National Association of Unemployment Insurance Appeals Professionals

Navigator

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CONGRESS' RESPONSE TO THE COVID-19 PANDEMIC

By June Egeland and Jayson Myers, New York State Unemployment Insurance Appeal Board

In response to the COVID-19 pandemic, Congress huffed and puffed for a little while but in the end navigated through its troubled, partisan waters to agree on the CARES Act, which the President signed on March 27, 2020 to enact into law.

With regard to unemployment compensation, which is such a crucial element in this unprecedented period in American history, the key features of the legislation addressed the amount of total benefits potentially available to claimants, the duration of benefits, and an expansion of the definition of "claimant" to include non-traditional workers who have been affected by the pandemic. Here is an analysis of the different types of unemployment compensation to which claimants may be entitled during the pandemic under the CARES Act.

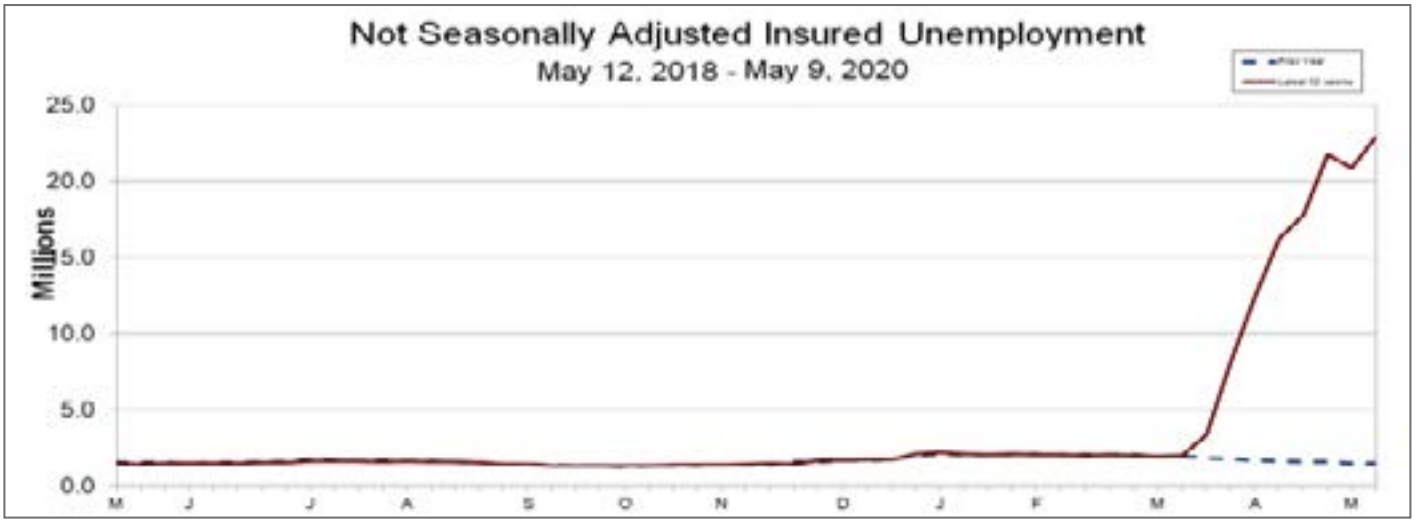
Unemployment Insurance Program Letter 10-20

First, a claimant, regardless of the type of benefit, must be unemployed or partially unemployed and not receiving paid sick leave or paid family/disability leave under any provision, whether employer provided or required by law. If the answer is yes to both of those questions, the next analysis is whether the claimant is able to establish a claim for regular unemployment compensation benefits?

Under UIPL 10-20, "unemployment" requires a reduction in both work hours and earnings. The UIPL also allows the State to remain flexible on the issue of whether a claimant is able to work and available for work. A claimant is available if they are available for any work during the entire week or any part of it, as long as any limitation on the claimant's availability does not indicate a withdrawal from the labor market. A claimant may also be considered available if limiting availability to suitable work and the limitation does not indicate a withdrawal from the labor market, or if on a temporary layoff and available only to return to the previous employer.

Unemployment Insurance Program Letter 13-20

UIPL 13-20 provides guidance regarding the first Federal law enacted, referred to as EUISAA. That law gave States the authority to modify their unemployment laws with respect to waiting week, work search, good cause, and employer experience rating on an emergency, temporary basis as needed to respond to the spread of COVID-19. With respect to good cause, the Program Letter provides that States should consider temporarily modifying their Unemployment Insurance Law so that good cause for voluntarily separating from employment reflects directives regarding social distancing. The Letter provided the example that good cause could include leaving employment due to a reasonable risk of exposure or infection or to care for a family member affected by the virus. With respect to employer charges, the UIPL directs States to consider how to fairly distribute the cost of unemployment benefits to employers. If a State decides not to charge employers with respect to benefits paid as a result of the spread of COVID-19, the same decision is required for both the reimbursable employers and the contributory employers. In addition, the UIPL provides that the claimant who is unemployed due to injury or illness may be considered able to accept employment until such time that the claimant refused an offer of suitable employment due to injury or illness. Lastly, the UIPL provides that the State has discretion to determine the type of suitable work the claimant must seek.



