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Unemployment Compensation

Committee on Benefits to Unemployed Persons, Section of Labor and Employment Law, American Bar Association

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UNEMPLOYMENT COMPENSATION:
Position of the Committee on Benefits to Unemployed Persons, Section of Labor and Employment Law, American Bar Association*

Uniformity

The Committee declares itself in principle for greater uniformity in the unemployment insurance laws in the various states. Except for certain standards required by the Social Security Act and other federal legislation, the states are free to adopt any unemployment insurance program or standard that they desire (subject to constitutional attack). Accordingly, the states differ in the amount of benefits paid, the duration of benefits, the types and forms of disqualifications, ineligibility provisions, coverage and taxation methods. In view of the ever-growing interdependence of business and industry and of the mobile labor force, the Committee believes that greater uniformity of law would be advantageous so that claimants, employers and taxpayers may reasonably predict what their rights and duties are without regard to geography (subject to a reasonable accommodation for differing standards of living in different parts of the country).

The Committee is unable to reach a consensus on how much uniformity is desirable, what areas of law should be made uniform, and the means of obtaining uniformity, except that the Committee is in agreement that uniform procedural provisions are desirable. The Committee is in agreement that a body be authorized to draft a Model Unemployment Insurance Act in the light of modern conditions which Model Act shall be submitted for adoption by the states, but that state adoption of such Model Act not be obligatory.

Separation of Claims and Appeals Functions

The unemployment insurance process involves several steps. One of the steps involves the filing of claims by unemployed persons and the payment or denial thereof by the state (and other) unemployment agencies. Another step involves appeals by parties from the granting or denial of benefits or from other actions taken by the said agencies which affect claimants, employers, or taxpayers.

The Committee declares itself in principle, at least, that the appeals and claims functions should be separate and that the appeals function or process should be as independent as possible of the claims function or process. Ideally, the one who hears and decides appeals should not be an employee of or dependent upon the agency from which the appeal is taken; but if state organizational setup impedes acceptance of this ideal, the Committee supports the principle that the one who hears and decides appeals should not be subject to interference or undue influence, from the agency.

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The Committee does not have a consensus that in each state the appellate tribunal be appointed separate and apart from the unemployment insurance claims agency and be completely independent thereof, because the organizational setup in many states is contrary. The Committee agrees that increased separation of function is a desirable goal.

The Committee believes that there have been instances in the past when the claims agency has improperly interfered in the appellate process.

Since a great deal of influence in the unemployment process is determined by budgetary considerations, which are in the hands of the United States Department of Labor, it is further the opinion of the Committee that the appeal function should be represented in some fashion in the U.S. Labor Department. The Committee is not in agreement whether it is necessary that there be a bureau or agency in the Labor Department separate and apart and independent of the bureau or agency in the Department relating to the employment service and unemployment insurance claims. The actual mechanics are undecided but the Committee is in agreement that by some means the budgetary considerations of the appeals function be kept independent of the other aspects of the unemployment insurance program.

The Committee is of the opinion that in the past the United States Department of Labor has intentionally or unintentionally neglected the appeals functions in budgetary considerations.

**Qualifications and Training of Hearing Officers**

The Committee believes that it is desirable that every state hearing officer in unemployment insurance appeals should be or become a lawyer having prior extensive experience in administrative matters or court proceedings. The Committee believes that the United States Department of Labor should consider establishing minimum standards for qualifications and competence of hearing officers which should include the requirement that said hearing officers be lawyers prior to being hired or become lawyers within a short period of time after hire.

The Committee agrees that hearing officers should have some experience in trials or in the presentation of evidence before judicial or quasi-judicial bodies before being hired.

Either the U.S. Department of Labor or some other body should address itself to the question of establishing minimum qualifications for hearing officers for the purpose of improving their competency.

