



A Port in the Storm: Restoring the Safety Net for Low Wage Workers During the Pandemic

Employment Transition Recommendations for the Biden Administration from Community Legal Services, Inc., Philadelphia, PA

Introduction

Community Legal Services, Inc., of Philadelphia, PA (CLS) represents around 1,500 low income workers in Philadelphia per year. From this significant sample size of clients, we have developed deep knowledge of our clients' legal and policy needs related to their employment. These recommendations to the transition team are informed by our on-the-ground experience.

For years, the most significant issues presented to us by our clients concerned criminal records, wage theft, and abuse of vulnerable workers such as immigrants. While these issues remain critical, new priorities have emerged since the pandemic began that are even more vital. For people who are working, occupational safety and paid leave have taken center stage. For those who are not, unemployment benefits are crucial, especially from the new Pandemic Unemployment Assistance (PUA) program that provides benefits to people not covered by traditional unemployment insurance. In the absence of enactment of a stimulus bill, PUA expires at the end of this year.

CLS's proposed agenda focuses on recommended agency action, raising only the highest priority legislative actions considering the unsettled situation in Congress. We urge that the Transition Committee give its highest priority in policymaking and resources to workers most impacted by the pandemic/economic crisis, particularly Black and Brown workers who are disproportionately impacted.

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1. Department of Labor

A. Employment and Training Administration (ETA)

i) Office of Unemployment Insurance

Unemployment benefits are one of the most vital areas within DOL for immediate attention, as the country grapples with crushing unemployment caused by the pandemic. Extensive UI changes must be made to strengthen this strained program area and to stabilize the economy through the stimulus that UI provides. For this reason, we make extensive recommendations on UI, which are explained more in depth by the accompanying paper.

Recommendation: The Pandemic Unemployment Assistance (PUA) program must be reauthorized as soon as possible.

All of the CARES Act unemployment benefit programs filled in gaps in the states' unemployment insurance (UI) programs. PUA, however, fills in the most gaping hole: lack of UI coverage for a large portion of the working population, including gig workers, self-employed, independent contractors, workers with inadequate wage histories to be financially eligible, and others. When this program ends on December 31, 2020, millions of workers will be left without any cash income at a time when COVID infections are exploding and layoffs from business shutdowns follow. The termination of the PUA program will cause massive hardships with cascading effects, including elimination of a key economic stimulus.

Recommendation: Unemployment Insurance Program Letters (UIPLs) regarding the PUA program must be revised to conform to the intent of the CARES Act.

PUA guidance has been provided primarily in UIPL 16-20 and later "Changes 1 and 2" to it. Numerous serious PUA operational issues must be addressed or corrected.

- *Clear guidance is needed that PUA claims for 2020 can be taken, processed and adjudicated after the end of program date.*
- *Clarify that self-certification satisfies the labor market connection required for PUA eligibility.*
- *The COVID-connected eligibility conditions in Section 2102(a)(3)(ii)(I) should be broadly construed to effectuate the remedial purpose of the Act.*
- *Penalty weeks should be considered weeks during which claimants were "ineligible" for UI benefits and thus eligible for PUA.*
- *Guidance must ensure that incorrect receipt of benefits under the CARES Act caused by claimant confusion, agency delay, or lack of agency communication should generally be assessed as non-fraud overpayments.*

Recommendation: Given widespread failure by states to pay PUA claims, DOL must exercise oversight over state administration of the PUA program in order to effectuate the purposes of the CARES Act.

States have confronted significant challenges in administration of PUA, including separating fraudulent claims from legitimate ones. However, these challenges have left hundreds of thousands of PUA claimants cut off from their badly needed benefits.



Recommendation: Timeliness measures must start to be enforced.

- *DOL must require robust corrective action plans that move states toward compliance with the federal timeliness standards.*
- *DOL should confirm that “when due” obligations include any separate branch of government involved in making payments, not just the state agency administering UI.*
- *DOL should provide guidance that in the appeals system, claimant appeals should be prioritized over employer appeals.*

Recommendation: The “reasonable assurance” barrier to receipt of benefits by educational institution workers must be narrowly interpreted.

Given the extraordinary changes to the operations of educational institutions during the pandemic, UIPL No. 10-20, Change 1 must be revised to reflect the reality that educational institutions cannot predict future operating environments reliably enough for benefits to be denied based on generic offers of “reasonable assurance.”

