

Testimony of
Sharon M. Dietrich
Community Legal Services, Inc.

Hearing Before the
U.S. Congress, House of Representatives,
Committee on Ways and Means
Subcommittee on Human Resources

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Chairman Reichert, Ranking Member Doggett, and members of the Subcommittee, thank you for this opportunity to testify on the subject of program integrity in the Unemployment Insurance (UI) system.

My name is Sharon Dietrich. I am the Managing Attorney for Employment and Public Benefits for Community Legal Services, Inc. (CLS), in Philadelphia, PA. CLS is the larger of the two legal services programs serving low income people with civil legal problems in Philadelphia; we are not funded by the Legal Services Corporation. CLS is among the few legal services programs in the country that have long-standing employment law practices, with ours dating to the early 1970s. We see about 1,500 new clients seeking employment law representation every year.

I have been practicing employment law at CLS for 26 years. In that capacity, I have long been the lead policy advocate on the operations of the UI system in Pennsylvania. My advocacy is on behalf of the hundreds of unemployed legal aid clients with UI claims that our community represents every year, and it is informed by their experiences. I am knowledgeable about the role of overpayments in the system, how they occur, and how they can be prevented. I also have experience around issues of fraud and UI program integrity.

Let me be unequivocal about several points on which we all agree. First and foremost, fraud must not be tolerated. Second, UI should not be paid to people who are not entitled to it. Third, as stated in the press release for this hearing, correct payments should be made to the correct individuals.

As for the subject of “cash for convicts,” I reiterate my agreement that UI benefits should only be paid to people who are entitled to them. Incarcerated people who are serving time on a conviction are generally are not “able and available” for work, and thus are not entitled to benefits. I support efforts to root out claims by such ineligible people. However, I will raise two caveats.

First, from my extensive experiences working on employment issues involving criminal records, I am very aware that criminal justice system databases are often not reliable, because they are inaccurate or are not updated on a timely basis.¹ Especially given that many people are serving short sentences and availability for work is determined on a week by week basis, special care must be taken that the database used to identify incarcerated persons is up to date and reliable, and “hits” should be verified by the states.

¹ For instance, the FBI database is rightly criticized for its inaccuracy. See Madeline Neighly and Maurice Emsellem, Wanted: Accurate FBI Background Checks for Employment (National Employment Law Project, July 2013).

Second, while I understand the outrage around people who are incarcerated collecting UI benefits, clearly this is a small subset of claims that are found to be fraudulent, much less overall overpayment numbers. There are much more significant ways to avoid or reduce UI overpayments, which will be the focus of most of my testimony today. In particular, I will focus on:

- Resolving the inadequate federal funding of the state administrative systems, which compromises the functioning of these systems, including proper payment of claims and program integrity; and
- Involving state administrative agencies and employers in preventing overpayments, in addition to the focus on the unemployed.

I. Overpayments ≠ Fraud.

Sometimes, there is a tendency to conflate fraud with overpayments, the latter which are all circumstances in which people received UI benefits for which they were later determined to be ineligible. In the vast majority of cases, these overpayments are “non-fraud,” meaning that the worker was not intentionally trying to defraud the system. While fraud should of course be curbed to the extent possible, its prevalence should be kept in context.

For the three year period ending June 2012, approximately 10.87% of UI payments were overpaid. Just 2.67% of total payments represented fraud.² ***Fewer than one out of four (24.6%) overpayments were found to be fraudulent.*** The other three out of four cases involve reasons that do not involve fraudulent intent, such as a good faith dispute or misunderstanding about eligibility, employer error, or agency error. In these cases, the worker is found ineligible for such non-fraudulent reasons after initially having been paid benefits

The percentage of fraudulent UI claims has not been on the rise. During this lengthy recession, claims have been at historically high levels. But the average rate of fraud from mid-2008 to mid-2011 (24.0%) declined slightly compared to the prior three-year period (28.0%).³

In fact, workers are more likely to be underpaid benefits to which they are entitled rather than to be overpaid as a result of fraud. In 2010, for example, workers were underpaid \$2.2 billion in benefits. In contrast, overpayments resulting from fraud were \$1.6 billion.⁴

² U.S. Dept. of Labor, Employment and Training Admin., “Unemployment Insurance Integrity Rates, From July 1, 2009 to June 30, 2012”, https://www.oui.doleta.gov/unemploy/improp_payinitiatives.asp# .

³ National Employment Law Project, The Facts about Overpayments and Fraud in the Unemployment Insurance Program (Aug. 2012) [hereinafter The Facts about Overpayments and Fraud in the UI Program], at 1, *citing* U.S. Dept. of Labor, Employment and Training Admin, “State Improper Payment Data and Integrity Initiatives,” https://www.oui.doleta.gov/unemploy/improp_payinitiatives.asp# .

⁴ *Id.*, *citing* U.S. Dept. of Labor, Employment and Training Admin., “Calendar Year 2010 Benefit Accuracy Measurement Data Summary.”

