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CLARIFYING CONDITIONS FOR NONMONETARY ELIGIBILITY IN THE UNEMPLOYMENT INSURANCE SYSTEM

Amy B. Chasanov*

This Article explores the nonmonetary eligibility requirements that unemployed individuals must meet in order to receive Unemployment Insurance (UI) benefits. These eligibility criteria, which are decided by the states, vary significantly. Because states often have relatively vague statutes regarding their specific nonmonetary eligibility criteria, state rules, regulations, and case law interpret these statutes and better define the criteria. The author discusses the results of a recent survey of UI nonmonetary eligibility criteria which provides information on the status of criteria across the nation than has been available previously. The author concludes that policy reform in this area should be focused on (1) clarifying and distributing these eligibility conditions for the benefit of unemployed individuals and employers, and (2) reviewing and revising eligibility conditions to be more responsive to individuals who have a significant attachment to the labor force but whose work and family situations necessitate their job separations.

INTRODUCTION

The Unemployment Insurance (UI) program is a federal-state program, where each state determines its own eligibility requirements with only minimal requirements imposed by the federal government.¹ As a result, there is considerable variation among states in these requirements. In determining

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1. *Wimberly v. Labor and Indus. Relations Comm'n*, 479 U.S. 511, 515 (1987). Federal law prohibits a state from denying benefits to individuals who are otherwise eligible if they refuse to accept a job when (1) the job is vacant due to a strike, lock-out, or other labor dispute; (2) wages, hours, or other conditions are substantially less favorable for the individual than those available for similar work in the area; or (3) as a condition of employment the individual would be required to join a company union or to resign from, or not be permitted to join, any labor organization. 26 U.S.C. § 3304(a)(5) (1994). In addition, benefits cannot be denied solely on the basis of pregnancy. *Id.* § 3304(a)(12).

whether an unemployed individual is eligible for UI benefits, two broad categories of eligibility standards are applied. Monetary eligibility conditions are designed to ensure that those who receive UI benefits had a substantial labor force attachment prior to unemployment.² Nonmonetary eligibility requirements are designed to limit payment of benefits to only those workers who are unemployed primarily due to economic causes.³

States have a number of monetary eligibility requirements, which are specified explicitly in state laws. Although levels vary, all states require that workers earn a specified amount of wages, or work a certain amount of time within a "base period," or both, in order to be monetarily eligible for benefits.⁴

2. For more information on monetary eligibility for UI benefits, see ADVISORY COUNCIL ON UNEMPLOYMENT COMPENSATION, UNEMPLOYMENT INSURANCE IN THE UNITED STATES: BENEFITS, FINANCING, AND COVERAGE 91-100 (1995) [hereinafter ACUC REPORT]; EMPLOYMENT AND TRAINING ADMIN., U.S. DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 3-1 to 3-30 (1994) [hereinafter COMPARISON].

3. Useful sources on nonmonetary eligibility conditions include the following: CORSON ET AL., NONMONETARY ELIGIBILITY IN STATE UNEMPLOYMENT INSURANCE PROGRAMS: LAW AND PRACTICE (1986); WILLIAM HABER & MERRILL G. MURRAY, UNEMPLOYMENT INSURANCE IN THE AMERICAN ECONOMY 249-313 (1966); Margaret M. Dahm & Phyllis H. Fineshriber, *Disqualifications for Quits to Meet Family Obligations*, in 1 UNEMPLOYMENT COMPENSATION: STUDIES & RESEARCH 9 (National Comm'n on Unemployment Compensation ed., 1980) [hereinafter Dahm & Fineshriber, *Disqualifications*]; Margaret M. Dahm & Phyllis H. Fineshriber, *The Issue of Part-Time Employment*, 1 UNEMPLOYMENT COMPENSATION: STUDIES & RESEARCH 29 (National Comm'n on Unemployment Compensation ed., 1980) [hereinafter Dahm & Fineshriber, *Part-Time Employment*]; Margaret M. Dahm & Phyllis H. Fineshriber, *Women in the Labor Force*, in 3 UNEMPLOYMENT COMPENSATION: STUDIES & RESEARCH 737 (National Comm'n on Unemployment Compensation ed., 1980) [hereinafter Dahm & Fineshriber, *Labor Force*]; Louise F. Freeman, *Able to Work and Available for Work*, 55 YALE L.J. 123 (1945); Katherine Kempfer, *Disqualifications for Voluntary Leaving and Misconduct*, 55 YALE L.J. 147 (1945); Deborah Maranville, *Changing Economy, Changing Lives: Unemployment Insurance and the Contingent Workforce*, 4 B.U. PUB. INT. L.J. 291 (1995) [hereinafter Maranville, *Changing Economy*]; Deborah Maranville, *Feminist Theory and Legal Practice: A Case Study on Unemployment Compensation Benefits and the Male Norm*, 43 HASTINGS L.J. 1081 (1992) [hereinafter Maranville, *Feminist Theory*]; Richard McHugh & Ingrid Kock, *Unemployment Insurance: Responding to the Expanding Role of Women in the Workforce*, 27 CLEARINGHOUSE REV. 1422 (1994); Arthur M. Menard, *Refusal of Suitable Work*, 55 YALE L.J. 134 (1945); Diana M. Pearce & Monica L. Phillips, *When Sexual Harassment Happens: State Unemployment Insurance Coverage of Workers Who Leave Their Jobs Because of Sexual Harassment*, 5 STAN. L. & POL'Y REV. 75 (1994); Paul H. Sanders, *Disqualification for Unemployment Insurance*, 8 VAND. L. REV. 307 (1955); Lee G. Williams, *Eligibility for Benefits*, 8 VAND. L. REV. 286 (1955); Elizabeth F. Thompson, Comment, *Unemployment Compensation: Women and Children—The Denials*, 46 U. MIAMI L. REV. 751 (1992).