Recommendation: DOL should issue guidance instructing states to provide secure online or telephone PIN and password reset protocols.***Recommendation: Access for individuals with limited English proficiency and individuals with disabilities must be improved.***

The paper also addresses longer-term UI issues for consideration by the Biden Administration, including gig worker eligibility, alternative base periods for financial eligibility, technology deployment, and administrative funding.

ii) JobCorps***Recommendation: DOL should overhaul JobCorps’ policies and procedures that are far more restrictive than what is required by WIOA and open access to this vital program for youth with criminal system contact.***

As young people are being hardest hit by unemployment during the pandemic and recovery, it is more important than ever that the JobCorps program be accessible to the youth that need it most. JobCorps has numerous policies and practices that serve to exclude young people with criminal system contact unnecessarily, going beyond what is required by the Workforce Innovation and Opportunity Act (WIOA). DOL should: 1) rescind JobCorps’ policy restricting access to the program for youth who owe \$500 or more in criminal court fines and restitution, or alternatively instruct regional offices to use their authority to waive this requirement in the vast majority of cases; 2) rescind JobCorps’ policy allowing denial of applicants who owe less than \$500 in court fines and restitution; 3) instruct regional offices to properly enforce WIOA’s mandate that youth should not be denied access to the program on the basis of contact with the criminal system unless they have been convicted of murder, child abuse, sexual assault, or rape (*see* 29 U.S.C.A. § 3195(b)(2)(3)); and 4) provide oversight over regional offices and programs to ensure that when youth are rejected from the program, the proper notice and appeal processes are followed consistent with what due process requires.



iii) O*NET Resource Center

Recommendation: ETA should cease use of the Dictionary of Occupational Titles Crosswalk and terminate use of the DOT.

The Dictionary of Occupational Titles (DOT) is 35 years out of date, and its continued use causes disabled workers to be denied employer-provided long-term disability benefits, by making it falsely appear as though simple, undemanding entry-level jobs are still widely available. ETA should remove the DOT Crosswalk from O*NET Online, and clarify that DOT job descriptions can no longer be considered as directly equivalent to current-day fields of employment.

B. Occupational Safety and Health Administration (OSHA)

Recommendation: Increase General Duty Clause Citations for COVID-19 Violations of CDC Guidelines.

OSHA can cite employers for violation of the General Duty Clause if a recognized serious hazard exists in the workplace and the employer does not take reasonable steps to prevent or abate the hazard. The General Duty Clause is used where there is no OSHA standard that applies to the particular hazard, like the COVID-19 pandemic. During the H1N1 pandemic, the Obama Administration tasked OSHA and the CDC with issuing detailed guidance for how employers should protect their workers. OSHA then enforced the CDC guidelines using the General Duty Clause as an enforcement tool. Under the Trump Administration, the number of General Duty Clause citations issued during the COVID-19 pandemic has been limited. In the absence of an Emergency Temporary Standard for COVID-19, OSHA should increase its use of General Duty Clause citations for COVID-19 violations of CDC guidelines. Such enforcement is vital in thousands of workplaces where employee safety is not adequately protected.

Recommendation: Create an Emergency Temporary Standard for COVID-19.

With the input of unions and worker advocacy groups, OSHA should quickly develop a COVID-19 Emergency Temporary Standard to give employers and employees specific, enforceable guidance on what to do to reduce the spread of COVID-19 in the workplace.

Recommendation: Increase OSHA's Enforcement Concerning COVID-19. OSHA should rapidly increase its enforcement efforts, including by increasing the number of OSHA investigators to enforce the law and existing standards and guidelines, as well as stiffer penalties for violations related to COVID-19.

Recommendation: Finalize a Permanent Infectious Disease Standard.

The Obama Administration prepared a new, permanent infectious disease standard that would have required health facilities and certain other high-exposure workplaces to permanently implement infection control programs to protect their workers. Given the significant impact of the COVID-19 pandemic on the U.S. workforce, the new administration should revisit the proposed infectious disease standards and adopt a permanent standard (even if the COVID-19 pandemic ends) to address this and future pandemics in the United States.

Recommendation: Overhaul OSHA Whistleblower Protections.

