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WORKER PROFILING AND DUE PROCESS

P. Maureen Bock-Dill

OVERVIEW

The Social Security Act provisions dealing with unemployment compensation recently were amended to require unemployment insurance claimants, who are identified as being likely to exhaust benefits and in need of reemployment services to aid their passage to new employment, to avail themselves of reemployment services. These claimants are identified through the process known as "profiling." Profiling is the principal method by which claimants enter the reemployment system established by the Unemployment Compensation Amendments of 1993.¹ These amendments seek to link unemployment insurance (UI), employment services (ES), and economic dislocation and worker adjusted assistance (EDWAA) to better serve unemployed workers, especially dislocated workers. This system of profiling is meant to "(A) identif[y] which claimants will be likely to exhaust regular compensation . . . ; (B) refer[] claimants . . . to reemployment services, such as job search assistance services . . . ; [and] (C) collect[] follow-up information relating to the [profiling program]."²

I. DEFINITIONS

To better understand the area of unemployment law, some terms must be defined.

a. A *claimant* is an unemployed worker who is asserting a right to unemployment compensation. To be eligible, a claimant must meet certain eligibility thresholds including those involving monetary and personal eligibility. Once a claimant has established initial eligibility, he must also meet the continuing eligibility requirements of being able to work, available for work, and seeking work.

1. 42 U.S.C. § 503(j) (Supp. V 1993).

2. *Id.*

b. The *State Employment Security Administrator (SESA)* is the state agency responsible for overseeing the state's compliance with federal guidelines. Each SESA is responsible for ensuring that the state's employment security laws conform to the federal statutes. This includes enacting legislation to "establish and use a system of profiling all new claimants for regular benefits."

c. *Statistical model* is one of the methods for determining whether claimants are likely to exhaust their benefits. This method is considered more "efficient" and "provide[s] a more predictive means for claimant selection and referral." Claimants that enter the selection pool via this model have an "exhaustion probability score or numerical ranking" that relates to their position in the pool. The higher the claimant's score, the more likely it is that the claimant will exhaust benefits and have a greater need for reemployment services.

d. *Characteristic screening* is the other method for determining whether claimants are likely to exhaust benefits. Claimants identified through this process are not ranked and thus are presented as being equally in need of reemployment services. Thus, the selection from the pool will be on a random basis.

e. *Dislocated workers* are workers who are displaced through such events as plant closures. These workers are most likely to be permanently or structurally unemployed and to exhaust benefits. Secretary of Labor Robert Reich, in discussing the need for the Unemployment Compensation Amendments of 1993, stated that the reasons for this include "the number of corporations who are making permanent reductions in their labor force, military downsizing, and an unprecedented technological change making both industries—and occupations—obsolete." Another factor is global competition.

f. *United States Department of Labor (DOL)* is the federal agency responsible for coordinating the employment security system. It does this by monitoring the various states' agencies to ensure compliance with the Social Security Act. All federal-state cooperative unemployment insurance programs are financed in part by federal grants. These federal grants may not be made to any state for a fiscal year unless the Secretary of Labor finds that the state's program conforms to federal guidelines and certifies the amount to be paid.

g. *Exhaustion of benefits* occurs when a claimant receives the maximum number of weeks of regular unemployment benefits. The exhaustion rate, or percentage of claimants who exhaust regular benefits, typically peaks in the first months following the end of a recession. At the time the Unemployment Compensation Amendments were being considered, over 250,000 claimants continued to exhaust regular benefits each month.

h. *Justifiable cause* is similar to "good cause" as used in the unemployment context. Good cause typically has meant that the claimant has a substantial reason that affords an excuse for not complying with some aspect of the law. For example, good cause for leaving one's employment is one that would compel a reasonably prudent person to quit under similar circumstances.

II. PROCESS

When a claimant files an initial claim, certain data elements will be collected for analysis. Labor market information also will be entered. Once a claimant receives the first payment, the claimant is then profiled. A claimant who is subject to recall or who uses a union hiring hall is excluded. The remaining claimants are then assigned a probability of dislocation through one of two methods—the statistical model or characteristic screens.

A list of potentially eligible claimants is created. If the statistical model is used, claimants are ranked highest to lowest in order of probability of benefit exhaustion. If characteristic screens are used, a list without any ranking is the end result.

Reemployment service providers and the unemployment insurance component of SESAs will establish how many claimants should be referred to reemployment services. This should reflect the number that actually can be provided such services. The number of those referred will be greater than the number that actually receives the services because of attrition and identification of those with good cause not to participate.

Claimants are notified that they are likely dislocated workers. The notification will refer these claimants to

reemployment services, explain why these services are being offered, give a time and place to report, and inform them that continued eligibility for benefits depends on their participation. Service providers are informed which claimants have been referred.

