

August 13, 2020

Testimony of The Legal Aid Society on the Impact of COVID-19 on Workers, presented before the Senate Standing Committee on Labor, the Senate Standing Committee On Banks, the Senate Standing Committee on Investigations and Government Operations, the Assembly Standing Committee on Labor, the Assembly Standing Committee on Banks, and the Assembly Standing Committee on Oversight, Analysis and Investigation.

Submitted by Richard Blum

Good morning. My name is Richard Blum, and I am a staff attorney in the Employment Law Unit of The Legal Aid Society. I prepared this testimony together with a paralegal casehandler in the unit, Katherine Stanton.

The Legal Aid Society is the oldest and largest not-for-profit public interest law firm in the United States, working on more than 300,000 individual legal matters annually for low-income New Yorkers with civil, criminal, and juvenile rights problems in addition to law reform representation that benefits all two million low-income children and adults in New York City. The Society delivers a full range of comprehensive legal services to low-income families and individuals in the City. Our Civil Practice has local neighborhood offices in all five boroughs, along with centralized city-wide law reform, employment law, immigration law, health law, and homeless rights practices.

The Employment Law Unit (ELU) provides representation, community education, and advice to low-wage workers regarding a variety of employment issues, including unemployment insurance benefits, leave rights, and wage theft, as well as employment discrimination. During the pandemic, the ELU has focused on helping train advocates and the public on workers' right to paid sick leave and family leave and on accessing critical unemployment assistance. The ELU has also focused on issues of worker health and safety, including how to object to unsafe conditions in the workplace.

Our testimony focuses on three inter-related areas: 1) the need for enforceable workplace health and safety standards with respect to COVID-19; 2) problems with delivery of unemployment assistance to New York workers and proposed legislative solutions to specific problems; and 3) the need for a fund to provide wage assistance to workers who have been excluded from the existing unemployment assistance programs.

Workplace Health and Safety Legislation

New York must legislate enforceable health and safety standards with stiff penalties to deter employers from subjecting their workforces to conditions that can prove lethal to workers, their families, their communities, and to the society as a whole. The federal government, specifically OSHA, has abdicated its responsibility to enact an emergency workplace standard for COVID-19.

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New York needs to step up and fill in where the federal government has failed us. Unenforceable guidelines are not sufficient to protect workers' lives, the lives of their families, their communities, and the society as a whole. Despite helpful guidelines issued by the State for businesses that are reopening, those guidelines have no teeth and do not address the needs of workers, often in low-wage exploitative industries, who continue to risk their lives at work.

The Legal Aid Society strongly supports the passage of legislation to create clear and enforceable safety standards in the workplace. In the absence of enforceable standards at both the state and federal level, workers in essential positions or in jobs with employers that have reopened face hazardous working conditions. Many of these workers are low-income, immigrant workers, and workers of color, groups that have faced long histories of labor rights violations and disproportionate occupational health hazards. During the pandemic, these injustices have only increased. Over 53% of essential workers are immigrants and over 63% of all essential workers are Black and Latinx. As such, continual failures to enforce health and safety standards will lead to further disparate COVID-19 related fatalities in immigrant communities and communities of color.¹

Examples of unsafe working conditions are numerous. As you will hear, even today, retail establishments in New York do not uniformly require customers to wear masks, leaving workers subject to infection and abuse. Some workers in such high-contact fields as education and elderly residential care did not receive Personal Protective Equipment (PPE) until May, months after the fact of widespread community transmission was known and safety guidelines had been issued. The Legal Aid Society, together with other members of the Coalition for Labor and Disability Advocates (COLADA), has written to the State concerning the egregious lack of protection endured by home health aides whose agencies have abandoned them during the pandemic, even as these workers care for the most vulnerable members of society. Other employers have also failed to provide PPE in the workplace, forcing workers to pay for their own masks and sanitizing products and creating an unlawful burden on essential workers living on often-reduced wages. Many employers fail to ensure the worksite has adequate ventilation. Even when compliant with building safety standards, some employers refuse to use PPE themselves and are reluctant to enforce masks and guidelines for both employees and customers. Workers trying to enforce safety protocol are sometimes threatened in the workplace by customers, with no support from their employers. In often poorly-ventilated and small workplaces, this behavior is not only in violation of established scientific and governmental guidelines but is a recipe for catastrophic loss of life. Further, many of these workers live in multi-generational households and are sometimes the sole care-taker for their elderly parent or grandparent. Many workers fear contracting COVID-19 and putting their elderly parent or grandparent in harm's way.