During the COVID-19 pandemic, OSHA has failed to protect workers who raise health and safety concerns. Under the new administration, OSHA must reverse its mismanagement of the



whistleblower program to restore worker confidence that they will be protected when reporting unsafe working conditions. In absence of private right of action, OSHA must quickly docket and investigate whistleblower complaints in a timely manner. OSHA should make a determination on the complaint within the statutory time period, or otherwise communicate the reason for any delay to the whistleblower and provide an update as to when the case will proceed. Completing investigations on time will require increased funding to adequately staff whistleblower enforcement. The new administration should also reestablish the Whistleblower Protection Advisory Committee, which was disbanded in 2018, because the committee provides the important function of evaluating the whistleblower program and recommending improvement. In cases where OSHA determines that an employer retaliated, the agency should refer the employer to the enforcement unit for a possible inspection, especially if the employer is a repeat offender. Finally, because OSHA's whistleblower protections require workers to file a complaint within thirty days of the retaliatory act, OSHA should take steps to ensure that workers have information about whistleblower protections. In partnership with unions and worker-led organizations, OSHA should focus its outreach efforts on industries where retaliation is most likely to occur. Outreach should also be in multiple languages so all workers can understand their rights and how to exercise them.

C. Wage and Hour Division (WHD)

Recommendation: Increase and Expand DOL Enforcement with A Focus on Low-Wage and Immigrant Workers.

A 2017 study of the Economic Policy Institute estimates that the total wages stolen from workers due to minimum wage violations exceeds \$15 billion each year. Wage theft is an issue that disproportionately affects low-wage workers, especially low-wage workers of color and immigrant workers. Moreover, low-wage workers—especially immigrant workers—are particularly vulnerable to retaliation from employers for complaining about or reporting wage theft. To address these issues, the new administration should work to expand and strengthen the DOL's enforcement capabilities, including by hiring more investigators. The DOL should focus enforcement efforts on industries that employ low-wage and immigrant workers and/or routinely misclassify workers as independent contractors. The DOL should work to identify and partner with immigrant advocacy groups to identify target industries, as well as potential labor trafficking cases. The DOL should issue strong and forceful guidance on protecting immigrant workers from exploitation and retaliation, and recommit to not sharing information with ICE since many immigrant workers may not come forward about wage theft out of fear of negative immigration consequences like deportation. Finally, the DOL must take stronger enforcement actions against wage theft to deter violations, including by vigorously seeking penalties like liquidated damages.

Recommendation: Reverse Measures Aimed to Narrow the Application of the FLSA Minimum Wage and Overtime Requirements.

The Trump Administration has taken various pro-business measures to narrow the application of minimum wage and overtime requirements under the Fair Labor Standards Act (FLSA). For example, on March 16, 2020, the DOL adopted a final rule narrowing the definition of “joint employer” under the FLSA that had the effect of limiting the circumstances under which multiple companies could be deemed to employ the same workers. Similarly, on September 22, 2020, the DOL proposed a rule broadening the “independent contractor” test under the FLSA, thus making it easier for companies to classify workers as independent contractors who are not entitled to



minimum wage and overtime protections under the FLSA. The new administration should reverse these measures, including by abandoning defense of the joint employer rule, engaging in new rulemaking to rescind the independent contractor rule, or adopting new regulations that provide more worker-protective interpretations of employee status under the FLSA.

Recommendation: Amend the Executive, Administrative, and Professional (EAP) exemptions to overtime eligibility under the Fair Labor Standards Act (FLSA).

Under President Obama, the DOL proposed regulations that would have raised the salary threshold for the EAP exemption to \$47,476 per year as a starting point. However, that regulation was struck down and the Trump Administration instituted a much smaller change to around \$35,000 per year. The current salary threshold for the EAP exemption does not reflect present economic realities and allows employers to misclassify workers as exempt who should be eligible for overtime. Raising the threshold to at least the salary levels proposed by the Obama Administration would protect low-wage workers against exploitation, boost the economy, and ensure that FLSA's overtime standards are correctly implemented.

D. Equal Employment Opportunity Commission (EEOC)

Recommendation: Increase and expand enforcement of the EEOC's guidances concerning discrimination against people with criminal records.

EEOC has long recognized that an employer's policy or practice of excluding persons from employment on the basis of their conviction or arrest records may constitute racial discrimination. During the Trump administration, enforcement of EEOC guidances against discrimination has been considerably weakened, providing little protection for individuals with criminal histories who are otherwise qualified for jobs they are applying for. The high unemployment rate caused by the COVID-19 pandemic has created further hurdles for people with criminal records who seek to be gainfully employed. Expanding and increasing enforcement of the EEOC's guidances on the consideration of criminal records would help ensure that workers with criminal records are assessed on their qualifications rather than on past mistakes.



