

**Testimony for the Performance Oversight Hearing on the  
Department of Employment Services (DOES) Office of Unemployment Compensation**

**Committee on Labor & Workforce Development**

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The Legal Aid Society of the District of Columbia<sup>1</sup> (Legal Aid) and the Claimant Advocacy Program<sup>2</sup> (CAP) submit this joint testimony on the performance of the Department of Employment Services (DOES) Office of Unemployment Compensation. Legal Aid and CAP praise DOES for effective implementation of the *Unemployment Benefits Modernization Amendment Act of 2016*, which has increased unemployment benefits by an average of \$1,344.00 for 12,486 claimants and provided important relief to part-time and seasonal workers. We have also seen improvements in DOES's processing of unemployment claimants on behalf of victims of domestic violence.

However, we remain concerned about the implementation of several Office of Unemployment Compensation programs, including claims processing for workers who quit their jobs to take care of ill or disabled family members, implementation of identification checks that needlessly disrupt benefits for nearly 25% of participating claimants, providing language access services for limited or non-English speaking claimants, and a lack of transparency on the processing of waiver requests and enforcement of the 15% fraud penalty for overpayments. We urge the Committee to monitor these crucial programs that disproportionately impact the most vulnerable unemployment claimants in the District.

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<sup>1</sup> 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.” For 85 years, Legal Aid attorneys and volunteers have served tens of thousands of the District’s neediest residents. Since 2011, Legal Aid has represented or counseled low-income claimants in unemployment matters at the Department of Employment Services, Office of Administrative Hearings, or the District of Columbia Court of Appeals. By helping claimants receive the benefits they are legally entitled to, Legal Aid helps prevent evictions, utility terminations, and other collateral consequences of unemployment. For more information visit [www.LegalAidDC.org](http://www.LegalAidDC.org), and our blog, [www.MakingJusticeReal.org](http://www.MakingJusticeReal.org).

<sup>2</sup> The Claimant Advocacy Program (CAP) is a free legal counseling service available to individuals who file unemployment compensation appeals in the District of Columbia. CAP provides legal advice and/or representation to 50-60 claimants each month. CAP is a program of the Metropolitan Washington Council AFL-CIO, which works with over 200 affiliated union locals and religious, student, and political allies to improve the lives of workers and families throughout the greater metro Washington area. For more information, visit <http://www.dclabor.org/unemployment-help.html> or <http://www.dclabor.org/>.

## I. Successes in Fiscal Year 2016 and 2017

### a. Recent Benefit Increases Help More than 12,000 Claimants

In FY17, DOES implemented the *Unemployment Benefits Modernization Amendment Act of 2016*, which brought four crucial changes to District workers: (1) the maximum weekly benefit amount was increased from \$359 to \$425 per week; (2) part-time workers now keep a higher percentage of their unemployment benefits while they search for full time work; (3) seasonal workers are no longer penalized for inconsistent work histories; and (4) DOES must consider increasing the maximum weekly benefit amount each year in accordance with the Consumer Price Index for Urban Consumers in the Washington Metropolitan Statistical Area.

Implementation has been a resounding success for District workers. As a result of these reforms, DOES issued an average of \$1,344.00 more in unemployment compensation to 12,486 claimants so far. The unemployment trust fund remains strong.<sup>3</sup> While DOES does not track partial unemployment benefits, it is likely that hundreds more claimants who work part-time were also helped. The need for these reforms is especially apparent in light of a recent report that while the District's unemployment rate has fallen overall, black residents and residents without a college degree continue to have rates of joblessness higher than before the recession of 2007 – 09.<sup>4</sup> DOES continues to play a crucial role in supporting jobless workers in the District.

### Recommendations:

- By September 30, 2017, report to the Mayor the result of DOES's consideration to raise the maximum weekly benefit amount in accordance with the Consumer Price Index, per *id.* § 51-107(b)(2).
- Track how many claimants receive partial unemployment benefits (and how much they receive) and report these figures to the Mayor or the Council.

### b. Processing of Claims for Domestic Violence Victims Has Improved

Legal Aid commends the DOES Office of Unemployment Compensation for its ongoing efforts to serve victims of domestic violence in accordance with the provisions of D.C. Code § 51-131 *et seq.* Over the past year, Legal Aid has represented a number of victims who lost their jobs because of injuries caused by domestic violence, stalking, and kidnapping. Abusers commonly interfere with employment as a tactic to further control and harass the victim. Unemployment benefits offer a lifeline of economic support that allows a victim to flee abuse.