Crucially, health and safety standards must be enforceable and include provisions against interference with workers exercising their rights under the law and against retaliation and discrimination against workers who exercise their rights. Employers feel enabled to act in disregard of workers' safety and the public's safety precisely because there are no repercussions. Given that life and death are at stake, penalties for employers engaging in flagrant violations of these standards are crucial to ensure compliance. Provisions against interference, retaliation, and discrimination

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would ensure that workers feel safe in speaking up about unsafe working conditions, thus protecting themselves as well as the general public.

Simply put, workers are terrified. Many of our clients are non-unionized workers in low-paying positions, often the most vulnerable to exploitation. However, due to the immensity of the problem, both non-unionized and unionized workers have concerns about workplace safety. Without substantive legislation, there will be catastrophic health and economic impacts. At risk is the hard-won economic and social rehabilitation that New Yorkers have thus far achieved as well as the risk of future losses of life.

Unemployment Assistance

Since about mid-March, the Society's Employment Law Unit has been inundated with phone calls from desperate workers who have lost their jobs or other sources of work income and are seeking unemployment assistance from the New York State Department of Labor (DOL). We know from close up that the DOL itself was inundated with claims on an unprecedented scale. We applaud the staff of the DOL who have worked day and night to get benefits to workers. They are among the unsung heroes of this health and economic crisis.

A. Administrative Failures

1. Agency Errors and Poor Communication

At the same time, we have been profoundly frustrated with the lack of clear guidance to the public from the leadership of the DOL at every step of the way. Where clear messaging to potential claimants, employers, and even DOL staff has been of the utmost importance to protect worker safety and economic security, the DOL has either refrained from providing needed information about rights, rules, and procedures, or it has actually issued misleading and even flatly incorrect information and deployed misleading and incorrect procedures. The agency has even used badly worded and incorrect questions on the application and certification forms for unemployment insurance (UI) and/or federal pandemic unemployment assistance (PUA), causing confusion, anxiety, delay, hardship, and avoidable administrative burden.

For example, at the outset of the pandemic, the United States Department of Labor granted states latitude in adjusting work search requirements for their UI programs in light of the pandemic's impact on jobs and the restrictions on working placed on workers by states. Even though New York imposed a pause on work outside of essential jobs in March, the DOL took about a month to change the UI application question that asked workers if they were available to work. Workers who had just been told not to go to work were baffled by this question until the DOL, weeks later, clarified that it was asking if workers would be available if it were not for COVID-19. As a result, workers who answered the initial question in the negative were automatically denied benefits and had to reapply or advocate to have the initial decision reversed, causing preventable confusion, anxiety, delay and economic hardship and avoidable administrative burden to the DOL.

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Similarly, the application form asked workers if they could telework, without asking if the employer provided teleworking full time as an option. If a worker answered yes, because they had the capacity, but the employer had not offered the option, their application was denied. The DOL later issued a correction on its Twitter feed and eventually changed the wording of the question, but only after causing more anxiety, delay, economic hardship, and avoidable administrative hardship.

