

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

**Committee on Labor & Workforce Development
March 7, 2018**

**Drake Hagner, Senior Staff Attorney, Legal Aid Society of the District of Columbia
Tonya Love, Program Director and Attorney, Claimant Advocacy Program, Washington
Metropolitan Council AFL-CIO**

The Legal Aid Society of the District of Columbia¹ and the Claimant Advocacy Program² (CAP) submit this joint testimony on the performance of the Department of Employment Services (DOES) Office of Unemployment Compensation. Legal Aid and CAP commend DOES for raising the unemployment compensation maximum weekly benefit amount from \$425 to \$432 per week – the first annual increase under the review process established by the *Unemployment Benefits Modernization Amendment Act of 2016*. DOES also continues to commit to annual trainings on domestic violence, and the number of claims, though small, has increased.

However, Legal Aid and CAP remain concerned about DOES’s performance in several areas, which we address in further detail below. These performance issues fall under two themes: first, DOES tends to craft overly broad policies in response to legitimate concerns, impacting a much larger group of claimants than is necessary to resolve the concern; and, second, DOES fails to share information with stakeholders and engages in an opaque and, unfortunately, terse manner with advocates, eroding trust in the stakeholders community and distracting from their efforts to address existing problems.

Before we continue, we would like to note that DOES faces a leadership challenge this year with the imminent departure of Director Odie Donald II after just twelve months of service in his current position. His replacement will be the third Director of the agency in a three year period. In wake of his departure, it is imperative that the District attract and retain effective leadership that will boost morale at DOES and inspire confidence in the public.

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.” 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, and our blog, www.MakingJusticeReal.org.

² 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 2017 and 2018

The Office of Unemployment Compensation has made progress in several areas in FY17 and FY18 to date, including implementing benefit raises and slowly but steadily increasing the number of claims for those who have lost their jobs due to survivors of domestic violence, as discussed below. Additional improvements include the launch of a Spanish language website for finding a job or filing for unemployment insurance.³

a. DOES implemented the first annual benefit increase in accordance with the UI Modernization Amendment Act of 2016

In 2016, DOES implemented a desperately needed benefits increase as part of the *Unemployment Benefits Modernization Amendment Act of 2016*. The maximum weekly benefit amount rose from \$359 per week – where it had remained stagnant for over a decade – to \$425 per week, making the District’s benefit rate competitive with surrounding states. In the 15 months that followed, DOES gave an average \$61.20 benefit raise to 21,763 claimants.⁴

As the next step in these reforms, DOES implemented the first annual benefit increase on January 7, 2018, through a process outlined in the modernization amendment.⁵ This amendment requires DOES to review the maximum weekly benefit amount annually in accordance with the Consumer Price Index for Urban Consumers in the Washington Metropolitan Statistical Area and submit a proposal to the Mayor with DOES’s recommendation on whether benefits should increase or stay the same. Effective January 7, 2018, DOES announced on its website⁶ that the weekly benefit amount would increase from \$425 to \$432 per week. Thus far, 1,212 claimants have benefitted from this change for an average benefit increase of \$6.91 per week.⁷

b. DOES’s services for victims of domestic violence continues to improve

Legal Aid thanks the Office of Unemployment Compensation for welcoming Legal Aid attorneys each year to conduct a training on processing unemployment claims for victims of domestic violence. Our most recent training was February 23, 2018, with 100 DOES employees attending and asking thoughtful, engaged questions. Training DOES employees to spot victims of domestic violence should lead to an increased number of claims. Though still small, DOES reports that domestic violence claims for unemployment insurance have increased – from 15 in FY16 to 24 in FY17.⁸

Last year, this Committee championed a small but important change in the unemployment compensation act on behalf of employers and claimants who have been impacted by domestic violence. The amendment extended a “no fault” payment provision for all

³ See DC Networks (“En Español”), <https://www.dcnetworks.org/vosnet/Default.aspx>.

⁴ DOES Performance Responses, FY 17-18, page 63.

⁵ See D.C. Code § 51-107(b)(2).