2. Department of Justice

A. Federal Bureau of Investigation (FBI)

Recommendation: The FBI must work to make its background reports more accurate and more readable.

The FBI has made progress recently in making their background reports more accessible to individuals who are the subject of the reports. This work should be built upon by improving the accuracy and readability of reports. Case outcome information is often missing from FBI reports, making it appear as if cases are still open and causing great harm to individuals seeking employment. Often these cases ended in non-convictions; however, the FBI records were never updated. In addition, FBI background checks are notoriously hard to read, which is confusing to individuals with records and employers. FBI background reports should be reformatted to be more easily understood by a lay audience.

Recommendation: The FBI must continue to work with states to implement sealing of their records, especially as automated Clean Slate policies take effect around the country.

Until recently, the FBI was not able to process criminal record sealing orders from states unless they were members of the “Compact Council.” The FBI has recently made progress on working with states to implement record sealing when they are provided with sealing orders from the state. This collaboration should be encouraged to continue. Moreover, as automated Clean Slate record clearing policies are being contemplated and/or passed in many states, the FBI should work with states to process automated record clearing without requiring individual orders to be served. Lastly, the FBI currently only has the capacity to seal full cases or “arrest cycles,” and should continue to work on implementing record clearing for individual charges within an arrest cycle (also known as “partial sealing”).

B. Legislation: Federal Clean Slate

Recommendation: Support legislation providing for automated clearance of federal criminal cases.

The federal government has an unwanted distinction in the criminal record clearing field: it is the only entity that does not permit *any* expungement or sealing. Even a person who was not convicted in a federal case cannot get that case cleared. While providing some record clearing remedy for former federal defendants is essential and long overdue, an even better idea is for enactment of a “Clean Slate” automated sealing bill. Such a bill (HR 2348) was introduced this session by bipartisan co-sponsors Lisa Blunt Rochester (D-Del) and Guy Reschenthaler (R-PA). Clean Slate has passed with overwhelming bipartisan support in Pennsylvania, Utah and Michigan, and it should enjoy the same bipartisan support in Congress.



3. Consumer Financial Protection Bureau (CFPB)

Recommendation: The CFPB should provide critically needed guidance and oversight over Consumer Reporting Agencies (CRAs) that perform criminal background checks.

The CFPB can help ensure the mandate in the Fair Credit Reporting Act (the FCRA) of “maximum possible accuracy” is a reality by: 1) requiring strong identity matching criteria to reduce the likelihood of reports being issued for the wrong person; 2) requiring CRAs to perform updated searches before preparing reports to ensure charge, outcome, and grade information is being accurately reported and that expunged and sealed cases are not being reported; 3) encouraging CRAs to present background information in more readable formats that are not repetitive or prejudicial to job seekers; and 4) encouraging CRAs to improve full file disclosure and dispute processes to increase transparency and the ability for consumers to access what is on their reports and correct mistakes.

4. Federal Trade Commission (FTC)

Recommendation: The FTC should provide critically needed enforcement and oversight over Consumer Reporting Agencies (CRAs) that perform criminal background checks.

The FTC can help ensure the mandate of the Fair Credit Reporting Act (the FCRA) of “maximum possible accuracy” is a reality by reviewing CRA compliance and enforcing compliance when necessary in the following areas: 1) requiring strong identity matching criteria to reduce the likelihood of reports being issued for the wrong person; 2) requiring CRAs to perform updated searches before preparing reports to ensure charge, outcome, and grade information is being accurately reported and that expunged and sealed cases are not being reported; 3) encouraging CRAs to present background information in more readable formats that are not repetitive or prejudicial to job seekers; and 4) encouraging CRAs to improve full file disclosure and dispute processes to increase transparency and the ability for consumers to access what is on their reports and correct mistakes.





DOL Unemployment Insurance Recommendations

Community Legal Services, Inc., Philadelphia, PA

Recommendation: Unemployment Insurance Program Letters (UIPLs) regarding the PUA program must be revised to conform to the intent of the CARES Act.

PUA guidance has been provided primarily in UIPL 16-20 and later “Changes 1 and 2” to it. Numerous serious PUA operational issues must be addressed or corrected.