4. The "base period" is the time period used to determine eligibility. In most states, the base period is defined as the first four of the most recently completed five

Most states also require a minimum amount of earnings in the calendar quarter in the base period in which the highest level of wages were earned, the "high-wage quarter," and that wages be earned in at least two of the four calendar quarters in the base period.⁵ Some states have additional monetary qualifying requirements.⁶

In addition to meeting a state's monetary eligibility conditions, applicants for UI benefits also must meet certain nonmonetary eligibility conditions.⁷ These nonmonetary eligibility conditions are designed to ensure that UI recipients (1) are either involuntarily unemployed or voluntarily unemployed for good cause, and (2) are able to work, available for work, and seeking work.⁸

While the general categories of nonmonetary eligibility conditions usually are stated explicitly in state UI statutes, the laws often provide only vague definitions of eligibility criteria.⁹ The specific interpretations of eligibility conditions sometimes appear in state rules, regulations, or administrative or judicial case law. At times, these sources may conflict. For example, a New York statute notes that "[a] claimant who for reasons personal to himself is unable or unwilling to work usual full time and who customarily works less than the full time"¹⁰ can receive UI benefits, but case law indicates that a person seeking part-time work may be considered unavailable and unable to receive UI benefits if part-time work is not commonly available in that person's field.¹¹ As a result, predicting the treatment of a given individual or circumstance, even within a particular state, can be extremely difficult.

The primary purpose of this Article is to explore the current nonmonetary eligibility conditions across all states using data from a new survey and to offer suggestions regarding policy reform. This Article is divided into three sections.

calendar quarters, based on the UI application date. See COMPARISON, *supra* note 2, at 3-1, 3-2, 3-23, 3-24.

5. *Id.* at 3-3, 3-27 to 3-29.

6. For example, Indiana requires that UI applicants earn at least \$1500 in their last two base period quarters. For a summary of all state requirements, see *id.* at 3-27 to 3-29.

7. *Id.* at 4-1.

8. *Id.*

9. See *infra* Part I.A.3.

10. N.Y. LAB. LAW § 596(4) (McKinney 1988).

11. See *Goldwag v. Catherwood*, 280 N.Y.S.2d 738, 739 (N.Y. App. Div. 1967); *In re Bollinger*, 156 N.Y.S.2d 445, 446 (N.Y. App. Div. 1956).

First, Part I describes how the states make nonmonetary eligibility decisions. It reviews the states' three-step process of determining nonmonetary eligibility, which includes the following: (1) defining the state's eligibility criteria and the disqualification period associated with any eligibility violations; (2) identifying potential nonmonetary eligibility violations among UI claimants and making a decision whether to grant or deny UI benefits; and (3) conducting hearings when employers or UI applicants appeal an eligibility determination. Next, Parts II-IV discuss the results of a recent state survey conducted by the Interstate Conference of Employment Security Agencies (ICESA), which provides new information from all state UI agencies in an attempt to better understand the status of the UI nonmonetary eligibility conditions across the nation. Finally, Part V of this Article discusses policy implications suggested by the survey and argues that significant changes in the labor market since the UI program was adopted in 1935 necessitate a reevaluation of nonmonetary eligibility conditions. New information from the ICESA survey indicates that a number of individuals with a significant labor force attachment currently are being denied UI benefits. Specifically, women, low-wage workers, contingent workers, and individuals in two-earner families are often denied benefits when they are faced with work and family situations over which they have little control.

I. STEPS IN DETERMINING NONMONETARY ELIGIBILITY

Determining monetary eligibility is a straightforward process based solely on the employment and earnings history of the UI applicant. In contrast, determining nonmonetary eligibility is frequently a more difficult process. There are three steps that ultimately can lead to a denial of benefits on the basis of nonmonetary eligibility. First, state agencies define and impose a set of nonmonetary eligibility requirements. Second, the state identifies potential nonmonetary eligibility determination issues and makes a determination either to deny or grant UI benefits.¹² Third, the UI applicant or employer may choose to appeal the state agency's initial

12. See CORSON ET AL., *supra* note 3, at 59-96.

decision of UI eligibility and have an administrative hearing to reconsider the issue of eligibility. Each of these steps is discussed below.

*A. Definitions of Nonmonetary Eligibility and the
Associated Disqualification Period*

1. *Categories of Nonmonetary Eligibility Conditions*—Although particular nonmonetary eligibility conditions vary considerably by state, the general categories are similar. States initially disqualify individuals from receiving benefits for a number of reasons, including the following: (1) voluntary separation from work without “good cause;” (2) discharge from employment due to misconduct related to the job; (3) unemployment resulting from a labor dispute; and (4) fraudulent misrepresentation to obtain or increase benefits.¹³ These are termed “separation issues” because they relate to the individual’s separation from employment. These disqualifications usually result in a postponement of benefits for the duration of the unemployment spell or for a specified period of time.¹⁴

In addition, states disqualify individuals from receiving UI benefits for “nonseparation issues,” which do not relate to an individual’s initial separation from employment but instead relate to an individual’s *ongoing* eligibility for benefits. First, a UI claimant must be able to work and be available for suitable work in order to be eligible to receive benefits.¹⁵ Second, a claimant must be looking for work and must submit evidence of a job search in accordance with state law.¹⁶ These two conditions generally are considered “continuing requirements” because they must be met each week of unemployment.¹⁷ If an individual is disqualified for not meeting one of these two continuing requirements, she may receive benefits again as soon as that condition changes. Third, an individual is disqualified from receiving UI benefits if he refuses an offer

13. COMPARISON, *supra* note 2, at 4-1.

14. For example, in all but five states, an individual who leaves work without good cause is disqualified from receiving UI benefits for the duration of her unemployment spell. For information on state disqualifications, see Table 1, *infra* pp. 96–97.