The Committee is in agreement that hearing officers, once appointed, should be properly trained in how to hear cases and write decisions and that said training should be stressed by each state. State funds should be made available for periodic (and frequent) training and if said funds are not available, federal funds should be used for that purpose.
U.S. Labor Department Standards of Promptness

Due in part to said budgetary considerations above referred to, as well as pursuant to the decision of the United States Supreme Court in California v. Java, 402 U.S. 121 (1971), the U.S. Department of Labor has established and subsequently implemented certain Standards Relating to Promptness. As part of these Standards, the states are required to handle appeals expeditiously. Specifically, the standards provide that a certain percentage of appeals must be decided within thirty days after the appeal is filed; a further percentage of appeals must be decided within forty-five days after the appeal is filed; and the balance of appeals must be decided, with certain exceptions, within seventy-five days after the appeal if filed. By reason of these standards, there have been occasions when the quality of the hearing process and the quality of decisions have been sacrificed for the purpose of obtaining output and quantity.

The Committee is in accord that appeals should be decided expeditiously and pursuant to the provisions of the Social Security Act and the tenor of the decision in the Java case (requiring the payment of benefits promptly when due). The Committee is, however, concerned that due process and fair hearings requirements should not be sacrificed for the goal of speed. Measures taken should not prejudice the rights of parties to request delay upon a showing of good cause.

Accordingly, the Committee urges that the Standards be amended as follows: The numbers of cases counted shall not include any case where any bona fide party thereto (claimant, employer or agency) has requested a delay, continuance or postponement upon a showing of good cause. The U.S. Labor Department shall formulate guidelines to determine "good cause" for delay after consultation with the states.

In connection with the aforesaid budgetary considerations, another approach to the rigidity of the standards might be for the federal government to provide the appeals function in each state with additional funds, where shown necessary, for the purpose of permitting the state to hire such additional personnel, as may be necessary, so that the Standards are complied with without sacrificing due process or fairness.

The Committee is prepared to provide proof that the standards under certain conditions and on certain occasions are adverse to quality of the hearing process and decisional process.

Representation of Parties in Unemployment Insurance Matters

The Committee is concerned with both the claims and appeals process in unemployment insurance matters. Although originally the scheme was designed to be informal and lawyers were discouraged from participating, due to circumstances beyond the control of claimants, employers and those persons who are administering the scheme, complexities have developed in the process. Therefore, an unrepresented litigant at certain times suffers the risk of losing his rights either due to procedure technicalities or lack of knowledge on how to proceed.
(In California, for example, there are literally hundreds of court cases interpreting the unemployment insurance law, many of which drastically changed previous concepts. The situation is similar in other states. In addition, appellate tribunals have issued countless interpretations of the law. There are numerous administrative rules and regulations.)

This applies to both claimants and employers. The amount in controversy has increased during the past years so that the sums are becoming more substantial. Nonetheless, representation by competent representatives, whether lawyers or otherwise, is still the exception and not the rule.

a. The Committee believes that representation by competent representatives should be encouraged.

b. Training programs should be initiated and carried out to acquaint the bar, legal paraprofessionals, union representatives and employers on how to proceed adequately and competently in unemployment insurance claims and appeals. The furthering of such training is a matter to be discussed and perhaps federal funding of such training is required.

c. In order to equalize the respective strengths of adversaries in the unemployment insurance process (claimant v. employer, claimant v. agency; employer v. agency) adequate representation by competent representatives should be afforded to those parties who are unable to pay for representatives or who because of lack of knowledge do not realize the benefits of representation. But representatives will not work for free. They must be paid somehow for their work. From whence shall their fees emanate? Obviously, neither the indigent claimant nor the small employer can afford private counsel and this also applies often to middleclass claimants as well. Paraprofessionals might be considered if they charge less. The legal aid sector does not have funds to handle all those who approach it. An educational process is also needed to acquaint litigants of the availability or representation. Fees might be paid to representatives out of the award of benefits, but this would be counterproductive to the whole purpose of unemployment insurance as income replacement. Provisions should be considered for "fee-generating" machinery to provide for payment of reasonable fees. Various proposals have been put forward in this area; federal funding; payment out of state funds; payment to indigent claimants only; payment to successful litigants only. Fee-generating machinery will motivate the private Bar to become involved. It should be pointed out that in social security disability cases the private Bar has only recently become active in representing applicants in social security disability appeals because the federal government agreed to establish a mechanism so that attorneys may obtain a lien on the award to the applicant and substantial fees have since been awarded.