- *Clear guidance is needed that PUA claims for 2020 can be taken, processed and adjudicated after the end of program date.* In Pennsylvania alone, many thousands of PUA claims are tied up in poor program administration or overbroad fraud investigations. Other claims have been rejected based on disputed legal interpretations or are still awaiting determinations on their UI eligibility. These claims should not be barred solely because the state agency has not resolved them by December 26, 2020. Likewise, proof of the weekly benefit rate should be permitted to be produced, and benefits retroactively adjusted, after year’s end.
- *Clarify that self-certification satisfies the labor market connection required for PUA eligibility.* Section 2102(a)(3)(ii) of the CARES Act provides that PUA applicants self-certify their labor market connection. Congress selected this methodology to disseminate benefits quickly and to permit workers whose self-employment income was often less formalized than in W-2 employment to easily establish labor market connection for PUA eligibility. UIPL 16-20, Change 1, Q&A 18 reiterates the self-certification standard, in lieu of “proof of employment.” However, UIPL 16-20 Change 2, Q&A 23 indicates that “the state has the authority to request supportive documentation when investigating the potential for fraud and improper payments” (emphasis added). In conjunction with DOL webinars, this language has been relied on by Pennsylvania’s agency to require claimants to produce proof of 2019 income for eligibility purposes and/or onerous documentation which they are not able to meet. DOL should issue guidance clarifying that the language in Change 2 was not meant to require proof of 2019 income or documentation to establish eligibility.
- *The COVID-connected eligibility conditions in Section 2102(a)(3)(ii)(I) should be broadly construed to effectuate the remedial purpose of the Act.* The UIPLs have narrowly construed eligibility for PUA, and this construction is harming workers who have lost work due to COVID. For example, states are applying DOL’s narrow interpretation to exclude workers laid off in COVID-based business reductions and self-employed workers who are operating but have lost business due to COVID. In addition to broadly construing the enumerated reasons, the Secretary should also issue additional qualifying reasons under subsection (kk). Similarly, DOL should issue guidance clarifying that loss of intervening employment does not eliminate PUA eligibility.
- *Penalty weeks should be considered weeks during which claimants were “ineligible” for UI benefits and thus eligible for PUA.* UIPL 16-20, Change 2, Q&A 13 provides that PUA eligibility for persons required to serve penalty weeks is dependent on whether state law makes them ineligible for UI benefits. DOL determined, construing Pennsylvania’s UI law, that persons serving penalty weeks are “eligible” for UI in the Commonwealth, despite



state law providing that they are “disqualified.” Such dubious legal niceties have had the effect of a significant number of unemployed workers being without income during a pandemic. The guidance should be changed to state that all claimants serving penalty weeks are eligible for PUA.

- *Guidance must ensure that incorrect receipt of benefits under the CARES Act caused by claimant confusion, agency delay, or lack of agency communication should generally be assessed as non-fraud overpayments.* DOL has heavily focused on fraud overpayments to the detriment of workers. Now, guidance should be issued that explains the conditions leading to overpayments have generally been due to non-fraudulent conduct. Outside of criminal fraud activity in the PUA system, the majority of improper payments under the CARES Act were the result of incomplete guidance from DOL and state agencies or claimant confusion about program eligibility. Additionally, state agencies were disastrously slow in issuing regular UI eligibility determinations, leading many claimants to apply to PUA when they never received benefits.

Recommendation: Given widespread failure by states to pay PUA claims, DOL must exercise oversight over state administration of the PUA program in order to effectuate the purposes of the CARES Act.

States have confronted significant challenges in administration of PUA, including separating fraudulent claims from legitimate ones. However, these challenges have left hundreds of thousands of PUA claimants cut off from their badly needed benefits. For instance, in Pennsylvania, the state has selected more than a half-million PUA claims for verification of the identity of the claimant. While the state has grappled with the scope of this challenge, many thousands of legitimate claimants who have provided proof of their identities have had their benefits cut off for months. PUA claimants also have had their benefits interrupted indefinitely for other reasons, without notice of the problem, opportunity to correct it, or an appealable determination, in violation of the Due Process Clause and the “when due” provision as construed in *California Dept. of Human Resources Development v. Java*, 402 U.S. 121 (1971). Litigation proceeds in other states where similar violations are occurring. Correcting these shortcomings should not be left to private litigants and the courts; DOL must step in to lead in these corrections.

Recommendation: Timeliness measures must start to be enforced.