In the middle of the pandemic, the DOL suddenly asked applicants who had received retroactive benefits to certify for those benefits retroactively. The DOL asked claimants if, for each week, they had worked any part of the week, and instructed them, incorrectly, that they were ineligible for benefits for any week in which they had worked at all. This instruction is harsher even than New York's draconian partial unemployment rule (discussed below). At a time when the DOL was complaining of administrative burdens, it took the position that it would go back and follow up with any claimant that answered, according to the DOL's own inaccurate instructions, that they were ineligible in order to determine if that was correct. Given the number of people desperately trying to find part-time work, particularly among the self-employed workers covered by PUA, this inexplicably wrong way of posing the question caused significant confusion and anxiety on large numbers of claimants, as well as avoidable administrative burden on the agency.

Perhaps the most obvious DOL communications failure during the pandemic concerns language access. New application forms were not even made available in Spanish, let alone any other language. We are all familiar with the crisis of workers seeking benefits being unable to get through to DOL on the phone. This problem was greatly exacerbated by the agency making it impossible for Spanish speakers to apply for PUA, or for UI and PUA jointly, on line. Moreover, worker centers assisting workers speaking other languages have repeatedly complained about the difficulties in accessing an interpreter. Workers have complained about being disconnected after requesting an interpreter. All of these problems have fueled the massive delays in providing benefits. New York is a famously polyglot City and State, and the language challenges can be daunting. But the DOL utterly failed its limited English proficient applicants and claimants and in the process, caused avoidable delay and unnecessary administrative burden.

2. Failure to Address Misclassification

PUA is a new program and it is understandable that implementation would not be smooth, particularly as New York State DOL had to rely on a series of explanatory documents issued by US DOL. Nevertheless, State DOL caused needless errors and confusion. For example, even though DOL posted a thorough chart listing the grounds for PUA eligibility on its web site, its application form did not ask about all of these possible grounds. For example, in mid-April, DOL inexplicably removed a question asking if the applicant had quit a job because of COVID-19.

Perhaps the most serious administrative failure in the implementation of PUA was the insistence by DOL of accepting employers' misclassification of employees as independent contractors. As we know from the *Islam* litigation, even where the New York State Unemployment Insurance Appeal Board had already decided that a group of workers were misclassified employees, most notably Uber drivers, the State relied on Uber's failure to report employment income to place these workers on

PUA instead of UI. Indeed, it appears that the DOL has no procedure for implementing a finding of misclassification across the board. For example, I am not aware of the DOL having taken any steps to implement the decision in the *Postmates* Court of Appeals decision, whether with respect to Postmates workers or any other workers who clearly fall within the scope of the decision's reasoning. The DOL's reliance on unlawful misclassification has resulted in massive delays in the issuance of benefits and serious underpayments.

We hope that the State is now undertaking to remedy this problem, at least with respect to app-based drivers, and not putting additional scarce resources into litigating to avoid following the law and protecting workers. But this problem affects a range of worker not covered by the *Islam* litigation. During the pandemic, misclassified workers' requests for reconsideration of the agency's finding that they had no employment income from their employers seemed to have been filed away in a bureaucratic hole with no action taken on them. The existence of PUA for genuinely self-employed workers is not an excuse to ignore the legal obligation to correctly determine eligibility for UI and to set the correct benefit level based on all employment income, even if the employer has unlawfully misclassified the claimant as an independent contractor. The harm is not theoretical. First, some of these claimants are receiving a federal benefit to which they are not entitled, because PUA is only available to claimants who are not eligible for UI. Second, many of these workers will receive less money in either UI or PUA benefits because their employment income is not being correctly counted. If fixing this problem is a burden, the burden was of the agency's making.

B. Danger to Workers and their Families

1. The Problem

Perhaps the most egregious example of misleading communication from the DOL can be found in its web site posting concerning workers returning to work as the economy reopens: <https://www.labor.ny.gov/ui/pdfs/returning-to-work-and-UI.pdf>. New York case law allows a person who is claiming UI (and this rule applies to PUA and extended benefits as well) to refuse to return to a job (or to continue working in a job) if the working conditions are unsuitable. If an employer is made aware of unsafe conditions and does not remedy them, a claimant can refuse to work under those conditions and continue to get UI or qualify for UI in the first instance. DOL's posting does not convey that information to the public and even suggests that the opposite is true.