Source: U.S. Department of Labor, May 21, 2020 Unemployment Insurance Weekly Claims Report Update

Pandemic Emergency Unemployment Compensation (PEUC)

If the claimant cannot establish a regular claim for benefits because they exhausted a previous regular UI claim in U.S. or Canada, the next analysis is whether the claimant can establish a claim pursuant to Pandemic Emergency Unemployment Compensation (PEUC) benefits (Sec. 2107). The law defines exhaustion of regular compensation to mean receipt of all regular compensation available to a claimant based on employment or wages during their base period, or expiration of the benefit year. Sec. 2107(a)(3). PEUC benefits are available beginning the week ending April 5, 2020 and through December 31, 2020. The claimant must separately apply for PEUC after exhausting regular UC benefits. PEUC benefits entitle claimants to an additional 13 weeks of benefits under these circumstances.

The CARES Act requires all States to redetermine after each quarter whether a claimant can establish a valid new benefit year for regular UI benefits or as a combined wage claim. If the claimant can establish a new valid claim, the State must advise the claimant that they are no longer eligible for PEUC and to file a claim for regular benefits. Once a claimant qualifies for a new claim, their PEUC claim ceases, even if the new benefit rate is less than what the claimant was receiving on the PEUC claim. If the claimant exhausts the new claim and remains unemployed, the claimant can resume their PEUC claim if they had not already collected the 13 weeks of PEUC. No extended benefits are payable to the claimant until they have exhausted their PEUC claim. Sec. 2107(a)(5). PEUC appeals proceed in conformity with the State requirements for hearing requests and appeals.

If a claimant knowingly makes a false statement or representation of a material fact, or caused one to be made by another, or knowingly has failed or caused another to fail to disclose a material fact, and as a result of such the claimant received PEUC to which they were NOT entitled, that claimant will NOT be eligible for further PEUC and will be subject to prosecution pursuant to 18 U.S.C. Sec. 1001. Sec. 2107(e)(1) (A & B) and Sec. 2104(f)(1) (A & B). PEUC benefit weeks can be used to satisfy a previous forfeiture penalty. The law provides for repayment of PEUC overpayments, except the State may waive repayment if the overpayment was not the claimant's fault and "such repayment would be contrary to equity and good conscience." Sec. 2107(e)(2) and Sec. 2104(f). Recovery of overpayments is limited to three years after the date the individual received the overpayment, and claimants are entitled to an opportunity for a fair hearing regarding repayment.

Pandemic Unemployment Assistance (PUA)

If the claimant is not eligible for PEUC or State extended benefits, the next analysis is whether the claimant can establish a claim for Pandemic Unemployment Assistance (PUA) benefits (Section 2104). PUA benefits are for eligible claimants for weeks of unemployment caused by the COVID-19 reasons listed below, beginning after January 27, 2020 through the week ending December 31, 2020. PUA benefits are for claimants who are not eligible for regular, extended, or PEUC benefits, and includes claimants who have exhausted all their rights to any of those benefits and those who cannot establish a valid claim. A claimant who has been disqualified from regular UI benefits can still be eligible for PUA benefits. UIPL 16-20, Change 1.

To qualify for PUA, the claimant must be unemployed, partially unemployed, or unable or unavailable to work as a direct result of one of the following conditions:

- diagnosed with COVID-19 or has COVID-19 symptoms and is seeking medical diagnosis (a positive test is not required);
- is a member of the household of an individual diagnosed with COVID-19;
- is providing care for a family or household member diagnosed with COVID-19;
- has a child or another dependent who is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the claimant to work; once the school year has ended it is expected that parents will rely on their usual summer caregivers and their eligibility to receive PUA on that basis will end, but if the summer caregiver is unable to provide care as a direct result of the pandemic, the parent may continue to qualify for PUA benefits;
- is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency;
- is unable to reach the place of employment because the claimant was advised by a health care provider to self-quarantine due to concerns with COVID-19;
- was scheduled to start employment and does not have a job or unable to reach the job as a direct result of the COVID-19 public health emergency;
- became the breadwinner or major support for a household because the head of household died as a direct result of COVID-19;
- quit their job as a direct result of COVID-19;
- place of employment is closed as a direct result of the COVID-19 public health emergency;
- meets any additional criteria established by the Secretary for unemployment assistance under this section;
- is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular, extended, or PEUC benefits. Lacking sufficient work history is defined to include claimants with a recent attachment to the labor force or with insufficient wages in covered employment during the last 18 months to establish a regular claim. Self-employed individuals, as defined by 20 C.F.R. 625.2(n), means claimants whose primary income is derived from services for their own business or farm, and includes independent contractors, gig economy workers, and workers for certain religious entities.

Unlike Disaster Unemployment Assistance (DUA) benefits, PUA claimants do not need to provide proof of employment or self-employment to qualify. UIPL 16-20, Change 1. Nonetheless, claimants must have an attachment to the labor market and must have experienced a loss of wages and hours or an inability to start employment following a bona fide job offer. In addition, claimants must certify weekly for PUA benefits, including which COVID-19 reason applies to the claimant's continued unemployment; the reason can change from the original reason without any change in eligibility, and without a new PUA application.