15. COMPARISON, *supra* note 2, at 4-1, 4-2, 4-25 to 4-27.

16. *Id.* at 4-3, 4-25 to 4-27.

17. *Id.* at 4-1 to 4-3.

of suitable work without "good cause."¹⁸ Refusal to accept suitable work is a more serious situation than being unable or unavailable to work in a given week and results in a postponement of benefits for the period of time specified by state law.¹⁹

2. *Disqualification Penalties*—Claimants can be disqualified from receiving UI benefits as a result of the separation issues discussed above. Claimants also can be disqualified from receiving benefits for refusing suitable work, which is a nonseparation issue.²⁰ Claimants who are determined to be unable or unavailable for work may be temporarily ineligible for benefits in a given week,²¹ but they are not disqualified and can again receive UI as soon as their condition changes.²²

Disqualifications may result in a postponement of benefits either for a specified period of time or for the duration of the spell of unemployment.²³ All state laws specify some length of time for each type of disqualification.²⁴ When states set the disqualification to be less than the duration of the unemployment spell, it reflects a view that a worker's continued unemployment after a specified period of time is more a result of general labor market conditions than of the individual's disqualifying act.²⁵ In some states, the number of weeks of disqualification varies relative to the seriousness of the disqualifying action.

When a disqualification results in the denial of benefits for the duration of the unemployment spell, a disqualified individual usually must work for a given additional amount of time before requalifying for UI benefits.²⁶ The amount of time that an individual must work varies significantly both by state and by the reason for disqualification. For example, an individual in Kansas who is disqualified from receiving benefits for the duration of an unemployment spell for leaving voluntarily without good cause must then earn at least three times

18. *Id.* at 4-8 to 4-11, 4-41 to 4-43. The definition of what constitutes good cause for refusing a job offer varies by state and is discussed *infra* Part II.A.

19. In 1994, 40 states disqualified an individual from receiving benefits for the duration of her unemployment spell if she refused a suitable job offer without good cause. See Table 1, *infra* pp. 96-97.

20. See Table 1, *infra* pp. 96-97.

21. See COMPARISON, *supra* note 2, at 4-1 to 4-3.

22. *Id.*

23. See Table 1, *infra* pp. 96-97.

24. See *id.*

25. See COMPARISON, *supra* note 2, at 4-4.

26. *Id.* at 4-11.

the weekly benefit amount that would have been collected before requalifying;²⁷ a similar individual in Idaho must earn at least sixteen times the weekly benefit amount before requalifying.²⁸

In addition to being disqualified from receiving benefits for a certain period of time, an individual may have UI benefit payments reduced when the disqualification period ends or may have benefit rights cancelled altogether.²⁹ A cancellation of benefit rights, which may occur for incidents of “gross misconduct” or fraud, erases all of an individual’s recent employment history for purposes of current and future benefit determination.³⁰

The severity of the impact of any given penalty depends ultimately on the individual’s duration of unemployment. For example, disqualification for the duration of unemployment is a relatively minor penalty for an individual who becomes reemployed within a few weeks, but it is much more severe for someone who is unemployed for many months.

Table 1 shows the severity of the disqualifications by state in 1994 for four major UI eligibility violations: (1) voluntary leaving without good cause; (2) discharge for deliberate misconduct connected with work; (3) discharge for gross misconduct connected with work; and (4) refusal of suitable work without good cause. Over time, states have significantly increased their use of disqualifications for the duration of unemployment. Table 2 illustrates the increase in the severity of the penalties for these disqualifications. For example, in 1948, only eleven states imposed penalties that lasted for the duration of an individual’s unemployment spell for voluntarily leaving work without good cause; by 1994, claimants were denied benefits for the duration in fifty-one jurisdictions. Some research has found that these increases in the severity of disqualification penalties were enacted to ameliorate states’ deteriorating UI trust funds³¹ and have significantly decreased the percentage of the unemployed who receive UI.³²

27. KAN. STAT. ANN. § 44-706(a) (1993).

28. IDAHO CODE § 72-1366(n) (Supp. 1995).

29. See Table 1, *infra* pp. 96–97.

30. See COMPARISON, *supra* note 2, at 4-16 to 4-17, 4-39 to 4-40.

31. See U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/HRD-93-107, UNEMPLOYMENT INSURANCE: PROGRAM’S ABILITY TO MEET OBJECTIVES JEOPARDIZED 31 (1993).

