an interview regarding potential fraud. Again, the Maine unemployment regulations could be a model:

Prior to interviewing the claimant, the [Director] shall advise the claimant that he or she has the right to remain silent, that everything he or she says can and will be used against him or her in a court of law; and that he or she has the right to the advice of a lawyer before, and the presence of a lawyer during, the questioning. If the claimant desires the advice of a lawyer, and has not yet retained legal counsel, the interview shall be postponed for a reasonable time.

Unemployment Insurance Reporter, Regulation, Maine, 2(C) (Investigation of Cases of Potential Unemployment Fraud or Misrepresentation).

Conclusion

Legal Aid thanks the Committee for the opportunity to submit testimony and we look forward to working with DOES to continue resolving matters impacting claimants' benefits.