Coverage under the PUA is limited to 39 weeks. PUA claims must be backdated to the first week that the claimant met the definition of covered individual. UIPL 16-20, I-10. The 39 weeks include those weeks that the claimant received any regular or extended benefits unless the extended benefits are further extended after the enactment of this law. Sec. 2102 (c) (2). The 13 weeks of PEUC benefits that the claimant may have received are not included in this 39-week period. UIPL 14-20, p. 7.

The base period for a PUA claim is the four quarters of the previous calendar year. For PUA purposes this is calendar year 2019. The PUA benefit rate will not be less than the minimum weekly DUA benefit rate established by the USDOL plus any increase to the weekly benefit rate after the date of the law's enactment. Sec. 2102 (d)(1). The benefit rate for a PUA claim is not affected by part-time status; a claimant who customarily works part-time will receive the minimum benefit rate unless their wages support a higher benefit rate. UIPL 16-20, Change 1. PUA does not required claimants to submit wage information within 21 days to avoid a denial of benefits. The benefit rate for the PUA claimant can be adjusted once the claimant submits additional wage information and the benefit rate will be retroactive. Similar to PEUC, the State must redetermine PUA claimant's eligibility for a regular, extended, or PEUC claim each quarter.

Since the filing period for the 2019 tax year was extended, some PUA claimants will not have filed their 2019 tax return, but they can submit their 2018 tax information to determine their benefit rate. The weekly PUA benefit rate will be based on gross wages unless the claimant was self-employed. Self-employed benefit amounts are based on the net earnings from self-employment, usually obtained from line 31 of the schedule C tax return or box 7 of the form 1099. Earnings, which can include wages reported to the Department of Taxation and Finance and/or self-employed income for the 2019 calendar year are added together and divided equally among the four quarters to determine the weekly benefit rate. The PUA weekly benefit rate will not be less than that established by the USDOL and cannot exceed the State's maximum benefit rate for all PUA-eligible claimants.

For claimants who qualified for PUA because the head of household passed away as a result of the pandemic, the wages of either the claimant or the deceased head of household will be used to establish the weekly benefit rate. The higher benefit rate will be used as long as the deceased head of household contributed at least 51 % of the wages toward the household.

The PUA weekly benefit rate will be reduced by the wages earned by the claimant dollar for dollar without regard to the actual number of days worked. For example, a PUA claimant who established a benefit rate of $504 and earned, either in self-employment or wages, $400 during the week ending March 29, 2020, will have their PUA benefits for that week reduced to $104 without regard to the number of days the claimant actually worked.

Disqualification or termination of PUA benefits will occur once any of the following five conditions are met:

- The claimant becomes employed and the claimant's earnings exceed the DUA maximum benefit amount; or
- The claimant refuses to accept an offer of suitable employment without good cause; or
- The claimant refuses to accept a referral to suitable employment without good cause; or
- The claimant is not able or available for employment unless it is due to the claimant's injury directly related to the disaster; or
- The claimant refuses to resume or begin suitable self-employment.

The CARES Act provides that DUA regulations would apply if there is any conflict between the DUA and section 2102 regarding PUA benefits. Sec. 2102 (h). For purposes of PUA, a refusal to return to previous employment or any employment because of a general concern about exposure to COVID-19 alone will result in the claimant's ineligibility for benefits. UIPL 16-20, Change 1. The reason for the refusal must fall within one of the conditions required for PUA eligibility in order for the claimant to remain eligible for PUA.

With respect to the overpayment of PUA benefits and disqualifications due to fraud, overpayments are recoverable where the claimant was not entitled to the benefits, regardless of the basis for the overpayment. 20 CFR 625.14 (a). In addition, the law does not permit any waiver of the overpayment, unlike the PEUC and FPUC as indicated above. If the PUA claimant makes a willful misrepresentation on their initial application for PUA benefits, the claimant will be disqualified from receipt of any PUA benefits with respect to the COVID-19 health emergency. 20 CFR 625.14 (i) (1). If the willful misrepresentation is made as a part of the claimant's weekly certification, then the PUA claimant is disqualified for that week and the first two compensable weeks in the disaster period that immediately follow the week of the willful misrepresentation. 20 CFR 625.14(i)(2). In addition, the claimant can be criminally prosecuted. 20 CFR 625.14(j).

While DUA provides that a hearing request on a determination must be made within 60 days, the CARES act did not extend similar hearing rights to the PUA claimant. Rather the PUA claimant must file their hearing request and any appeal of the ALJ decision in conformity with the State requirements for hearing requests and appeals. UIPL 16-20, Change 1.

Federal Pandemic Unemployment Compensation (FPUC)

If a claimant has qualified for regular, PEUC, or PUA benefits, the claimant will receive the additional $600 weekly benefit provided by the CARES Act, referred to as Federal Pandemic Unemployment Compensation (FPUC). These benefits are first available for the week of unemployment ending April 4, 2020 and end July 26, 2020. Sec. 2104(b)(1)(B) and (e) and UIPL 15-20, p. 3, para. (b). The claimant is entitled to the entire $600 as long as they are eligible for at least one dollar ($1) of any of the underlying unemployment benefits for the claimed week, regardless whether the underlying benefits were used to repay a previous overpayment.