32. See ADVISORY COUNCIL ON UNEMPLOYMENT COMPENSATION, REPORT AND RECOMMENDATIONS 40–41 (1994).

TABLE 1: DURATION (IN WEEKS) OF VARIOUS UI DISQUALIFICATIONS, BY STATE, 1994

| State | Voluntary Leaving | Discharge for Misconduct | Additional Penalty for Discharge for Gross Misconduct | Refusal of Suitable Work |
|----------------------|-------------------|--------------------------|---|--------------------------|
| Alabama | Duration* | 3-7* | Duration* | 1-10 |
| Alaska | 5* | 5* | — | 5* |
| Arizona | Duration | Duration | — | Duration |
| Arkansas | Duration | 7 | Duration | 7 |
| California | Duration | Duration | — | 1-9 |
| Colorado | 10* | 10* | 26* | 20* |
| Connecticut | Duration | Duration | — | Duration |
| Delaware | Duration | Duration | — | Duration |
| District of Columbia | Duration | Duration | — | Duration |
| Florida | Duration | Duration | Duration | Duration* |
| Georgia | Duration | Duration* | Duration | Duration |
| Hawaii | Duration | Duration | — | Duration |
| Idaho | Duration | Duration | — | Duration |
| Illinois | Duration | Duration | † | Duration |
| Indiana | Duration* | Duration* | † | Duration* |
| Iowa | Duration | Duration | † | Duration |
| Kansas | Duration | Duration | Duration* | Duration |
| Kentucky | Duration | Duration | Duration | Duration |
| Louisiana | Duration* | Duration* | Duration* | Duration |
| Maine | Duration | Duration | Duration | Duration |
| Maryland | Varies | 5-10 | Duration | 5-10 |
| Massachusetts | Duration | Duration | — | 7* |
| Michigan | Duration | Duration | Duration* | 6* |
| Minnesota | Duration | Duration | Duration* | Duration |
| Mississippi | Duration | Duration | — | 1-12 |
| Missouri | Duration | 4-16 | 4-16 | Duration |
| Montana | Duration | Duration | 52* | Duration* |
| Nebraska | Varies* | 7-10* | † | 7-10* |
| Nevada | Duration | Duration | † | Duration |
| New Hampshire | Duration | Duration | 4-26* | Duration |
| New Jersey | Duration | 5 | Duration* | 3 |
| New Mexico | Duration | Duration | — | Duration* |
| New York | Duration | Duration | 52 | Duration |
| North Carolina | Varies* | Varies | — | Varies |
| North Dakota | Duration | Duration | 52 | Duration |
| Ohio | Duration | Duration | † | Duration |
| Oklahoma | Duration | Duration | — | Duration |
| Oregon | Duration* | Duration* | † | Duration* |
| Pennsylvania | Duration | Duration | — | Duration |
| Puerto Rico | Duration | Duration | — | Duration |
| Rhode Island | Duration | Duration | — | Duration |
| South Carolina | Duration | 5-26* | 5-26* | Duration |
| South Dakota | Duration | Duration | — | Duration |

| State | Additional Penalty | | | |
|----------------|--------------------|--------------------------|------------------------------------|--------------------------|
| | Voluntary Leaving | Discharge for Misconduct | for Discharge for Gross Misconduct | Refusal of Suitable Work |
| Tennessee | Duration | Duration | — | Duration |
| Texas | Duration | Duration | — | Duration |
| Utah | Duration | Duration | 51 | Duration |
| Vermont | Duration | 6–12 | Duration | Duration |
| Virgin Islands | Duration | Duration | — | Duration |
| Virginia | Duration | Duration | — | Duration |
| Washington | Duration | Duration | † | Duration |
| West Virginia | Duration | 6* | Duration | 4* |
| Wisconsin | Duration | Duration* | — | Duration |
| Wyoming | Duration | Duration* | — | Duration |

SOURCE.—EMPLOYMENT AND TRAINING ADMIN., U.S. DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 4-29 to 4-31, 4-35 to 4-43 (1994).

* State reduces the benefit amount a claimant receives at the end of the disqualification period.

† State cancels the individual's earned credits.

— State imposes no additional penalties for gross misconduct.

TABLE 2: DURATION OF PENALTY IMPOSED FOR VARIOUS UI DISQUALIFICATIONS, OVER TIME, BY NUMBER OF STATES

| Reason for Disqualification | No. of States That Postpone Benefits for: ^a | | No. of States That Reduce or Cancel Benefits |
|---|--|--------------------------|--|
| | Fixed or Variable Number of Weeks | Duration of Unemployment | |
| Voluntary Leaving | | | |
| 1948 | 41 | 11 | 16 |
| 1971 | 33 | 28 | 19 |
| 1978 | 17 | 42 | 11 |
| 1994 | 5 | 51 | 8 |
| Misconduct Discharge^b | | | |
| 1948 | 46 | 6 | 16 |
| 1971 | 41 | 20 | 18 |
| 1978 | 31 | 30 | 16 |
| 1994 | 12 | 42 | 12 |
| Suitable Work Refusal | | | |
| 1948 | 40 | 12 | 17 |
| 1971 | 35 | 23 | 16 |
| 1978 | 32 | 26 | 14 |
| 1994 | 13 | 41 | 11 |

SOURCES.—SAUL J. BLAUSTEIN ET AL., UNEMPLOYMENT INSURANCE IN THE UNITED STATES: THE FIRST HALF CENTURY 284 (1993); EMPLOYMENT AND TRAINING ADMIN., U.S. DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 4-29 to 4-31, 4-35 to 4-37, 4-41 to 4-43 (1994).

^a Some states are counted as having both a denial period of a fixed or variable number of weeks and a durational disqualification for a given reason category. In these instances, the severity of the penalty imposed is based on the individual circumstance.

^b Count excludes disqualification for gross misconduct.