The posting emphasizes that, in general, one cannot refuse to return to a job and continue to get UI. It explains correctly that a claimant cannot turn down a job offer because of a general fear of COVID-19 and still get benefits. But it does not go on to explain that if a claimant has a specific fear of COVID-19 due to unsafe work conditions, the claimant can turn down the offer and continue to get benefits. It offers no guidance on what steps the claimant should take, other than instructing them to report the conditions to the DOL. But the DOL has no authority to enforce any of the health and safety "guidelines" issued by the State. And that instruction does not address the law on eligibility for UI benefits.

The only way for the worker to stay safe is to refuse to work under those conditions, but no claimant reading and relying on this posting would know that they may be able to refuse to work under those circumstances without losing the income that helps them put food on the table. In short, this misleading message pushes workers to accept unsafe conditions for fear of losing benefits.

It gets worse. The posting actually goes on to say affirmatively that an employer has no obligation to provide masks to workers who do not interact with the public, a position that I have not seen elsewhere. It should go without saying that the coronavirus does not distinguish between co-workers and customers. Not only is that statement inconsistent with the CDC guidance concerning masks and the State's own executive orders concerning the importance of masks to prevent infection, it also misleads workers into believing that they have to pay for equipment that is necessary for their jobs. Making workers pay for their protective gear violates New York Labor Law Section 193. So the DOL is not only misleading workers into believing that they are not entitled to insist on necessary protective gear, it is misleading workers into accepting violations of their labor rights.

It is worth comparing this misleading posting with guidance to the public from the labor agencies in Connecticut, <https://www.ctdol.state.ct.us/returntowork.pdf>, Colorado, <https://covid19.colorado.gov/sites/covid19/files/FAQs-CDLE-042720.pdf>, and North Carolina, <https://des.nc.gov/need-help/covid-19-information/returning-work>, all of which inform the public that they can refuse to work under unsafe conditions and still continue to receive benefits.

2. The Solution

S.8309 (Hoylman) / A.10468 (Simon): The Legal Aid Society strongly supports this bill, which clarifies eligibility for unemployment insurance for claimants who refuse to work under unsuitable conditions. As set forth above, under current case law, workers have the right to refuse to work under unsafe conditions. This bill would clarify and codify the existing case law. In general, this bill provides that a claimant is not disqualified from receiving UI benefits for refusing to work under unsafe conditions that make the environment unsuitable and that it is enough for the conditions to be inconsistent with governmental orders and guidelines for it to be unsuitable.

As discussed above, employers continue to engage in flagrant health and safety violations at the risk of the both workers and the public. Workers facing these conditions often feel they must choose between quitting at the risk of denial of unemployment insurance benefits, or continuing to work in hazardous conditions at the risk of their personal health, the health of their families and communities, as well as public health. If workers do not know that they can access basic subsistence benefits if they refuse to accept unsafe, even life-threatening, conditions, they will all too often accept those conditions. Meanwhile, the messaging from the DOL on this issue has been misleading and dangerous.

As workers continue to be offered jobs in workplaces lacking personal protective equipment, social distancing measures, or basic sanitizing processes, clarifying the standard of what constitutes a valid basis for refusing to accept work is absolutely crucial in this unprecedented and uniquely challenging public health landscape. We urge the passage of this bill to encourage employers to maintain the

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necessary standards of health and safety in the workplace, and to empower workers to protect themselves and the public when that is not the case.