The claimant who is disqualified from unemployment benefits under any of the benefit plans for committing fraud is also disqualified from receiving FPUC benefits (additional $600) for the same week(s). The FPUC overpayment is recoverable if the claimant was not entitled to it, except there is an opportunity for a waiver if the overpayment was not the claimant's fault and "such repayment would be contrary to equity and good conscience." It appears that the State's forfeiture penalty may be applicable with respect to eligibility for future FPUC benefits, but the State cannot impose a monetary penalty on any overpaid FPUC benefits. UIPL 15-20, I-6.

Final Note

It is important to remember that the CARES Act clearly provides that quitting a job without good cause in order to claim any of these unemployment benefits is fraud. UIPL 14-20, p. 2; UIPL 15-20, p. 2; UIPL 16-20, p. 2; UIPL 17-20, p. 2. Because the benefits provided by the CARES Act are significant, the CARES Act makes it clear that it is the States' responsibility to maintain the integrity of these benefits by ensuring that claimants who quit their jobs without good cause in order to claim these benefits are treated accordingly.

President's Column

Edward S. Steinmetz, Assistant Chief Administrative Law Judge
Washington State Office of Administrative Hearings

Hello everyone

As I begin writing what will be my last President's Column for the Navigator Newsletter, I find myself reflecting back on this past year, and what a year it has been! My term as President of this wonderful Association began last June in Indianapolis, at the end of what was for me an inspiring and amazing conference. Your Board of Governors was energized and enthused as we began work on the 2020 conference in Denver, and in the following nine months, the preparations for the conference were nearly complete. However, in March 2020, nearly everything came to a screeching halt as it became apparent that our country was facing a crisis of national importance. For the time being, the way that most of us work has changed significantly as our states and territories have grappled with the reality of continuing to serve our states' citizens and businesses during a national pandemic. With a record number of UI-related claims being filed in a very short period of time, most states are confidently forecasting a substantial increase in the number of UI appeals. If any of us ever want confirmation of the importance of the work we perform day in and day out, we only have to look at the Federal response to the pandemic. This response emphasizes the substantial value of the Unemployment Insurance program in helping to stabilize the nation's economy and assist millions of people and businesses who are suffering and in dire need.

Despite our current challenges, the NAUIAP Board of Governors is forging ahead with our NAUIAP webinar training. Our next presentation is scheduled for June 17, 2020, and will feature Sara Cromwell, Chair, Oregon Employment Appeals Board and myself discussing the importance of using clear and accessible language in the conduct of our hearings and in the drafting of our decisions. More information on this training is included in this issue of the Navigator.

I am very pleased to remind you that we have been successful in rescheduling the annual training Conference with the Crowne Plaza in downtown Denver for 2021. Therefore, for everyone who was looking forward to going to the mile-high city, you will have your chance next year! Given all the uncertainty for what lies ahead, next year's Conference is scheduled for travel on September 21, 2021, with the training being conducted on September 22 through noon on September 25, 2021.

The Board still has business that we need to complete this year though, and we need your help. In mid-June, 2020 please be looking for an NAUIAP email which will include the new slate of Officers and the Treasurer's financial report. We will be asking for your vote on both of these issues. Next year we will resume voting at the annual Business Meeting during the Conference.

In conclusion, I want to tell you all that my service on the NAUIAP Board of Governors will be ending in June, 2020, but I very much hope to see you all at the September 2021 Conference in Denver! The opportunity to serve on your Board of Governors and meet so many of you is, and will continue to be, one of the highlights of my career. Thank you all!

Don't Forget Denver!!

Sept. 21-25, 2021

We have rescheduled the NAUIAP Conference. Make sure to mark the date so you don't miss out on our exciting agenda.

Can't wait to see you there!

Tyops Hpapeni[i]

By J. S. Cromwell, Chair, Oregon Employment Appeals Board

Have you ever worked diligently to perfect the order you're drafting and been absolutely certain it was polished to a high shine, then reviewed it three months later and discovered to your shock and chagrin that it, well, wasn't? Take comfort, you're not alone, and you're not a bad writer!

There are physiological reasons why self-editing to perfect our own written materials is a notoriously fallible process. Because our brains are focused on complicated tasks – like creating and communicating a message involving complex themes and ideas – performing lower order tasks like spelling and hitting the correct keys on a keyboard falls by the wayside. Once we're done typing, we're familiar with our text, and that familiarity then correlates to how many proofreading errors we miss because our brains already know what we want to say. Once we're done writing our brains read our written product as though we actually wrote what we wanted to say instead of reading what we actually wrote.[ii] In other words, every time you read what you wrote, you're actually less of it and reciting more of it from memory, resulting in missed opportunities to self-correct errors.[iii]

The same can be said for peer reviewing. For instance, Oregon's EAB uses a peer-reviewing process for every decision we issue, in order to get a fresh set of eyes on the decision and hopefully catch more errors. Everyone who performs peer review, however, is already highly familiar with our decisions' format, style, content, flow, and common phrasings. That familiarity means that peer reviewers, like the authors, are also susceptible to reading what we expect to find rather than reading what's on the page, resulting in missed opportunities to correct our errors through peer review.