⁶ Frequently Asked Questions (FAQs) for Claimants: January 2018 Maximum Weekly Benefit Amount Increase (January 7, 2018),

https://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/MWBA%20FAQs_Effective%201-7-18_FINAL%20%28v%29.pdf.

⁷ DOES Performance Responses, FY 17-18, page 63.

⁸ DOES Performance Responses, FY 17-18, page 61.

employers in the District of Columbia on domestic violence claims. This means that all claims where the job loss is due to domestic violence will be paid from the general fund and not from an employer's own coffers or experience-rating accounts.⁹

We thank this Committee for championing this change. We urge DOES to produce and distribute outreach materials to claimants and employers educating them about the protections for victims.

Recommendations:

- DOES should produce and distribute outreach materials to claimants and employers educating them about special unemployment claims processing for victims.

II. Challenges and Areas for Improvement

Legal Aid and CAP remain concerned about the Office of Unemployment Compensation performance in several areas, including processing appeal decisions and notifying claimants of their rights when they are assessed an overpayment.¹⁰ However, when reviewing past and present performance concerns, we also identified two broader themes to these problems. First, the Office of Unemployment Compensation tends to craft overly broad policy solutions that are implemented inflexibly. As a result, policy changes tend to impact a much larger group of claimants than is necessary to resolve the concern. And all too often, the claimants whose benefits are terminated or delayed are those with the fewest resources. We have also found that DOES sets rigid policies for its staff, allowing very little discretion when responding to claimants' individual circumstances.

Second, in the past year, DOES leadership has failed to engage productively with us on claimant concerns. At a time when Director Odie Donald II proclaims DOES "values what District stakeholders have to say about their local programs and service offerings,"¹¹ Legal Aid and CAP advocates have had a different experience. DOES leadership has failed to share recent policy changes and even refused to answer straightforward requests for information on DOES program implementation. Unfortunately, certain DOES leaders have responded to questions and concerns in a terse, and ultimately, unhelpful manner, eroding trust among stakeholders and distracting from their efforts to address existing problems. We continue to welcome the opportunity to meet with DOES and address claimant concerns.

⁹ See D.C. Code § 51-133. This provision formerly applied only to employers who participated in the experience rating system by paying UI taxes for employees and not to the District government and certain nonprofit organizations who choose to pay UI claims out of pocket.

¹⁰ Legal Aid and CAP testified at last year's performance oversight hearing about identification checks that needlessly terminated 25% of claimants. These concerns remain unchanged for FY17 and FY18 to date. CAP is also concerned about DOES's recent trend in finding higher numbers of claimants have "failed to report" or "failed to timely respond" to DOES requests, leading to unnecessary appeals.

¹¹ Odie Donald II, *D.C. Workforce Strong, But Needs Support*, Washington Business Journal (March 1, 2018), <https://www.bizjournals.com/washington/news/2018/03/01/viewpoint-d-c-workforce-strong-but-needs-support.html>

a. DOES has substantially increased the time it takes to process payments for claimants who have appealed

When a claimant's initial application (or claim) for unemployment insurance is denied, the claimant may appeal this decision to the District of Columbia Office of Administrative Hearings (OAH). OAH hears approximately 1,800 unemployment appeals each year.¹² In FY2017 alone, 1,030 of those appeals (more than half) resulted in OAH requiring DOES to grant benefits to a claimant who had previously been denied.¹³ These claimants go months without income or benefits while waiting for the erroneous initial denial to be overturned.

For many years, DOES would promptly pay these claimants approximately 2-3 business days after the decision was published. Mysteriously, in spring 2017, this processing time increased causing substantial economic hardship to claimants. In addition to our own client complaints, calls began pouring into the Claimant Advocacy Program on behalf of claimants who could not pay mortgages, rents, electrical bills, or pay for transportation or groceries because of needless, unexplainable payment delays.

Legal Aid and CAP tried to work with DOES for the past year to advocate for our individual clients and understand the cause for the recent delays. Unfortunately, DOES leadership was opaque, usually resolving our individual cases but refusing to discuss systemic concerns. On February 20, 2018, OAH hosted a UI stakeholders' meeting with DOES and claimant and employer representatives. There, the DOES leaders responsible for overseeing these policies refused to describe the policy or answer basic questions about what the process, though they agreed to send a written response at a later time.¹⁴ Claimants continue to ask why 15 days is needed when payments had previously been made within 2-3 days.