Section 303(a)(1) of the Social Security Act, 42 U.S.C. § 503(a)(1), requires that the states use a method of administration “reasonably calculated to insure full payment of unemployment compensation when due” (emphasis added). This requirement means that benefits are to be paid “with the greatest promptness administratively feasible.” 20 C.F.R. §§ 640.3(a), 650.3(a).

Federal regulations establish specific numerical benchmarks for compliance with the timeliness requirement at each level of decision making. The “when due” requirement is met for initial determinations in waiting week states like Pennsylvania if 87% of first payments of UC benefits are issued within 14 days and 93% are issued within 35 days. 20 C.F.R. § 640.5. For appeals, the “when due” obligation has been met where a state decides at least 60% of first-level appeals within 30 days of the filing of the appeal and 80% are decided within 45 days. 20 C.F.R. § 650.4(b).

Understandably, states were no longer able to meet these standards in the wake of the unprecedented calamity of claims filings that hit their agencies in mid-March. But now more than six months out, it is time for DOL to monitor and enforce progress towards these goals.



- *DOL must require robust corrective action plans that move states toward compliance with the federal timeliness standards.* Separate plans should be required for first payments, issues requiring adjudications (which at this time are more backed up than other issues), and appeals.
- *DOL should confirm that “when due” obligations include any separate branch of government involved in making payments, not just the state agency administering UI.* In Pennsylvania, the Treasury Department makes UC and PUA payments, and subcontracts with US Bank to provide debit cards. Due to fraud concerns, PUA claimants in Pennsylvania can only receive benefits through these debit cards. Pennsylvania and other state agencies have been troubled that their payors have been slowing down claims, often by a redundant fraud review allegedly required by the Bank Secrecy Act. DOL should leave no doubt that the timeliness requirements encompass all branches of state government and their contractors involved in the handling of unemployment claims from beginning to end.
- *DOL should provide guidance that in the appeals system, claimant appeals should be prioritized over employer appeals.* The statutory text requires “payments when due,” not speedy appeals. Thus, claimant appeals should get priority in adjudication.

Recommendation: The “reasonable assurance” barrier to receipt of benefits by educational institution workers must be narrowly interpreted.

Given the extraordinary changes to the operations of educational institutions during the pandemic, UIPL No. 10-20, Change 1 must be revised to reflect the reality that educational institutions cannot predict future operating environments reliably enough for benefits to be denied based on generic offers of “reasonable assurance.” The guidance offered in UIPL No. 10-20, Change 1 essentially instructed state agencies to assess whether reasonable assurance exists based on existing guidance, but failed to account for the uncertainty that the pandemic has caused regarding the operation of educational institutions. The guidance ignores the fact that a finding of reasonable assurance can only be reassessed retroactively for the nonprofessional category of worker under 26 USCS § 3304(a)(6)(A). As a result, teachers, instructors and other professional employees are out of luck when circumstances change if initially determined to have reasonable assurance.

- *States should be encouraged to account for the reality that educational institutions cannot reasonably assure most employees that future work will be available based on the analysis laid out in UIPL No. 05-17.* Under revised guidance, states should presume that reasonable assurance does not exist while COVID-19 continues to be widespread and require employers to rebut that presumption by establishing that the claimant’s employment is unlikely to be affected by COVID-19 related changes to operations.
- *Benefits should be paid immediately, and stopped only after an examiner has determined that reasonable assurance existed at the time of filing.* As in other cases where claimants have applied for benefits due to lack of work, benefit eligibility should be presumed until proven otherwise to prevent lengthy delays while examiners investigate reasonable assurance on a case-by-case basis.

Recommendation: DOL should issue guidance instructing states to provide secure online or telephone PIN and password reset protocols. Many states, including Pennsylvania, still require that all PIN resets must occur by postal mail. This requirement has created significant problems



for workers in low-income areas with unreliable mail service and housing unstable workers. It is unacceptable that in 2020 workers must wait to receive this information by mail, thereby delaying their access to benefits. DOL can issue this guidance under the same federal authority as UIPL 2-16, October 1, 2015.

Recommendation: Access for individuals with limited English proficiency and individuals with disabilities must be improved.

Lack of effective telephone services has exacerbated access problems, highlighted by the fact that new PUA websites and notices are not offered in other languages and many do not include Babel notices. DOL should issue corrective action notices, supported by prior guidance in UIPL 2-16 Change 1, for states on their handling of these worker populations.