3. *Selected Review of State Statutes, Regulations, and Case Law*—The state laws governing the nonmonetary eligibility conditions outlined above are often general and quite vague. For example, Texas's statute regarding availability for work simply states that an individual must be "able to work" and "available for work,"³³ which does not indicate whether a claimant is denied benefits if he restricts his hours in any way. As a result, it is necessary to consult state rules and regulations and state case law to determine whether there is a precedent for treatment of a certain circumstance in the state. Acquiring information on the nationwide status of nonmonetary eligibility for UI, however, is a complicated process. Some previous research has provided a comprehensive review of statutes, regulations, and case law by focusing on nonmonetary eligibility for a single issue,³⁴ or by providing a general sense of how certain types of workers would be treated in various states.³⁵

A review of the states' and territories' treatment of one particular eligibility issue illustrates the disparity of information available in the statutes, rules, and case law. This discussion focuses on whether an individual is considered available for work and therefore eligible for UI when he restricts his work search to a part-time job. Only twelve states provide information in their state laws to answer this question. In ten states, statutes explicitly require claimants to be available for full-time work.³⁶ For example, Michigan law requires that an individual "must be available to perform suitable full-time work."³⁷ In two states, statutes explicitly cover some individuals who seek part-time work.³⁸ The statutes in the remaining states and territories are silent on this issue, with language similar to Michigan's,

33. TEX. LAB. CODE ANN. § 207.021(a)(3)–(4) (West Supp. 1996).

34. Pearce & Phillips, *supra* note 3.

35. Maranville, *Changing Economy*, *supra* note 3.

36. See National Employment Law Project, Analysis of State Unemployment Compensation Availability for Work Requirements When Work Search Is Limited to Part-Time Work (Oct. 25, 1994) (unpublished data, on file with the *University of Michigan Journal of Law Reform*) [hereinafter NELP Review]. The states are Georgia, Indiana, Maine, Michigan, New Hampshire, New Mexico, Oklahoma, Pennsylvania, Washington, and West Virginia. See *id.*

37. MICH. COMP. LAWS § 421.28(a) (1995) (MICH. STAT. ANN. § 17.530(1)(a) (Callaghan 1989)). This language is typical of the other nine states.

38. N.J. STAT. ANN. § 43:21-20.1 (West 1991) (requiring that the individual have base period part-time earnings, good cause for limiting hours, and suitable part-time work available in the locality); N.Y. LAB. LAW § 596.4 (McKinney 1988) (providing benefits to "[a] claimant who for reasons personal to himself is unable or unwilling to work usual full time and who customarily works less than the full time").

noting that an individual must be able to work and available for work, but not specifying what type of work.³⁹

An examination of state regulations on this same issue reveals the position of sixteen additional states. Ten states have rules providing that an individual must be seeking full-time work.⁴⁰ Six states explicitly cover individuals seeking part-time work but often in selected circumstances.⁴¹ The amount of detail included in the rules varies significantly by state. Illinois, for example, provides detailed information on some eligibility requirements and even includes hypothetical examples. The following is an excerpt from an Illinois rule that addresses claimants seeking part-time work:

The requirement that a claimant shall be able and available for full-time work shall not be applied to a claimant who can prove by a preponderance of the evidence that for him only part-time work . . . is suitable because:

- (a) He restricts his availability to part-time work due to:
 - (1) Circumstances which are beyond his own control, such as, the advice of his physician that full-time work would adversely affect his health; or,
 - (2) The kind of work suitable to his skill, training or experience is available only on a part-time basis, and he is not reasonably qualified for available full-time work; and,
- (b) He is seeking work in an area where a labor market for the part-time work applicable to him and suitable to his skill, training or experience normally exists; and,
- (c) He has a reasonable possibility of securing that part-time work suitable to his skill, training, or experience.

Example: The claimant is the single parent of a school age child. While otherwise suitable, full-time work exists for a person with his skill, training or experience, the claimant believes that it is in the best interest of his child that he be with the child when the child is not in school. The claimant would not be eligible for benefits, for he unduly restricts his

39. See NELP Review, *supra* note 36.

40. The states are Alabama, Connecticut, Idaho, Iowa, Minnesota, Nebraska, Oregon, Utah, Vermont, and Wisconsin. See *id.*

41. California, Colorado, Illinois, Kansas, Massachusetts, and Montana allow an individual to seek part-time work in some circumstances. See *id.*

availability to part-time work based on a personal preference. The alternative of child care arrangements would allow this claimant to work full-time.⁴²

Illinois's description clarifies a number of issues surrounding an individual who might seek part-time work, including health problems, domestic circumstances, personal preference, and the requirement of a prior part-time work history. Most states, however, provide much less detail on eligibility. For example, the language in California's regulations is more general, providing that "[i]f a claimant has good cause for a restriction [on his or her availability for work], the claimant will not be ineligible . . . so long as a substantial field of employment remains open to him or her."⁴³ California defines good cause as

a compelling reason, one which would influence a prudent person in the same circumstances as the claimant, and who is genuinely desirous of working, to impose the restriction. A finding of good cause depends on a determination that the claimant had no reasonable alternative for discharging the obligation that led the claimant to place the restriction on his or her availability. Reasons of ambition, prestige, taste, or similar motives . . . will usually not be considered to constitute good cause.⁴⁴

Thus, California's definition is more ambiguous than Illinois'. For example, it is not clear from the California rule whether domestic circumstances, such as child care according to the Illinois example, would be considered "a compelling reason" or just one of "taste."⁴⁵

Half of the remaining states and territories have neither explicit laws nor rules that discuss whether, and under what conditions, an individual seeking only part-time work is eligible

42. ILL. ADMIN. CODE tit. 56, § 2865.125 (1995).

43. CAL. CODE REGS. tit. 22, § 1253(c)-1(a) (1995).

44. *Id.* § 1253(c)-1(c)(4).