Recommendations:

- Ask DOES to provide a copy of the Standardization of Processing Times policy, if they have not already done so in their performance answers;
- Ask DOES to clarify how the Standardization of Processing Times policy “delivers measurable improvements to the level of customer service.”¹⁵
- Ask DOES to clarify how long it takes DOES to receive OAH Final Orders from OAH and what efforts have been made to coordinate the transmission of orders between the two agencies.
- Clarify whether the 15-day deadline is calendar or business days; clarify whether the 15-day deadline begins to run when the Final Order is issued by OAH or received by DOES.

¹² This estimate is based on past numbers shared orally with claimants' advocates by OAH at stakeholder meetings.

¹³ DOES Performance Responses, FY 17-18, page 62.

¹⁴ To date, Legal Aid and CAP have not received a written response.

¹⁵ DOES Performance Responses, FY 17-18, page 62.

b. DOES must do more to notify claimants of their rights when they are assessed an overpayment

When DOES determines that it has overpaid a claimant, they must issue a Notice of Determination of Overpayment that includes notice of the claimants' right to appeal or request waiver of the overpayment.¹⁶ A shockingly small number of claimants appeal these decisions to OAH. In FY17, DOES established 7,205 overpayment cases¹⁷ and only 101 claimants appealed.¹⁸ DOES found that one-third of the overpaid claimants committed fraud, assessing \$446,366.00 in fraud penalties.¹⁹ But a shockingly small number of claimants appealed these determinations – only 4 claimants of 2,417.²⁰ Legal Aid and CAP have spoken to many claimants who felt afraid and intimidated by DOES employees who call to ask claimants to sign restitution agreements waiving their right to appeal. After receiving counsel about their rights, several claimants have expressed regret to us for signing the restitution agreement (sometimes agreeing to monthly payments they cannot afford to make) before they understood the appeals process and procedural process available to them.

Legal Aid and CAP continue to be concerned that most claimants do not know about or understand what an overpayment or fraud penalty is, let alone their right to appeal these decisions. This matters because we have represented dozens of claimants to remedy serious errors in the notices of overpayment. And we have counseled clients accused of fraud who were overpaid through no fault of their own. Just recently, Legal Aid counseled a claimant who received four different Notices of Overpayment for different weeks – DOES assessed a fraud penalty for some weeks but not for others, even though the claimants income reporting was exactly the same.

DOES has improved the waiver process this year by publishing a standard waiver form on its website²¹, but further clarifications are still needed.

Recommendations:

- Ask DOES how claimants are notified of their right to seek waiver and appeal simultaneously.
- Ask DOES how they track waiver requests where OAH is concurrently reviewing the merits of an overpayment, recoupment, or fraud penalty.
- Ask DOES how they assess 15% fraud penalties to ensure it meets the clear and convincing evidence standard of proof of fraud.

¹⁶ The claimant has several opportunities for redress. They may appeal the determination to the Office of Administrative Hearings (OAH) to (1) challenge the cause or amount of the overpayment, (2) challenge any fraud penalty, if one was assessed, *see* D.C. Code 51-119(e)(3), or, (3) ask OAH to stop DOES from recouping benefits if they are without fault and recoupment would “defeat the purpose” of the Unemployment Compensation Act or be “against equity and good conscience,” *see* D.C. Code 51-119(d)(1). The claimant may also request a waiver from DOES. *See* D.C. Code 51-119(d)(1) (stating that overpaid funds “may [be] ... waived in the discretion of the Director...”).

¹⁷ DOES Performance Responses, FY 17-18, page 65.

¹⁸ DOES Performance Responses, FY 17-18, page 65.

¹⁹ DOES Performance Responses, FY 17-18, page 65.

²⁰ DOES Performance Responses, FY 17-18, page 65.

²¹ DOES Request for Waiver of Overpayment (last viewed March 6, 2018), <https://does.dc.gov/page/request-waiver-overpayment>.

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.