Take heart. While perfection is not easily attainable and might seem nearly impossible, there are some tools you can employ to improve your chances of spotting and correcting more errors.

1. Make a checklist, and take a first pass through your draft ticking the checklist boxes without reading the draft for content. Your checklist could include, for instance:

- A list of the customary elements of a decision in your jurisdiction;
- Quickly scrolling through the document to check for uniformity of formatting and spacing, indentions, punctuation, and numbering;
- Verifying the accuracy of any eligibility or disqualification effective dates;
- Double-checking that you have correctly disposed of the case, e.g. affirmed, reversed, etc.;
- Using spell check and grammar check to look for basic errors; and
- Using find and replace to remove extra spaces or check for common errors you know you make (form vs. from, apostrophe placement, Oxford commas, etc.).

2. Read your draft through all the way in one sitting, without stopping to make any edits or changes.

Consider whether the draft is understandable, chronological, logical, and complete. If any of the phrasing seems awkward to you, it probably is. If you – an experienced, legally trained, unemployment insurance appeals professional – have difficulty understanding what you wrote, your customers almost certainly will not understand it.

3. Read through your decision a second time with an eye towards fixing anything you identified during your initial read-through, and ask yourself:

- Is all the necessary law included, and all unnecessary law omitted;
- Have you used any unintended transpositions (form versus from, etc.), homonyms (two vs. to vs. too, past vs. passed, etc.), or repeated words (and and, etc.);
- Have you used big words when diminutive ones would suffice;
- Are your sentences or paragraphs too long;
- Have you used active voice and strong noun/verb pairs whenever possible;
- Have you used gender-neutral or gender-appropriate terminology;
- Have you used plain language and avoided flowery verbs (e.g. "asked" not "quizzed", "concluded" instead of "extrapolated", etc.)?

4. Got editing fatigue at this point? Try these tips:

Read your decision backward. It sounds weird, but many times we start editing on page 1, make adjustments, start over at page 1, and repeat. As a result, the first page or two of our decisions are often highly edited, but editing fatigue kicks in somewhere in the last half of our decisions and we lose focus. To avoid neglecting the last parts of your decisions, try starting at the end of your decision and working your way backward toward the beginning.

- Try to trick your brain into actually reading what's on the page by making the draft look unfamiliar to you. For example:
  - ✓ Try changing the font type to, say, Comic Sans, and the font size to 18 – the decision will look so unfamiliar to you when you edit it that your brain might be tricked out of predicting what you intended to type or read, improving your chances of catching your own typos;
  - ✓ Try changing the background color before editing; or
  - ✓ Try printing the decision and editing in print.

5. Other tips include:

- Search and destroy superlatives and prefatory phrases, like very, just, began to, started to, mostly, furthermore, while, actually, additionally, also, etc.;
- Actively try to cut words from your sentences with a focus on brevity – less is always more;
- Don't overdo the punctuation;
- Ask yourself if the losing party will understand why they lost.

6. What do you do if you're finding the writing confusing and having difficulty figuring out how to fix the draft?

- If you're peer reviewing another person's draft, be as specific as possible about the reason for your confusion.
- If you're faced with an unclear sentence or phrase or paragraph, ask yourself who performed each action in that sentence, phrase, or paragraph. Confusion is often the result of passive phrasing without a strong noun-verb pairing.

It's unlikely that we'll issue perfect decisions every time, but if we can use these tips to trick our brains enough to let us effectively edit our own and our peers' work, maybe we'll get a little closer.

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What Process Is Due When Granting A Continuance?

By Ana Maria Price
Staff Attorney, Mississippi Department of Employment Security

If your hearing practice is anything like mine, then you will have parties requesting a continuance for various reasons. In the aftermath of the COVID-19 pandemic, what standards should you follow when evaluating a continuance request? The Department of Labor's Handbook for Lower Authority explains that hearing officers "may grant a continuance for compelling and necessary reasons if the circumstances of the case warrant it." Handbook for Measuring Unemployment Insurance Lower Authority Appeals Quality, ETA Handbook No. 382, 3d Ed. (March 2011) ("ETA Handbook").

The Fourteenth Amendment explains that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §1. The Supreme Court has noted that the Due Process Clause protects the rights of "life, liberty, and property," by ensuring constitutionally adequate procedures before the deprivation of those rights. Cleveland Bd. of Educ. V. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). The concept of which "property rights" deserve protection has expanded to include benefits and entitlements created by state law-rules or understandings that secure [those] certain benefits. Board of Regents v. Roth, 408 U.S. 564, 576-77, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972).