45. California answered this question in *Sanchez v. Unemployment Ins. Appeals Bd.*, 569 P.2d 740, 750 (Cal. 1977) (finding that parents have good cause to restrict their availability when work conflicts with activities undertaken to provide for the care and education of their minor children and there is no reasonable alternative for discharging these responsibilities).

for UI.⁴⁶ After also considering available case law on the issue, ten jurisdictions still remain silent,⁴⁷ and fifteen states have some relevant case law.⁴⁸ It is important to note that nine states have conflicting authority between the statutes, rules, and case law.⁴⁹

This type of review is not only time consuming when conducted for each state, but it also fails to provide the answers to many important situations that claimants face. Additionally, when answers from different sources within a single state conflict, claims examiners and administrative law judges must decide between them. Thus, the lack of treatment in state laws and rules, the sometimes ambiguous language when there is treatment, and the difficulty of interpreting case law indicate why predicting the treatment of a given individual in both the eligibility determination process and a subsequent hearing process is so onerous.

B. Detecting and Deciding Nonmonetary Eligibility

Just as the definitions of nonmonetary eligibility vary significantly by state,⁵⁰ there also is variation among states in the processes used for detecting determination issues—i.e., information collected to determine a claimant's continuing availability for work.⁵¹ Although a thorough description of how each state currently detects and decides separation and nonseparation issues is not available, some general information is known.

The number of determinations for separation issues depends primarily on the intake process and the information obtained

46. See NELP Review, *supra* note 36.

47. The jurisdictions are Hawaii, Kentucky, Louisiana, Missouri, Nevada, South Carolina, Tennessee, and Wyoming. Puerto Rico and the Virgin Islands are also silent on the issue.

48. Case law indicates that part-time workers are not eligible in Alaska, Arizona, Arkansas, Florida, Maryland, Mississippi, South Dakota, Texas, and Virginia. *See id.* Case law indicates that part-time workers are eligible with some restrictions in Delaware, the District of Columbia, North Carolina, and North Dakota. *See id.* In Ohio and Rhode Island the case law is conflicting. *See id.*

49. The states are Kansas, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and West Virginia. *See id.*

50. CORSON ET AL., *supra* note 3, at 3–5.

51. *Id.* at 5–6.

from employers.⁵² The characteristics of the intake process may have a number of different effects, such as increasing the number of determinations, providing misinformation during intake, and discouraging individuals from applying for benefits. Variations in the intake procedures that could affect the number of determinations include: (1) whether information on nonmonetary eligibility requirements is provided to claimants before or after the intake process; (2) whether additional forms are required at intake if a separation issue arises; and (3) how questions are posed to claimants—for example, by a submission of fact or by a claimant's judgment call on the matter of whether the separation action was with "good cause."

With regard to the information obtained from employers, the procedures in place to solicit employer information significantly affect the level and type of employer participation.⁵³ Variations in the processes for obtaining employer information include: (1) when and how information is gathered from employers—for example, whether a form is sent out with every application for UI benefits or whether all responsibility for contesting a claim originates with the employer; (2) how the questions are posed to employers; and (3) whether follow-up measures are taken to ensure a response.⁵⁴

The number of determinations for nonseparation issues detection depends largely on four sources of information: (1) the intake form; (2) ongoing claims forms, which include information on claimants' job search; (3) Eligibility Review Program (ERP) interviews;⁵⁵ and (4) claimants' responses to referrals and job offers generated by the Employment Service.⁵⁶ States vary on how often ongoing claims forms are submitted, as well as on how they interpret and review information submitted on forms.⁵⁷ For example, states that randomly audit some portion of employer contacts on required job search activity or that review the claims forms in detail are more likely to detect an issue than are states that have no review procedures.⁵⁸

52. *See id.* at 59–96.

53. *Id.* at 79–81.

54. *Id.*

55. ERP interviews are often used by states to ensure claimants are able to and available for work and are conducting an adequate job search.

56. CORSON ET AL., *supra* note 3, at 81–85.

57. *Id.*

58. *See id.* at 130–31.

Similarly, in some states, missing one appointment with UI staff is considered evidence of unavailability for work; other states are concerned only with repeated missed appointments; and still other states never consider this to be a reason to initiate a determination.⁵⁹ The frequency with which interviews and claims forms are required is another dimension of interstate differences that affects how well nonseparation issues are detected.⁶⁰

Given this variation in issue detection among the states, it is to be expected that determination rates vary significantly by state. Research indicates that the capacity of states to make the decision to deny benefits to UI claimants on the basis of nonmonetary ineligibility depends more on the effectiveness of detecting determination issues than on the actual extent to which determinations lead to denials.⁶¹ Stated somewhat differently, there is more fluctuation across states in determinations per initial claim than in the ratio of denials to determinations, which is more steady. In general, the number of denials in a state is more dependent on the number of determinations in the state than it is on the specific relationship between determinations and denials.

C. Appeals Process

Federal law requires that all states provide UI applicants with an “[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied.”⁶² In all states, employers also have a right to appeal decisions when their former employees are granted UI benefits.⁶³ All states allow a claimant or an employer at least one administrative hearing decided by either a single administrative law judge or a panel, which usually consists of an administrative law judge and representatives for

59. *Id.* at 81–85.