C. UI for part-time workers

1. The Problem

One of the major failures of New York's UI system is based on an outdated law that everyone agrees should be replaced. New York's antiquated statute provides that a claimant must be "totally unemployed" on a given day to receive UI benefits for that day. (This rule applies to the various temporary federal unemployment programs administered in New York as well.) Under current law, a claimant's unemployment insurance benefits are reduced by 25% for each day worked, regardless of the number of hours worked per day or the total amount of the claimant's earnings in that week. If a claimant performs as little as one hour of work on one day in a claim week, the claimant loses 25% of their weekly benefits, a financial loss that would not be compensated by the worker's meager weekly earnings from part-time work. A claimant who takes a little part-time work that includes some work and a little pay on each of four days in a week is completely ineligible to receive any benefits that week, no matter how little they earned, even if they earned nothing at all. A claimant who helps out a friend's business without getting paid at all gets no benefits for those days. A claimant who responds to inquiries from potential customers for a small side business on a given day gets no benefits for that day.

Thus, contrary to one of the stated goals of the unemployment benefits system, the current partial unemployment benefit system in fact often discourages claimants from aggressively seeking part-time work due to the often disproportionate reduction in unemployment insurance benefits after beginning part-time work.

Every other state relies on some sort of test that looks at actual income for a week to determine the level of UI benefits. Most have some sort of disregard that allows claimants to keep a portion of their benefits while earning some money up to a cap. That approach encourages claimants to take part-time work, whereas New York's rule discourages part-time work and punishes people who obtain it. New York's rule also generates allegations of fraud against workers who simply did not understand this absurd rule.

2. The Solution

S.5754 (Ramos) /A.446 (Stirpe): The Legal Aid Society strongly supports the proposal to change the eligibility rules for UI for claimants with part-time work and to establish an earnings disregard system. This bill has passed the Assembly and awaits passage in the Senate. Last year, the Governor included a similar proposal in his budget.

The proposed bill would align New York's rule with that of all other states, using an earnings disregard method to determine eligibility for UI benefits for claimants with part-time work. It would result in a more fair calculation of partial unemployment benefits based on a worker's actual earned part-time wages in a week. Ensuring fair benefits for part-time workers is particularly crucial for

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both workers' livelihoods as well as economic health. Many workers have applied to dozens of part-time and full-time jobs across industries with little to no success. When workers do find part-time employment, they are often offered wages significantly less than they were earning prior to the pandemic, causing those workers to fall behind on rent and utility payments. As many part-time workers continue to seek full-time jobs, this bill would ensure that part-time workers receive sufficient and reasonable unemployment benefits to allow them to continue to put food on the table. Ensuring adequate benefits for part-time workers not only supports the workers, but also supports the businesses and economic institutions that rely upon continual capital infusion into the economy.

It is important to emphasize that any additional payments under this rule would not affect the State budget at all. All of the payments would come from the dedicated UI trust fund which is supported through payroll taxes that operate independently of general state taxes. It is possible that the new rule, which incentivizes accepting part-time work, might even reduce net outlays by the trust fund by encouraging claimants to accept jobs. And it might actually increase revenues to the general fund, because more claimants will accept work. Moreover, to the extent that the new rule increases payments under the federally-funded unemployment assistance programs, PUA, PEUC, and extended benefits (EB), the rule would bring more federal dollars into the New York economy and in turn, generate more state revenue.

The New York State UI trust fund is currently operating on mandatory no-interest loans from the federal UI trust fund. In other words, during the recession, any payments from the UI trust fund bring much-needed federal dollars into the economy. It is one of the few forms of deficit spending permitted to the state at a time when countercyclical spending is critical to the economy. Ultimately, the loans will be repaid by the State trust fund, most likely through temporary payroll tax rate adjustments after the recession. Meanwhile, the loans will help pump the New York economy when that aid is most needed.