Finally, it must be noted that employer fraud also contributes significantly to the loss of revenues from the UI system. In 2010, employers failed to report \$4.4 billion in wages, mostly because of misclassification of employees as independent contractors.⁵

II. Overburdened and Underfunded State UI Administrative Agencies Are More Likely to Make Overpayments

While fraud has not increased during the recession, overpayments have. Non-fraud overpayments increased to 7.9% in the mid-2008 to mid-2011 period, compared to 6.9% in the prior three years.⁶ To observers of state UI administrative systems, this should not be surprising. During recessions, these systems must rapidly expand in order to handle vastly increased numbers of claims and to implement federal extension programs. They must hire and train new staff, often while fighting for resources in the recessionary environment to do so. All the while, they must try to pay benefits “when due” to meet their responsibilities to desperate unemployed workers and to comply with the federal timeliness guidelines. They often do this with badly obsolete technology.

Having seen several recessions in my career, I am always impressed by the challenges that the administrators face as they confront the increased claims load. Understandably, increased numbers of mistakes are made, including both paying claims that should not be paid and not paying claims that should be paid.

These challenges would be difficult enough if the state administrative agencies were adequately funded to do their jobs. But they are not, and have not been for a long time. And the consequences of this inadequate funding were exposed around the country during this recession. These consequences include compromised state ability to meet performance measures, including program integrity.

States’ UI administrative funding is to be paid for by through the Federal Unemployment Tax Act (FUTA). Employers pay a federal tax of 0.6% on the first \$7,000 of wages (or \$42.00 per worker) per year. But despite this dedicated funding mechanism, the allocations that the states receive have been eroding for almost 20 years. As the National Association of State Workforce Agencies (NASWA) noted earlier this year:

States argue that even in good economic times they do not receive enough administrative funds to administer their programs as well as they would like. Since 1995, the federal government has not adjusted grants to states for administration of their UI programs for inflation (except for the one percent increase in fiscal year 2010). When adjusted for inflation and normalized at a base

⁵ Audit Data, ETA 581, *Contributions Operations Report*.

⁶ The Facts about Overpayments and Fraud in the UI Program, *supra* note 3, at 1.

two million average weekly insured unemployment level, base funding for State UI Administration is at its lowest level since 1986.⁷

In a survey about the impact of anticipated reduced administrative funding, NASWA members indicated that they expected consequences to include reduced administrative performance with U.S. Department of Labor (USDOL) measures.⁸

Pennsylvania's problems caused by inadequate federal administrative funding were particularly acute over the last year, as administrative funding losses threatened the adequacy of staffing in our UI system. Customer service in Pennsylvania's UI program had been deteriorating for years, as flat administrative funding has not kept up with inflation. But starting in the fall of 2012, unemployed workers were confronted with impenetrable busy signals for days on end when they tried to call the UC Service Centers to file new claims, ask questions, or conduct their business (as were employers that had business to conduct with the call centers).

This funding crisis was severe enough that in a rare virtually unanimous action, the Pennsylvania General Assembly recently adopted Act 34 of 2013, which diverts revenues intended for the state's trust fund to administrative purposes through 2019.⁹ Indeed, many states are now forced to also contribute state funds to supplement the indicate federal administrative dollars. No one is pleased that state dollars had to be redeployed to supplement inadequate federal funding. However, there was consensus that this supplemental funding was needed, given that our UI program simply could not be run adequately without it.¹⁰ Our funding problems and their compromise of state agency operations have not been unique.¹¹

What does inadequate federal administrative funding have to do with overpayments? Plenty. Here are a few impacts.

- Worker communication with the state agencies is thwarted. They cannot get information that they need to act appropriately to avoid overpayments. Misunderstandings of complex and confusing rules are seen as fraud. Staff cannot be reached to report errors that have been made on online applications or telephone claims.

⁷ National Association of State Workforce Agencies, EUC08 UI Administrative Funding and State Staff Reductions (Feb. 1, 2013), at 2.

⁸ *Id.* at 7.

⁹ Pennsylvania is one of the few states in a position to take such an action. Federal law requires state employer taxes to be used solely for benefit payments. However, we are one of only three states to also collect employee taxes, which are not restricted to this use.

¹⁰ Pennsylvania's federal base appropriation for FY 2013 (\$119.8 million) is actually less than in 2001 (\$121.9 million).

¹¹ *See, e.g.*, Karen Bouffard, Jobless Feel Pain As State Cuts Staff at Unemployment Offices, Detroit News (Sept. 18, 2012); Associated Press, SC Jobless Agency Cutting More than 100 Positions, Enquirer Herald (Oct. 15, 2012).

- Because the agency staff struggles with their workloads, erroneous payments are made.
- Delay in adjudicating claims, both initially and on appeal, leads to bigger overpayments of more dollars when erroneous payments are identified and stopped.

Thus, Congress should reform federal UI administrative funding, not only to restore state program operations to acceptable performance levels, but as a necessary component of program integrity.

III. Preventative Measures by State Agencies and Employers Are Needed Reduce Overpayments

Most of the program integrity strategies discussed to date have focused on identifying workers after they have done something wrong. For instance, cross-matching with National Directories of New Hires identifies claimants who continued to collect UI benefits after returning to work. While such strategies are appropriate, taking actions that can avoid or curtail overpayments in the first instance are preferable and should at least supplement punitive actions.