Legal Aid and CAP have observed an improvement in the quality and accuracy of claims processing on behalf of victims of domestic violence.<sup>5</sup> Further, DOES reports that domestic

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<sup>3</sup> DOES Performance Responses, FY 16-17, Part 2, page 22 (showing unemployment trust fund with ending balance of \$392,175,186.00 in FY17 to date).

<sup>4</sup> DC Fiscal Policy Institute, "Still Looking for Work: Unemployment in DC Highlights Racial Inequity," (March 2, 2017), [http://www.dcfpi.org/wp-content/uploads/2017/03/Still-Looking-for-Work-Unemployment-2017\\_fnl.pdf](http://www.dcfpi.org/wp-content/uploads/2017/03/Still-Looking-for-Work-Unemployment-2017_fnl.pdf).

<sup>5</sup> Beginning in 2014, DOES invited Legal Aid attorneys to provide training for eighty (80) DOES staff members on the dynamics of domestic violence, how it impacts the workplace, and the procedures for handling

violence related claims have increased – from only two to four claims in FY14 and FY15 to 15 claims in FY16.<sup>6</sup> Despite the recent increase in claims, we believe that many more District workers have lost their jobs due to domestic violence than these numbers reflect. We urge DOES to produce and distribute outreach materials to claimants and employers educating them about the protections for victims.

Further, the domestic violence provision wisely includes a “no fault” provision allowing domestic violence claims to be paid from the general fund, per D.C. Code § 51-133<sup>7</sup>, thus reducing any potential harm to both the employer and the victim when domestic violence interferes with work. However, this “no fault” provision currently applies only to employers in the experience-rating system. The District government and certain nonprofits pay out of pocket for domestic violence claims just as they pay their other UI claims. As a result, unemployment claims against the District government and certain nonprofits are more likely to be contested and go to an evidentiary hearing. Given that these victims have often already testified under oath about the abuse in related court proceedings (for example, to obtain a Temporary or Civil Protection Order), having to again re-litigate the facts in front of their employers is humiliating and unnecessary. We encourage the Committee to develop legislation to expand the no-fault provision of the code to all employers and not just those in the experience-rating system.

### **Recommendations:**

- Produce and distribute outreach materials to claimants and employers educating them about special unemployment claims processing for victims.
- Develop legislation to expand the non-fault provision of D.C. Code § 51-133 to all employers and not just experience-rated employers.

## **II. Challenges and Areas for Improvement**

### **a. Identification Checks Needlessly Terminate Benefits for Nearly 25% of the Claimants Selected**

Department of Labor regulations require DOES to conduct random identification checks of claimants. Unfortunately, DOES has poorly implemented this program resulting in temporary or permanent benefit terminations for nearly 25% of the claimants selected.<sup>8</sup> DOES requires claimants to respond to a phone call within 48 hours and potentially also an email within 7 days. Claimants report often never receiving these emails, which can be routed to spam filters. Extremely short turnaround times to respond and/or deliver identification documents plus mismanagement of identification paperwork at the American Job Centers both contribute to the high rate of terminations.

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unemployment claims related to domestic violence. Legal Aid has continued to provide these trainings each year, thus bringing DOES into compliance with the annual training requirements of D.C. Code § 51-134.

<sup>6</sup> DOES Performance Responses, FY 16-17, Part 2, pages 29-30.

<sup>7</sup> The provision reads: “Benefits paid pursuant to this part shall not be charged to the experience rating accounts of employers, except that this section shall not apply to employers who have elected to make payments in lieu of contributions under § 51-103(f) and (h).” D.C. Code § 51-133.

<sup>8</sup> According to DOES, in FY17, 908 claimants were held ineligible for failing to respond to requests for identification out of 3,795 – for a total of 24% claimants terminated. In FY 16, 22% of claimants selected were terminated and in FY 15, 23% were terminated. DOES Performance Responses, FY 16-17, Part 2, page 30.

CAP has represented several claimants whose benefits were terminated as a result of these identification checks. Most claimants did not know they were selected for identification checks until their benefits stopped and they contacted DOES to find out why. Others turned in copies of their identification documents multiple times to the American Job Centers only to have the paperwork lost – requiring them to make multiple, unnecessary trips to the center while their benefits languished.