d. To encourage representation, therefore, our Committee believes would be to improve the administration of justice in this area.
The Committee suggests as an example of further proposals for an attempted solution of the problem, the proposals authored by its co-chairperson Paul Wyler (public) and submitted to the California State Bar regarding payment of attorney's fees in unemployment insurance appeals and in court cases involving unemployment insurance. Said proposals are merely suggestive and the Committee does not at this point endorse them. The Committee will study them further.

Another suggested approach which the Committee endorses is the concept of ombudsman/Office of Representation. Under this concept, which needs further clarification and study, unrepresented and underrepresented litigants (claimants and employers) who cannot properly afford a lawyer or other paid representative to advise them in their unemployment insurance matter, or to represent them at the claim, appeal, or court stage, should have access to an office of ombudsman/Office of Representation. Said office would be similar to state-appointed and funded public defenders to assist indigent criminal defendants. Said office of ombudsman/Office of Representation would be funded by the state (in some fashion) or possibly fully or partially assisted by federal funds. Said office would contain employees of the state appointed on a merit, civil service basis. Said office would train its representatives in unemployment insurance law and procedure so that they can competently advise litigants on their rights and duties and competently represent them if necessary, at the claims and appeal level, and in court (but in the latter instance, the ombudsman/Office of Representation would need to employ lawyers since most courts would not permit a non-lawyer to represent a party before them). This solution might be better than having private lawyers receiving fees, since there is no guarantee (other than fee motivation and success motivation) that the private lawyer will be competent and knowledgeable in this field, whereas the ombudsman/Office of Representation would emphasize training of its representatives in unemployment insurance law and procedure and civil service merit requirements would weed out the unfit.

These suggestions are just some of the possibilities that exist.

Procedural Technicalities and Time Limits

The Committee is concerned with procedural technicalities unemployment insurance agencies place in front of claimants and employers in both the claims and appeals process. Some states provide for a very short appeal period, and other states do not permit an extension of the appeal period upon a showing of good cause. Claimants and employers are sometimes denied benefits or the right to contest claims, respectively, because of unreasonable time limits with respect to filing claims or submitting protests or employer information. Obviously, in order for the system to operate efficiently, some time limits must be set down and claims or appeals or protests dismissed or denied when they are beyond reasonable limits; meritorious claims, appeals or protests should not be denied merely because of unreasonable time limits, and extensions and reopenings for good cause should be permitted. The Committee is in agreement that extremely short time limits should be abandoned, and appeal times or claims times be lengthened, and, endorses the concept of a uniform appeal period among the states, say twenty days or thirty days.
The Committee is in favor of federal standards to require that in unemployment insurance cases brought in the Courts to review administrative decisions, that said proceedings not be dismissed due to mere technicalities such as failure to name necessary parties, defendants or other and similar defects.

**Employer Reserve Accounts**

The Committee agrees that states should not charge employer reserve accounts for terminations by claimants not due to the fault of the employer, or for which the employer is not directly responsible, such as voluntary leaving for personal good cause or for the payment of benefits after a limited disqualification, or for terminations (layoffs) due to Acts of God, etc., and that federal standards may be considered to implement this provision.

**Pensions as Disqualifying Income**

The Committee agrees that the federal legislation providing that states be required to deduct from unemployment insurance benefits the amount of pensions, including social security payments, or some portion thereof, received by claimants should be repealed. The states should be free of federal constraints or standards to decide whether or not such pension payments are to be deducted, pending a further study of the matter.

The Committee invites others to comment upon or criticize these standards. Please send your written comments to Paul Wyler, P.O. Box 27396, Los Angeles, CA 90027.

Respectfully submitted,

Paul Wyler (Public)
William A. Jackson (Management)
Fred H. Altshuler (Union)
Co-chairpersons