Claimants then report to the service providers at the appointed time for orientation. The service provider (1) notifies the unemployment insurance component of who did and did not attend and whether the referral was appropriate; (2) conducts an assessment of the claimants; and (3) develops an individual service plan in a discussion with the claimant in question. This plan lists the services for which participation is planned.

The claimant is responsible for participating in the reemployment services according to the plan and submitting weekly certifications of participation. These certifications are presented to the UI component of the SESA for processing to determine continuing eligibility for benefits. Upon the claimant's termination or completion of participation, the service provider notifies the UI component. The service plan is given to the UI component so that the follow up information is available to it.

III. POTENTIAL PROBLEMS

Equal protection dictates that all similarly situated claimants be treated the same; however, the lack of reemployment services makes this impossible. Current service providers initially will not be able to service all the profiled claimants, a fact which could lead to litigation by similarly-situated claimants. This becomes an even greater problem for states that opt to use the characteristic screening methodology for identification, because there is no ranking of claimants in the pool, which can be interpreted as meaning that everyone in the pool is equally in need of services.

States are required to have a system that is "reasonably calculated to insure full payment of employment benefits when due." A state's ability to "insure full payment of unemployment benefits when due" will be jeopardized if a claimant is not disqualified pending the profiling process. Section 303(a)(1) of the Social Security Act provides that the Secretary of Labor is not to certify payment unless a state has adopted "[s]uch

methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due."³ Under the profiling system, a claimant identified as a dislocated worker in need of reemployment services may experience delays in payment while the jurisdiction attempts to determine whether there are services, whether the claimant has participated in similar services, or whether there was justifiable cause for failing to participate.

The case of *California Department of Human Resources Development v. Java*⁴ is instructive. California's system of suspending claimant's benefits when an employer appealed the initial determination of eligibility was found to frustrate the goals of the unemployment compensation program and to violate the requirement that state programs be reasonably calculated to provide payment of benefits when due. The Supreme Court did not reach the procedural due process issues. The California system "result[ed] in a median seven-week delay in payments to claimants who ha[d] been found eligible for benefits."⁵

Lack of notification to claimants will cause problems because it will require SESAs to develop a means to determine which claimants will receive referrals and which will not. Moreover, when claimants seek information on their claims, the information generally is provided under public records laws. Thus, similarly situated claimants may be treated differently.

Appeals at both the lower and higher level authorities will increase. Claimants who fail to participate without good cause for so doing may be denied benefits. In the official notification, claimants will be told that they are to contact the UI office if they are enrolled in training, have already received reemployment services, or are engaged in any reemployment services that they believe may exempt them from participation.

All of these reasons for not participating create potential appeals issues. Additional issues include whether the claimant has good cause for a failure to participate for a short period of time, such as when there is a death in the claimant's family.

Appeals units will be asked to address issues surrounding whether the good cause for failing to participate precludes the

3. 42 U.S.C. § 503(a)(1) (1988).

4. 402 U.S. 121 (1971).

5. *Id.* at 124.

claimant from receiving benefits because the claimant was not able to work or available for work. For example, a short term illness would be good cause to not participate, but the claimant may not meet the continuing eligibility requirement of being able to work and being available for work during the duration of the illness.

Appeals units also will be confronted with whether services available to a claimant by means other than state-designated service providers satisfy the participation requirement. The DOL recommends that states consider “how recently the services were completed by the claimant and how appropriate those services were in facilitating the claimant’s re-entry into the workforce.”

CONCLUSION

Profiling offers new challenges to SESAs juggling competing demands—those of meeting additional requirements with fewer personnel and smaller budgets. States would be well advised to address the potential problems with a comprehensive set of rules before instituting profiling. The DOL could assist by publishing a draft set of rules so states are not attempting to create rules from whole cloth.

DISCUSSION QUESTIONS

1. A claimant is enrolled in a class to learn how to translate English language documents to Spanish. This claimant received reemployment services in 1988 when her previous employer moved its factory to Mexico. This claimant lives in a right-to-work state and is unemployed because her present employer just closed its business due to a bankruptcy. This claimant does not think that reemployment services will be useful. Will the claimant be excused from participation? Why or why not?

2. A claimant was a union member employed at an assembly plant. The plant is modernizing its equipment and discharged some of the older workers, including claimant. The claimant

has a learning disability, which makes retraining difficult. The union runs classes on various topics to ensure that its members have journeyman level skills. Claimant has been involved in these classes. Claimant asserts that his union activities should exempt him from participation in reemployment services. Will claimant be excused from participation? Why or why not?