A) State agencies should focus on improving communications with workers

In my experience, many workers who have committed errors involving their unemployment claims have not done so purposefully and are in fact aghast when they learn that they are being charged with fraud or violating program rules. But rules that are clear to lawyers and program administrators are not always so obvious to the rank and file. Clear communications with claimants are extremely important, especially in an environment where they are being encouraged to process their UI claims without human interaction, through the internet and automated telephone interfaces.

For instance, the most common reason for overpayments is that claimants file for UI benefits after returning to work.¹² In some cases, this is an attempt to double dip. In others, it is caused by confusion over when a last claim can properly be filed. People are sometime uncertain about the timing of a claim. Or because they will not see a pay check for several weeks after starting work, they believe that they can continue to collect benefits. Clear communication about the rules and the consequences of violating them will help avoid such overpayments.

Another area where we have seen worker confusion is over opaque questions in applications. Online applications present particular difficulties. The options presented on a drop-down menu may not adequately reflect reality as experienced by a worker. Or the application may be structured in a manner that tracks UI law, rather than worker understanding. For instance, I have heard of much confusion among Pennsylvanians who have lost their jobs

¹² Earnings during the benefit year constitute almost 30% of overpayments. U.S. Dept. of Labor, Employment and Training Admin., “BAM Annual Report Rate Overpayments by Cause, From July 1, 2011 to June 30, 2012, http://workforcesecurity.doleta.gov/unemploy/improp_pay.asp

because of medical restrictions that that could not be accommodated by their employer (but that still permit them to be able and available for work). Tracking state UI law, the question on the online application was structured as though the worker had quit for medical reasons. But the claimants often did not see their separation that way; they believed that they have been laid off because the employer did not have any work consistent with their restrictions.¹³

State agencies can reduce overpayments caused by worker confusion by reviewing their communications to see whether they can be improved. Steps that should be taken include:

- Reviewing and clarifying notices and other written materials (including looking at literacy levels and language access) ;
- Reassessing technological interfaces with claimants, including online applications and continuing claims filing and automated telephone claims filing; and
- Making a priority of increasing access to staff to answer worker questions, to the extent consistent with administrative funding.

Because the areas of earnings during the benefit year and work search documentation are such frequent causes of overpayments, these are good subjects on which to start.

B) Prompt employer engagement in responding to claims should be further incentivized

One of the most common reasons for overpayments is employer delay in providing disqualifying information about a worker's separation (20%).¹⁴ The UI system was set up as an adversary system. A worker files a claim; then his or her employer is supposed to respond within a short time of getting notice of the claim. However, many employers do not initially contest claims, which are then paid based on the information given by the worker. The situation has become even more severe, especially among large employers, because of the proliferation of third-party agents (e.g, TALX) that represent employers in UI proceedings. When it comes time for the employer to face increased tax rates based on the paid claim, it may then still contest the claim, even if many months of payments have been made. By contrast, workers in Pennsylvania must file appeals within 15 days if their claims are denied, or the decision is final.

Workers who received benefits under these circumstances are harmed, as are the state trust fund and other employers that play by the rules. These workers now are burdened by large overpayments, which could have been avoided if the claim had been properly adjudicated at the beginning if the employer had responded as it is supposed to do. In Pennsylvania, we regularly

¹³ In the last year, Pennsylvania legal services advocates went through our online application and provided feedback to the PA Department of Labor and Industry that was gratefully received by the Department, which accepted most of our recommendations.

¹⁴ The Facts about Overpayments and Fraud in the UI Program, *supra* note 3, at 1.

see overpayments of 8-10 weeks under these circumstances; it is not unheard of to see most or all of an *entire* 26-week claim paid before the worker is ruled ineligible.

Hopefully, this problem will be reduced as the states implement the prohibition on noncharging due to employer fault that was created by Unemployment Compensation Integrity Act of 2011,¹⁵ which states must implement for overpayments established after October 21, 2013. However, the new federal law requirement that states must prohibit an employer from getting relief from charges if it did not timely or adequately respond to a claim applies *only* if the employer established *a pattern* of failing to respond timely or adequately.”

While this requirement is a move in the right direction, advocates believe that it does not go far enough. We worry that the state agencies burdened by tracking “patterns” will not be fully motivated to do so. A better standard that would further reduce overpayments would be for relief from charges to be denied in *any case* in which the employer lacks good cause for its failure to respond. In addition, the 2011 law did not specifically regulate the third-party agents, which contribute significantly to the delays in responding to requests for information and, in turn, to UI overpayments.¹⁶



On behalf of the Pennsylvanian clients with UI claims that I represent, I thank you for the opportunity to testify today.

¹⁵ Public Law 112-40 (enacted Oct. 21, 2011), enacting Section 3303(f) of FUTA. This law also requires states to impose a 15% penalty in cases of fraud. Additionally, Congress has permitted states to recover fraud and certain non-fraud overpayments from federal tax returns under the Treasury Offset Program.

¹⁶ Jason DeParle, Contesting Jobless Claims Becomes a Boom Industry, New York Times (April 3, 2010).