Longer Term UI Priorities for consideration by the Biden Administration

- Minimize the harmful effects of work search reporting requirements on continuing eligibility for UI.
- Improve funding allocations for administration of UI programs and ensure that future grants for technology modernization require states to apply user centered design to the projects.
- Address UI eligibility for gig workers by issuing guidance that evaluates their employment situation under each prong of the “ABC test,” parts of which is used in a majority of state unemployment laws, to show that they are working “in employment” when they earn wages from gig work.
- Limit delayed reviews and reversals of eligibility, years after claim years have ended, that otherwise tend to result in “default” fraud overpayments when issued with outdated claimant contact information.
- Require states to adopt alternative base periods for financial eligibility. At this point, technological advances and utilization of this feature by numerous states require its implementation under the “when due” provision of the Social Security Act. See *Pennington v. Didrickson*, 22 F.3d 1376 (7th Cir. 1994).
- Focus on approving telephone access and triage procedures in state call centers.
- Work with states to develop a mechanism for employer reporting of weekly earnings, removing the burden from workers who often lack access to exact wage data.
- Address liability for technology contractors under the state actor doctrine.





ETA should cease use of the DOT Crosswalk and terminate use of the DOT

Community Legal Services, Inc., Philadelphia, PA

Disabled workers are regularly denied employer-provided long-term disability benefits because the federal government has refused to stop using the 35-years-out-of-date Dictionary of Occupational Titles (DOT). By means of the “DOT Crosswalk” which the Employment and Training Administration makes available online through its O*NET Project, insurers are permitted to deny critically important benefits to disabled workers.

The DOT is a compilation of jobs which existed decades ago. Some of these jobs – such as “surveillance system monitor” - were extremely simple and low-stress, but such jobs have long since ceased to exist. Long-term disability rules provide that if there are jobs in your pay range that you are able to perform, then you are not eligible for disability benefits.

Insurers commonly use the “DOT Crosswalk,” which indicates that the job requirements for extinct DOT jobs are directly equivalent to currently existing jobs listed in the more up-to-date O*NET database. Insurers treat this as official permission to presume that people who could perform the old, extinct job must be viable candidates for the new jobs listed in the Crosswalk results, and thus, since the new jobs have openings, benefits are denied. The equivalencies in the Crosswalk are often false – currently available jobs invariably require greater physical ability and/or training or education than a surveillance system monitor.

- ETA must direct the partners in the O*NET project to take down the DOT Crosswalk Search.
- ETA must post notice that DOT job descriptions can no longer be considered directly equivalent to current-day fields of employment.





EEOC Should Increase and Expand Enforcement of its Guidances Concerning Discrimination against People with Criminal Records

Community Legal Services, Inc., Philadelphia, PA

The Equal Employment Opportunity Commission (EEOC) has long recognized that an employer's policy or practice of excluding persons from employment on the basis of their conviction records may violate Title VII because of racially disparate impact. Under EEOC guidance dating back to the 1980s (when Clarence Thomas was the chairman), employers are required to demonstrate a justifying business necessity for denying a job based on a criminal record through the examination of several factors, including the nature and gravity of the offense, the time passed since the offense, and the nature of the job held or sought. In 2010, the EEOC reemphasized this position and issued new guidances that strengthened its position that arrests may not be considered in employment decisions and that convictions may only be considered under narrow circumstances. The guidances also clarified for employers the factors that they must consider and gave examples to help them ensure that they were correctly adhering to Title VII when considering criminal records.

For a period of time, several regional offices of the EEOC made important inroads into application of the criminal records guidances. However, for the past few years, EEOC has generally declined to find discrimination under these guidances or let filed charges sit indefinitely.

We urge the new administration to reinvigorate the EEOC's protection against the discrimination against people with criminal records. Over the past decade, there has been a heightened awareness of the consequences of criminal records and a recognition that convictions should not be permanently held against people. The EEOC has in the past and should again play an important role in ensuring that Black and Brown people who have paid their debts to society are able to find and maintain employment that they are qualified for.

COVID-19 and the resulting high unemployment has made action from the EEOC more urgent than ever. People with criminal records have always had a higher unemployment rate than the general public. Now, many who have been productively employed for years, even decades, have lost their jobs because of the pandemic, and they face competition in the job market from the countless others also seeking work. We urge the Biden Administration to reinvigorate the EEOC and its guidances to ensure that workers with criminal records are assessed on their qualifications and not on their pasts.