Unemployment benefits are property rights entitled to procedural due process protections. Goldberg v. Kelly, 397 U.S. 254, 262, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1979) (citing Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963)); Berg v. Shearer, 855 F.2d 1342, 1345 (8th Cir. 1985)(noting "[u]nemployment benefits are a property interest protected by the due process requirements of the fourteenth amendment"); Ross v. Horn, 598 F.2d 1312, 1317-18 (2d Cir. 1979)(holding that "[a]ppellants certainly have a property right in receiving unemployment benefits to which they are entitled by statute....[t]hus it is clear that they may not be deprived of this right without due process."); Drumright v. Padzieski, 436 F. Supp. 310, 319 (E.D .Mich. 1977) (finding that "the due process clause...app[lies] to terminations of employment compensation benefits because they are statutorily created property interests, within the meaning of the Fifth and Fourteenth Amendments."). The seminal case addressing due process in the administrative law context, Matthews v. Eldridge, 424 U.S. 319 (1976), announced that due process is a flexible concept and the level of procedural protections necessary depend upon the demands of a given matter. The Supreme Court held that in the context of an administrative proceeding, once a property right exists courts must balance the following factors to determine the level of procedural process due: (1) the private interest affected by the agency action; (2) the risk of an improper deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would involve. Matthews, 424 U.S. 319.

As you will see from the cases below, courts also agree that constitutional procedural due process in the context of state administrative hearings requires a reasonable opportunity for a fair hearing to all parties as the standard set by Goldberg v. Kelly, 397 U.S. at 268. The Supreme Court has determined that "the decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing." Ohio Bell Tel. Co. v. PUC, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937). The Social Security Act at section 303(a)(3) also requires states to provide parties the "opportunity for a fair hearing before an impartial tribunal." 42 U.S. C. 303(b)(3). All states appear to have statutes, rules, or procedures that govern fair administrative hearings. See 42 U.S. C. 303(b)(2) (Social Security Act) (requiring States to comply substantially with the required provisions of State law"). Most state rules and procedures permit a continuance on a showing of good cause. Courts evaluate the application of those statutes, rules, or procedures in any given matter under an "abuse of discretion" standard.

In addition, the Department of Labor recognizes that rigid rules regarding the appeals process "subverts the remedial objectives of the unemployment insurance program through its regulation which specifically permits states to authorize reasonable requests by parties for continuances or rescheduling of hearings." 20 C.F.R. 650.1 (2020). The ETA Handbook notes that

> If a new issue arises during the hearing, the hearing officer must inform the parties that there is a new issue which could affect entitlement to benefits and that it needs to be covered [t]he parties must be advised of their options to proceeding which may include a party insisting on proper legal notice of the issue, waiver of the notice and proceeding with the case, or asking for a continuance to bring forward testimony or evidence as to any new issues. Any waiver of notice must be on the record.
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> **ETA Handbook No. 382, 3d Ed. p. 42 at Criterion No. 19.**

Even with the extensive case law at the federal level, most unemployment or workforce agency decisions often remain unchallenged beyond the Board of Review stage, leaving the agency's interpretation of what is "due process" relatively unchecked. However, fortunately for us, a few claimants have appealed several key issues affecting unemployment agency administrative decisions. Hopefully, as you navigate the post-Coronavirus landscape, you may find a few of these cases helpful when evaluating the inevitable requests for continuances that will arise.

Pre-hearing discovery

In Petro-Hunt v. Dept. of Workforce Services, 197 P.3d 107; 2008 UT App 391 (Utah App. 2008), the employer appealed the classification of the worker as an employee on the ground relevant to this topic, that the Utah Department of Workforce Services failed to permit pre-hearing discovery. The court found that procedural due process "at a minimum... requires... '[t]imely and adequate notice and an opportunity to be heard in a meaningful way.'" Id. at 197 P.3d 111 (citing In re Worthen, 926 P.2d 853, 876 (Utah 1996) (alteration in original) (quoting Nelson v. Jacobsen, 669 P.2d 1207, 1211 (Utah 1983)). The court

found that the relevant rule under the Utah Administrative Code only authorized pre-hearing discovery in limited circumstances which placed the burden on the party desiring the discovery to establish the need for such discovery by addressing the five elements of the rule. Id. at 197 P.3d 111 (explaining that the moving party must show that (1) informal discovery is inadequate; (2) no less costly or burdensome alternative exists to obtain the information; (3) pre-hearing discovery would not be unduly burdensome; (4) such preparation is necessary for a proper hearing; and, (5) such discovery would not cause undue delay). The court, in this case, held that the employer did not qualify for pre-hearing discovery because it had wholly failed to present any evidence at any level on these five elements and the record showed that the hearing officer had provided a fair hearing to the parties.

Scheduling and Other Conflicts

As often occurs, counsel for one of the parties (or a party) has another appointment or hearing set for the scheduled hearing date. Courts have addressed whether a denial of a request for continuance constitutes a denial of due process. With respect to scheduling conflicts, counsel must be unavailable on the date of the hearing and must request a continuance in a timely manner. Liebel v. Com., Unemployment Compensation Bd. of Review, 558 A.2d 579, 125 Pa.Cmwlth. 565 (Pa. Cmwlth. Ct. 1989) (noting that "[d]ue process standards do not guarantee a claimant a right to a continuance, even if for good cause if he fails to request it in a timely fashion or in a manner consistent with reasonable procedural rules").