**Recommendations:**

- Review procedures for the ID verification program and provide more time to claimants to respond to telephone calls or emails notifying them of the need to bring in identification documents.
- Develop procedures to ensure that ID paperwork is timely logged and processed such as requiring that employees scan paperwork as soon as it is presented and provide receipts to claimants.

b. Claims Processing is Less Than Transparent for Workers Who Leave Work to Care for an Ill or Disabled Family Member

In 2010, the Council amended the unemployment compensation statute to increase coverage for job losses caused by “compelling family reasons.” *See* Unemployment Compensation Reform Amendment Act of 2010 (B18-0455).<sup>9</sup> One of these changes allowed workers to receive unemployment benefits after quitting a job to care for an “ill or disabled family member.” *See* D.C. Code § 51-110(d)(5) (“Compensation shall not be denied to any otherwise eligible individual who leaves his or her most recent work to care for an ill or disabled family member.”). Since 2011, advocates have been asking DOES for regulations to interpret these provisions since claimant advocates and employer advocates have disagreed over their interpretation of these provisions in several cases at the Office of Administrative Hearings. However, DOES took the position in their FY15-16 Performance Oversight answers that they would not create regulations because, “[t]he requirements of the Unemployment Compensation Reform Amendment Act of 2010 are clear and unambiguous.”<sup>10</sup>

Now, DOES appears to have made a significant change to how they are implementing the “ill or disabled family member” provision by requiring medical documentation of the illness or disability.<sup>11</sup> An analogous UI provision allows claimants to collect benefits after quitting a job because their own “[i]llness or disability [that is] caused or aggravated by the work.” *See* 7-DCMR 311.7(e). Yet for this provision, DOES promulgated regulations that clearly define the rules, approving claims only where the “claimant has previously supplied the employer with a medical statement [...]” *See id.* In another provision on domestic violence where documentation of abuse is required, these requirements are clearly explained in the code. *See* D.C. Code § 51-132.

DOES has promulgated no such rules to interpret the compelling family reasons statutory provision to require that a claimant furnish notice or a medical statement about their ill or

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<sup>9</sup> The Council amended these provisions to allow the District to qualify for payments through the 2009 Assistance for Unemployment Workers and Struggling Families Act, part of The American Recovery and Reinvestment Act. Public Law (Pub. L.) No. 111-5, Section 2003(a) *amending* Section 903 of the Social Security Act, 42 U.S.C. § 1103.

<sup>10</sup> DOES FY15-16 Performance Review Questions & Answers, page 93.

<sup>11</sup> DOES Performance Responses, FY 16-17, Part 2, page 29.

disabled family member before quitting. Claimants deserve notice of documentary requirements that may impact their ability to receive benefits. Further, without notice and comment rulemaking, these claims may be subject to litigation under the District of Columbia Administrative Procedures Act.

**Recommendations:**

- Immediately discontinue the requirement for documentary proof for claimants who quit due to an ill or disabled family member under D.C. Code § 51-110(d)(5).
- Promulgate rules through notice and comment rulemaking to provide further guidance on § 51-110(d)(5), as needed.

c. Language Access Has Made Progress, But Needs Improvement

Under the *District of Columbia Language Access Act*, DOES must translate vital documents into languages where at least 3% or 500 individuals (whichever is less) of the population they serve, encounter, or is likely to encounter communicates in a language other than English. Legal Aid and CAP are heartened that DOES has expended significant resources improving language access in FY16-17, including developing more than two dozen Spanish language documents that are pending final review. These documents are desperately needed for Spanish speaking claimants to understand their rights and obligations under the UI rules.

However, to date, there are still significant gaps in DOES's language access compliance. First, DOES has not acknowledged its obligation to serve the District's significant population of Amharic workers with limited English proficiency. Instead, DOES has taken the position that under the standard of the Language Access Act, it is only required to translate documents into Spanish.<sup>12</sup> This seems very unlikely given the large population of limited English proficient Amharic speaking workers in the District.<sup>13</sup> Second, Spanish speaking claimants report long wait times for telephone translation services and great difficulty accessing the few Spanish-speaking DOES employees at the 14<sup>th</sup> Street American Jobs Center.

**Recommendations:**

- Identify how DOES measures its population served, encountered, or likely to be encountered to justify not providing translation into Amharic.
- Expedite final review and distribution of vital documents in Spanish, including Claims Examiner Determinations, Audit Notices, and Notices of Overpayment.
- Review customer service plans at each DOES office to ensure effective service for limited or no English proficiency clients in accordance with the Language Access Act.
- Continue efforts to translate the online unemployment benefits application into Spanish.

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<sup>12</sup> DOES Performance Responses, FY 16-17, Part 2, page 29.