60. *Id.*

61. *Id.* at 121–23.

62. 42 U.S.C. § 503(a)(3) (1994). For additional information on the appeals process and appeal outcomes, see ADVISORY COUNCIL ON UNEMPLOYMENT COMPENSATION, DEFINING FEDERAL AND STATE ROLES IN UNEMPLOYMENT INSURANCE 113–62 (1996).

63. COMPARISON, *supra* note 2, at 5-3.

the interests of business and claimants.⁶⁴ During this lower level appeal, the officer(s) considers oral testimony and other competent evidence and makes a de novo decision based on the record at the hearing.⁶⁵ Almost all states provide claimants and employers with the opportunity to file a second appeal,⁶⁶ and all states allow the decisions of these bodies to be appealed to the state courts for judicial review.⁶⁷ The outcomes of these administrative hearings provide case law which clarifies and actually prescribes the nonmonetary eligibility criteria when state law and regulation is vague or silent.⁶⁸

II. ICESA SURVEY RESULTS

The ICESA⁶⁹ recently conducted a survey of the states which provides more complete and current information than was previously available regarding nonmonetary eligibility conditions.⁷⁰ The purpose of the survey was to clarify how individuals would be treated in a variety of situations across all states. During October and November of 1994, the survey was mailed to all fifty states, as well as to the District of Columbia, Puerto Rico, and the Virgin Islands.⁷¹ All fifty-three jurisdictions responded to the survey. Directors of the UI program in each state were asked to respond to the survey based on their *expected agency result*, that is, based on the directives given to claims examiners on how to make nonmonetary eligibility

64. *Id.* at 5-4, 5-15 to 5-16.

65. [1C Fed.-St. L. Reg. Explanations] Unempl. Ins. Rep. (CCH) ¶ 2020, at 4588-89 (Sept. 17, 1992).

66. COMPARISON, *supra* note 2, at 5-15 to 5-16.

67. *Id.* at 5-6, 5-17 to 5-18.

68. See Maranville, *Changing Economy*, *supra* note 3, at 305 (noting that issues of voluntary quit disqualifications not covered by statute are governed by regulation or case law); Pearce & Phillips, *supra* note 3, at 77 (noting that vague language in law delegates eligibility decisions on issues of sexual harassment to individual UI boards, program administrators, and courts).

69. ICESA represents officials who administer the Employment Service, Unemployment Insurance, Labor Market Information, and, in many cases, the Job Training Partnership Act and Job Opportunities and Basic Skills training programs.

70. See ACUC REPORT, *supra* note 2, at 101-03 (describing the survey and summarizing its conclusions). A copy of the survey and results are on file with the *University of Michigan Journal of Law Reform*.

71. *Id.* at 121.

decisions.⁷² The survey focused on a number of specific non-monetary determination situations, including part-time work, restriction of work hours, classification of temporary workers, student status, mental or physical conditions that limit work, and domestic obligations.⁷³

The ICESA survey is important for two primary reasons. First, the survey provides eligibility information on a purely descriptive level. As discussed earlier, information providing nonmonetary eligibility definitions for the numerous situations that commonly arise is difficult to obtain. This survey's perspective is unique because it is based on how the initial determinations are made by claims examiners, which may differ from how administrative law judges would decide a case on appeal. Second, the survey provides a comprehensive source of information for state UI nonmonetary eligibility criteria, which is necessary in order to identify potential policy issues and problems with current criteria.

The description of the survey results that follows is organized by the four nonmonetary eligibility issues that the survey addressed: voluntarily leaving work, misconduct, availability for work, and refusal of suitable work. When state statute information is readily available, the discussion highlights differences between the survey results and the state statutes.

A. Voluntarily Leaving Without Good Cause

Because the UI system is intended to compensate workers who are unemployed through no fault of their own, individuals who voluntarily leave their job without "good cause" are disqualified from benefits.⁷⁴ There are two main questions connected with this type of disqualification: When can it be said that an individual has left his job, and how is "good cause" defined?

Defining when an individual has left a job is difficult. For example, how should the law respond when a temporary

72. *Id.* at 101.

73. *Id.* at 101–02.

74. See COMPARISON, *supra* note 2, at 4-5.

employee refuses to take a different subsequent temporary job offer, or when an individual holds multiple jobs and may be fired from one and quit the other, or when an employer makes a unilateral change in the job that the employee cannot accommodate?

Defining good cause amounts to defining the conditions under which an employee can leave a job and still be eligible for UI benefits. Currently, if an individual is found to have voluntarily quit a job without good cause, forty-eight states disqualify the individual for the duration of unemployment.⁷⁵ In most of these forty-eight states, individuals cannot receive benefits until they have had earnings and employment in another job.⁷⁶ Over time, state laws have become more restrictive in their definition of good cause for voluntary leaving, reducing the frequency with which reasons related to the worker's personal circumstances are allowed and leaving only reasons attributable to the job or employer as valid.⁷⁷ Table 3 displays the reasons that states explicitly consider "good cause" for voluntary leaving. In 1994, thirty-eight states restricted good cause to issues connected with work or attributable to the employer.