In J.W.B. v. Review Board of Indiana Dept. of Workforce Development, the court of appeals evaluated under an abuse of discretion standard a hearing officer's denial of two separate requests for continuance which resulted in an adverse decision after a hearing without the participation of the claimant. 952 N.E.2d 843, 846 (Ind. App. 2011). The rules in place permitted hearing officers in Indiana the discretion to grant continuances on a showing of "good cause" but did not define "good cause." Id. The claimant first requested a six-week continuance because of the death of his mother. Subsequently, the claimant filed a second continuance request because his attorney had another unemployment hearing on the same date and time. Id. The court ruled that the hearing officer abused her discretion in denying both continuance requests because the claimant had presented facially obvious good cause for both requests and, equally important, the claimant suffered prejudice as a result of the denials as a result of the loss of eligibility for benefits. Id. at 847.

In BNA Constr. Ltd. V. Dir. of State of Ohio Dept. of Jobs and Family Services, an audit case, an issue arose at the initial hearing that resulted in counsel for the employer becoming a fact witness. 2017 Ohio 7227, 96 N.E.3d 838 (Ohio App. 2017). At the continued hearing, the counsel for the employer requested to withdraw as counsel as well as for a continuance to allow the employer to find a new attorney. The request was granted. The hearing officer granted a continuance for two months to allow the employer to find new representation. When the hearing reconvened, the employer had not found a new attorney. The previous attorney appeared and again requested a continuance for his client to find new counsel. The hearing officer denied this request. The employer then elected to continue with the previous attorney. The hearing officer continued the hearing for his own scheduling reasons two additional times and denied requests to continue for the employer to find new counsel each time. Through all the hearings on the matter, the employer did not secure new representation.

The court ruled that due process was not impaired by the denial of the continuance requests because the hearing officer provided the employer time to find alternate counsel but failed to do so, prior counsel had repeatedly chosen to represent the employer, and the employer presented an additional witness regarding the fact on which the attorney testified. Id. 96 N.E. 3d at 846.

Request for Subpoenas

In Jones v. District of Columbia Unemployment Compensation Board, 395 A.2d 392 (D.C. 1978), an unemployment benefits case, the claimant asserted he did not receive due process on the grounds that the hearing officer denied his request to subpoena witnesses for the hearing as well as his request for his entire personnel file among other issues. At the hearing, the employer did bring the claimant's personnel file. However, the hearing officer denied the claimant the right to review his performance evaluations. The court ordered a remand and therefore the issue of the witness subpoena was moot. In a footnote, the court explained

> While denying a continuance to obtain the subpoenaed witnesses, the examiner emphasized at the outset of the hearing that he would grant a continuance on petitioner's motion if it became obvious during the hearing that petitioner would be prejudiced by the absence of these witnesses. At no time thereafter did [the] petitioner make such a motion, including a proffer indicating why the witnesses were needed, given the issues and drift of the testimony.

Id. 395 A.2d at 399. With respect to the claimant's personnel file, the court noted that the claimant received all relevant material from the file. Therefore, there was no evidence to demonstrate a denial of a fair hearing and thus due process. Id.

The Fifth Circuit Court of Appeals addressed which circumstances compel the cross-examination of an adverse affiant at a disqualification hearing. Cuellar v. Texas Employment Comm'n, 825 F.2d 930 (5th Cir. 1987). At the hearing of this case, the employer presented an affidavit from an employee which presented a statement from an alleged fact witness, of whom the claimant had no knowledge, regarding the claimant's leaving his employment. The affiant executed the affidavit shortly before the hearing and not at the time of the separation. The claimant objected to the surprise affidavit at the hearing which the hearing officer overruled. The claimant then requested a continuance to subpoena the affiant which the hearing officer also denied. The claimant then objected that the denials impaired his right "to confront and cross-examine a witness whose credibility directly related to the central issue of the case" [good cause to leave employment]. Id. 825 F.2d at 931. The Fifth Circuit vacated the lower court's opinion and ordered a remand on the basis that the affidavit did not have independent indicia of reliability and the claimant had no reason to anticipate testimony from this witness. Therefore, the claimant had demonstrated the possibility of "prov[ing] facts sufficient to demonstrate a violation of his due process rights." Id. 825 F.2d at 938.

Takeaways

The coronavirus pandemic is unprecedented and likely will present novel requests for continuances in all manner of unemployment hearings. While your cases may not present scenarios that exactly match these examples, the overarching elements should nevertheless apply. When evaluating whether to grant a request for a continuance, each of these cases reminds hearing officers to investigate the underlying basis of timely requests for good cause and to fashion reasonable measures to provide a fair hearing to all parties.

Cross-Examination, Bias, and Party Satisfaction

By J. S. Cromwell, Chair
Oregon Employment Appeals Board

The U.S. Department of Labor's ETA Handbook 382 includes Criterion 11: Cross-examination as a critical fair hearing and due process element. Criterion 11 requires hearing officers to provide a timely opportunity for cross-examination, but also requires hearing officers to properly control cross-examination and to "provide appropriate assistance where necessary."