<sup>13</sup> U.S. Census data reveals that there are 5,509 foreign born District residents who were born in Ethiopia. See Place of Birth for the Foreign-Born Population in the United States (District of Columbia), [https://factfinder.census.gov/bkmk/table/1.0/en/ACS/14\\_5YR/B05006/0400000US11](https://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/B05006/0400000US11). See also District of Columbia Office of Human Rights Language Access Program, Annual Compliance Review for 2015, page 19 and 23, [http://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/LAAR\\_2015\\_FINAL\\_HighQ2\\_041116.pdf](http://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/LAAR_2015_FINAL_HighQ2_041116.pdf).

d. Overpayment Waiver Processing is Opaque and Unclear to Claimants

Legal Aid continues to be concerned about DOES's opaque overpayment waiver process. While some overpayments involve dishonest or fraudulent conduct by claimants, the majority of claimants who seek help from Legal Aid were overpaid through no fault of their own and experience tremendous financial hardship.<sup>14</sup>

First, once a claimant applies for a waiver, the process is completely lacking in transparency and accountability resulting in hardship for claimants who were overpaid through no fault of their own. After multiple requests from this committee over the past two years, DOES merely explains that they take the claimants wage history, financial situation, or disabilities into account and assess each case's "unique facts and circumstances."<sup>15</sup> However, according to Legal Aid's and CAP's experience, waiver requests that were routinely granted several years ago are now being routinely denied – even on behalf of extremely low-income claimants with vulnerabilities such as disabilities and limited English proficiency. It is therefore hard to imagine that the agency is taking into account all the unique facts and circumstances that lead to these vulnerable claimants being overpaid.

Further, claimants are not given adequate notice of their right to file a waiver request.<sup>16</sup> On the Notice of Overpayment, the agency includes several sections (verbatim) of the statutory language in D.C. Code 51-119(d) – the waiver request is mentioned in one sentence buried in a length statutory paragraph. Department of Labor Unemployment Insurance Program Letter (UIPL) No. 1-16, which provides guidelines on overpayment waivers, requires states to provide a *plain language notice* to the claimant that is sufficient to "enable the individual to understand under what circumstances a waiver may be granted and how to request such a waiver."<sup>17</sup> The Department of Labor further explains that "states must *clearly communicate* the potential availability of a waiver to individuals when establishing an overpayment. . . ."<sup>18</sup>

The dense statutory text on DOES's current Notice of Overpayment clearly fails to meet these plain language requirements. According to a DOES response to a Legal Aid FOIA request, only one-half of one percent of claimants who are issued overpayments ever request a waiver – indicating that few claimants know a waiver request process even exists.<sup>19</sup> For several years, DOES has promised to create a standard waiver request form, so that claimants inquiring about

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<sup>14</sup> For example, Legal Aid clients have been asked to repay benefits when an employer's successful appeal terminates their benefits. Other times, an employer may have incorrectly submitted wage information.

<sup>15</sup> DOES Performance Responses, FY 16-17, Part 2, page 30-31.

<sup>16</sup> DOES asserts that claimants are notified of their right to file a waiver via messaging on the IVR and website. DOES Performance Responses, FY 16-17, Part 2, page 30. However, the only evidence we could find was of an FAQ for the fraud penalty that gave no instructions for how to file a waiver or contact information for gathering further information. See [https://does.dc.gov/sites/default/files/dc/sites/does/page\\_content/attachments/UC%20Fraud%20Penalty%20FAQ\\_June2016\\_0.pdf](https://does.dc.gov/sites/default/files/dc/sites/does/page_content/attachments/UC%20Fraud%20Penalty%20FAQ_June2016_0.pdf).

<sup>17</sup> UIPL No. 1-16, October 1, 2015 (emphasis added). [http://workforsecurity.doleta.gov/dmstree/uipl/uipl2k16/uipl\\_0116.pdf](http://workforsecurity.doleta.gov/dmstree/uipl/uipl2k16/uipl_0116.pdf), page 4.

<sup>18</sup> *Id.* at 2 (emphasis added).

<sup>19</sup> According to DOES data, in FY 2011, DOES issued 6,613 Notices of Overpayment. Only 29 claimants submitted waiver requests, of which 19 were granted. In FY 2012: DOES issued 5,274 Notices of Overpayment. Only 14 claimants submitted waiver requests, of which 11 were granted.

the accuracy or fairness of their overpayment could be given a procedure for challenging the overpayment, but DOES has failed to deliver on this promise.

**Recommendations:**

- Publish guidelines for overpayment investigations to ensure meaningful opportunities for claimants to review and challenge alleged overpayments.
- Develop and implement standards for evaluating waiver requests (including hardship and no fault standards) in a public DOES Policy Manual.
- Commit to halting overpayment recoupment when a waiver request has been filed until a determination has been made to grant or deny the waiver request.

e. Ensure that DC’s Assessment and Collection of the 15% Fraud Penalty is Lawful and Fair.