Excluded Workers

1. The Problem

The unemployment assistance programs currently available to New York's workers exclude large numbers of workers unfairly. First, both the regular state UI program and all the federal pandemic programs explicitly exclude workers who lack work authorization. Many of these workers performed essential jobs before the pandemic and often, during the pandemic. Many lost their jobs because they became sick or because family members became sick. Many even worked despite being sick because they knew that there would be nothing to fall back on if they lost their jobs. Thus, the lack of a safety net endangered their lives, the lives of their co-workers, and the lives of their families and communities. It is not surprising that low-income immigrant communities suffered disproportionately during the height of the pandemic. Now, even as we laud the workers who helped get us through what has so far been the worst of the pandemic, we allow them and their families to go hungry when they lose their jobs.

Second, the UI system reinforces the structural discrimination of the labor market. Despite anti-discrimination laws, certain categories of workers, most notably people with criminal convictions, especially recent criminal convictions, find it extremely difficult to get jobs. Discrimination against these workers is pervasive. For workers who are released from incarceration and have to participate in supervised programs, it is extremely difficult to find an employer who will offer a job. Often the programs themselves impede these workers' ability to get jobs.

Workers who were released from incarceration or detention in the months before the pandemic faced an extremely hostile job market. From about mid-March on, they faced virtually no possibility of getting a job. Without sufficient earnings in previous quarters, these workers have been unable to qualify for unemployment assistance. Without having had a job, they do not qualify for PUA which requires that a claimant have lost work or a specific job offer due to COVID-19. Thus, these workers, already stymied by job discrimination, face exclusion from the wage replacement programs that help other unemployed workers get by during the pandemic.

2. The Solution

S.8277A (Ramos) / A.10414 (to be amended) (de la Rosa): The Legal Aid Society strongly supports the proposed bill to establish a mark to market tax on billionaires, which would provide resources for an excluded worker fund. There is a moral, economic, and public health imperative to support those workers who are financially struggling during this pandemic and who have been excluded from the systems created to help workers weather the storm.

Many of the workers excluded from unemployment assistance, including those without work authorization, provide the labor upon which the economy rests. While many have lost jobs, the informal work done by these workers - delivering packages, care-taking for our elderly, building and cleaning our buildings, preparing our food - keeps all of us afloat. To deny assistance to workers is morally wrong. Moreover, it is wrong not to address how the unemployment insurance system echoes and reinforces the racial and economic disparities that existed prior to COVID-19.

In addition, this bill would provide tremendous economic benefits. At a time when the global economy is projected to experience its worst recession since the Great Depression^{1,2}, all efforts must be taken to prevent further economic downturn. Shifting dollars into the pockets of those who will spend the money locally through a mark to market tax on billionaires would ensure that these funds move into circulation to support the economy when priming the economy is desperately needed. Therefore, the Legal Aid Society strongly supports this bill on both moral and economic grounds.

Conclusion

This pandemic has caused the loss of tens of thousands of lives and even far more livelihoods. As New Yorkers continue to struggle to stay afloat, action is needed now to prevent both catastrophic economic losses and further devastating loss of life.

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All New Yorkers face unprecedented challenges amidst the Covid-19 crisis. But certain workers face immense health risks and workplace abuse as they continue to report daily to their jobs. Essential workers, who are often low-wage workers and part-time workers, have continued to keep our city running. These workers and those being asked to return to worksites deserve the protection of strong, unambiguous safety standards and reasonable and sufficient economic assistance.

The Legal Aid Society supports the proposals to create strong, enforceable safety standards with provisions against retaliation and discrimination, to clarify right-to-refuse work issues, to establish a more reasonable and fair partial unemployment system, and to create an excluded worker fund for the most vulnerable and forgotten workers.

¹<http://fiscalpolicy.org/wp-content/uploads/2020/04/Essential-Workers-Brief-Final.pdf>

²Silvia, Amaro, CNBC, “IMF says the world will ‘very likely’ experience worst recession since 1930s”, April 16, 2020, <https://www.cnbc.com/2020/04/14/imf-global-economy-to-contract-by-3percent-due-to-coronavirus.html>