ETA Handbook 382 also includes Criterion 22: Bias and prejudice. Criterion 22 is another critical fair hearing and due process element, which requires hearing officers to conduct impartial hearings without demonstrating or appearing to demonstrate bias or prejudice toward any participant. But hearing officers must also, simultaneously, control repetitive and/or irrelevant testimony (Criterion 12) and control interruptions (Criterion 14).

There is a natural tension between these criteria, not only as far as what each criterion requires of hearing officers, but also with respect to how parties might perceive the fairness of hearing officers' behavior. Hearing officers must walk a fine line between allowing parties enough leeway to effectively present their evidence and stopping parties who are attempting to make repetitive or irrelevant statements. They must help parties formulate questions when appropriate on cross-examination, but also restrict parties from asking inappropriate questions or from interrupting the proceedings.

It might be objectively appropriate to the circumstances of each case for the ALJ to treat parties differently depending on their behavior and need for assistance. Treating parties differently might even be required to ensure adherence to Criteria 11, 12, and 14. However, to satisfy Criterion 22 and avoid the appearance of demonstrating bias, hearing officers must also be sensitive to how treating parties differently during a hearing might be perceived by the parties involved and by reviewing bodies.

In an ideal world all parties would leave their unemployment insurance benefits hearings satisfied that the hearing officers heard them and understood their point of view, and they would read the resulting orders with the understanding that the hearing officers and proceedings were fair, regardless of whether the case was decided in their favor. This is not an ideal world, however, and many parties equate their dissatisfaction with the process or outcome to bias or prejudice on the part of the hearing officer, even if the hearing officer actually was unbiased and impartial.

The appearance of bias or prejudice can take many forms, and it is important to differentiate bias and prejudice from customer dissatisfaction. For instance, if the hearing officer is perceived as sounding bored, parties might perceive that the hearing officer was "rubber stamping" the state workforce agency's decision even if they were not. If the hearing officer sounded annoyed or was abrupt with one of the parties, that party might infer that the hearing officer had already decided the case against them before the hearing started, even though the hearing officer had not. If the hearing officer helped one party, but had to admonish the other party for inappropriately interrupting the proceedings, the admonished party might perceive that the hearing officer's behavior was grounded in bias or prejudice, particularly if the hearing officer's decision is not in the admonished party's favor. How might a hearing officer's behavior be perceived by the losing party if the hearing officer had a considerable number of questions for one party and very few for the losing party? Or when the hearing officer aided one party during cross-examination but could not discern from the losing party's attempts to ask questions what they were trying to ask, admonished them for making statements during cross-examination, and moved on without offering help?

At the higher authority level, most complaints that hearings were "unfair" or the hearing officer was biased are unfounded. The manner in which the hearing officers control the hearing appear to result from that natural tension between hearing officers' competing obligations to adhere to DOL criteria amidst a crowded docket as well as perhaps a lack of tact in the manner in which hearing officers execute those obligations. In such cases, the aggrieved parties' complaints do not actually implicate Criterion 22's prohibitions against bias and prejudice. Rather, such complaints from the aggrieved parties are often more accurately characterized as customer dissatisfaction complaints.

Parties might complain that the hearing officer was biased against them because the hearing officer helped the other party formulate cross-examination questions but did not provide similar help to them, even though the complaining party declined to ask questions on cross-examination. A hearing officer might avoid such complaints and offer better customer service by offering to help both parties formulate questions.

With respect to controlling interruptions and repetitive testimony, parties often identify the hearing officers' attempts to prevent interruptions, irrelevant comments, or repetitive testimony as signs that the hearing offer did not want to listen to them or even had predecided the case against them. In those cases, the higher authority might receive complaints that the hearing officer "wouldn't let me talk," "didn't let me tell my side of the story," "kept cutting me off," or "wouldn't let me ask any questions." The hearing officer might avoid such complaints and provide a high standard of customer service if, instead of just telling the party not to interrupt, the hearing officer explained – or even re-explained – that although the hearing officer cannot allow interruptions when someone else is talking, the party will have the opportunity to cross-examine the witness later on, and will also be given the opportunity to tell their side of the story.

While complaints that hearings were unfair are not uncommon, it is extremely rare that the hearing record supports parties' claims of actual bias or prejudice as opposed to customer dissatisfaction. And while it is important to distinguish customer dissatisfaction from partiality on the part of the hearing officer, we should not be neglectful of trying to provide a high level of customer service during both lower and higher authority appeals proceedings, especially if our goal is to hold proceedings and issue decisions that our customers can both understand and accept as unbiased and fair.

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JUNE 17, 2020

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Webinar call-in information will be emailed prior to the Webinar.

AGENDA INCLUDES:

- Literacy in the United States
- Criterion # 7 – Clear Language
- Criterion # 31 – Understandable Decision
- Criterion # 28 – Logical Reasoning
- Clear and Ethical Decision Writing
- Hearing Record Sufficiency
- Standard of Review
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