Legal Aid and CAP continue to be concerned about DOES’s assessment of a 15% fraud penalty. *See* D.C. Code § 51-119(e)(3). This penalty, which was implemented in October 2013 in accordance with federal guidelines, allows DOES to assess an additional 15% penalty in addition to overpaid benefits where a claimant knowingly made a false statement to DOES to receive more in unemployment benefits than they were due.

The District has a poor record of recouping overpaid funds and uncovering fraudulent claims in a timely manner. DOES’s Benefit Payment Control Unit has undergone reforms in recent years to improve these efforts. Advocates for claimants support common sense reforms to uncover fraud, since fraudulent conduct weakens the fiscal health of the Unemployment Insurance Trust fund and decreases public trust in the unemployment benefit system. However, in implementing the 15% fraud penalty, Legal Aid and CAP are concerned that DOES has cast too wide a net and is penalizing some conduct that is not actually fraudulent.<sup>20</sup> Fraud is a quasi-criminal penalty – because of the severity of such a penalty, the courts have made clear that a high burden of proof is required.<sup>21</sup> In order to prove fraud, the District is required to have specific evidence that the individual “*knowingly* made a false statement for the purpose of obtaining benefits” (emphasis added). *See Jacobs v. District Unemployment Compensation Board*, 382 A.2d 282, 289 (D.C. 1978).

In its performance answer, DOES failed to explain exactly *how* they assess fraud under code section 51-119(e)(3),<sup>22</sup> merely saying that they compare “activity related to filings” with

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<sup>20</sup> In fact, claimants across the country are more likely to lose benefits from improper denials of benefits or underpayments than to be overpaid due to fraud. 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).

<sup>21</sup> Under the common law, fraud must be proven by clear and convincing evidence. *See, e.g., Nethken v. Peerless Ins. Co.*, 978 A.2d 603, 604 (D.C. 2009). As the Supreme Court explained, “civil cases involving allegations of fraud or some other quasi-criminal wrongdoing” are typically governed by a clear and convincing standard of proof because “[t]he interests at stake in those cases are deemed to be more substantial than mere loss of money” and a standard of proof higher than preponderance is necessary to “reduce the risk to the defendant of having his reputation tarnished erroneously.” *See Addington v. Texas*, 441 U.S. 418, 424 (1979).

<sup>22</sup> DOES Performance Responses, FY 16-17, Part 2, page 32.

“applicable data.” However, these ongoing data-matching efforts fail to prove fraud because they do not include individualized proof that the claimant knew they were making a false statement. This did not stop DOES from assessing an astonishing number of fraud penalties in the last few years: 1,907 penalties in FY15; 2,768 penalties in FY16; and 675 penalties in FY17 to date.<sup>23</sup> Without further explanation, it is difficult to understand how DOES could have collected the requisite proof that such a high number of claims were the result of knowing and intentionally fraudulent conduct.

Legal Aid and CAP have worked with claimants who were assessed fraud penalties even though they did not intent to make a false statement or to be overpaid – for example, a claimant with a disability who miscalculated and misreported her part-time earnings but did not do so intentionally. Without policies to protect claimants who might fail to report wages due to barriers in communication and comprehension such as with limited education, low or lack of literacy, or limited or no English proficiency, DOES is assessing a 15% fraud penalty on workers who were overpaid due to these limitations. Not only does such a policy contravene basic principles of fairness, it is inconsistent with District law, which requires a finding of intentional wrongdoing to support a finding of fraud.

By contrast, Maine’s unemployment code offers clear, reasonable safeguards for vulnerable workers that should be a model for future District policy:

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).<sup>24</sup>

Such a policy would allow DC to pursue the workers who knowingly and intentionally commit fraud without harming those who were overpaid without any intent to receive more benefits than they were due (which constitutes the majority of claimants).

**Recommendations:**

- Review existing procedures for assessing the 15% fraud penalty to ensure DOES has clear and convincing evidence of *intentionally* fraudulent conduct in each case.
- Adopt safeguards for vulnerable workers in District Code or regulations, following New Hampshire or Maine.

**Conclusion**

Legal Aid and CAP thank the Committee for the opportunity to submit this testimony and we look forward to working with DOES to continue resolving matters impacting claimants’ benefits.

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<sup>23</sup> DOES Performance Responses, FY 16-17, Part 2, page 32.

<sup>24</sup> Unemployment Insurance Reporter, Regulation, Maine, 2(B) (Definitions); *see also* New Hampshire, Emp. 502.03 (Overpayment Without Fault).