Table 4 displays the ICESA survey results regarding reasons for good cause in leaving a job. The survey results indicate that, when individuals leave a firm due to new employment circumstances, such as a change in work hours, they are eligible for UI in fifteen states and potentially eligible—depending on the circumstances—in another twenty-five states.⁷⁸ The survey specifically asked whether a worker completing an assignment with a temporary agency is considered to have "quit." The survey found that individuals in this situation were definitely eligible in only five states and potentially eligible in twenty-six of the states.

75. See Table 1, *supra* pp. 96–97.

76. See COMPARISON, *supra* note 2, at 4-7, 4-29 to 4-31.

77. SAUL J. BLAUSTEIN ET AL., UNEMPLOYMENT INSURANCE IN THE UNITED STATES: THE FIRST HALF CENTURY 283 (1993).

78. These survey results indicate that employer-related issues are not considered to be "good cause" as definitively as is indicated in state statutes. See COMPARISON, *supra* note 2, at 4-5 to 4-7, 4-33 to 4-34.

TABLE 3: GOOD CAUSE FOR VOLUNTARY LEAVING, ACCORDING TO STATE LAWS, BY STATE, 1994

| State | Restricted to Work/Employer (not Personal) | Sexual or Unwelcome Harassment | To Accept Other Work ^a | Claimant's Illness |
|----------------------|--|--------------------------------------|--------------------------------------|-----------------------|
| Alabama | X | — | X | X |
| Alaska | — | — | — | — |
| Arizona | X | — | — | — |
| Arkansas | X | — | — | X |
| California | — | X | — | — |
| Colorado | X | — | — | X |
| Connecticut | X | — | X | X |
| Delaware | X | — | — | X |
| District of Columbia | X | — | — | — |
| Florida | X | — | X | X |
| Georgia | X | — | — | — |
| Hawaii | — | — | — | — |
| Idaho | X | — | — | — |
| Illinois | X | X | X | X |
| Indiana | X | — | X | X |
| Iowa | X | — | — | X |
| Kansas | X | X | — | X |
| Kentucky | X | — | — | — |
| Louisiana | X | — | — | — |
| Maine | X | — | X | X |
| Maryland | X | — | — | X |
| Massachusetts | X | X | X | X |
| Michigan | X | — | X | — |
| Minnesota | X | X | X | X |
| Mississippi | X | — | — | — |
| Missouri | X | — | X | — |
| Montana | X | — | — | — |
| Nebraska | — | — | — | — |
| Nevada | — | — | — | — |
| New Hampshire | X | — | — | X |
| New Jersey | X | — | — | — |
| New Mexico | X | — | — | — |
| New York | — | — | — | — |
| North Carolina | X | — | — | X |
| North Dakota | X | — | X | X |
| Ohio | — | — | X | — |
| Oklahoma | X | — | — | — |
| Oregon | — | — | — | — |
| Pennsylvania | — | — | — | — |
| Puerto Rico | — | — | — | — |
| Rhode Island | — | X | — | — |
| South Carolina | — | — | — | — |
| South Dakota | X | — | X | X |
| Tennessee | X | — | — | X |
| Texas | X | — | X | X |
| Utah | — | — | — | — |
| Vermont | X | — | — | X |
| Virgin Islands | — | — | — | — |
| Virginia | — | — | — | — |
| Washington | X | — | X | X |
| West Virginia | X | — | X | X |
| Wisconsin | X | X | X | X |
| Wyoming | X | — | — | X |

SOURCE.—EMPLOYMENT AND TRAINING ADMIN., U.S. DEPT OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 4-33 to 4-34 (1994).

^aType of job varies by state but might include leaving in good faith to accept full-time work with another employer or accepting another job while on layoff.

TABLE 4: CATEGORIZING NONMONETARY ELIGIBILITY STATUS UNDER VARIOUS CONDITIONS, BY NUMBER OF STATES, 1994
 ISSUE: "VOLUNTARY LEAVING WITH GOOD CAUSE"

| Individual Voluntarily Left Job: | Eligible ^a (no. of states) | Varies ^a (no. of states) | Ineligible ^a (no. of states) |
|--|--|--|--|
| Due to new <i>employment</i> circumstances | 15 | 25 | 13 |
| After the completion of assignment with temporary agency | 5 | 26 | 20 |
| Due to sexual or other discriminatory harassment | 44 | 9 | 0 |
| Due to new <i>personal</i> circumstances | 8 | 7 | 38 |
| To move to marry | 5 | 1 | 47 |
| To move with spouse to another locality | 9 | 6 | 38 |
| To perform other marital or domestic obligations (e.g., illness in family) | 8 | 13 | 32 |
| Due to domestic violence | 13 | 9 | 31 |
| Due to illness or injury without physician's advice | 1 | 16 | 36 |
| Due to illness or injury with physician's advice | 39 | 11 | 3 |
| Due to pregnancy without physician's advice | 2 | 16 | 35 |
| Due to pregnancy with physician's advice | 40 | 10 | 3 |
| In good faith to accept another job | 22 | 8 | 23 |

SOURCE.—This table shows the results from a survey conducted by the Interstate Conference of Employment Security Agencies (ICESA). Surveys were received from all 50 states, as well as the District of Columbia, Puerto Rico, and the Virgin Islands. The survey is meant to reflect the expected UI agency result, assuming that nonmonetary eligibility decisions are consistent with the applicable state policies. Survey results are on file with the *University of Michigan Journal of Law Reform*.

^a The response categories are grouped as follows: "always eligible" and "usually eligible" are displayed as eligible, "often varies" is displayed as varies, and "rarely eligible" and "never eligible" are displayed as ineligible.

Another question regarding employment circumstances related to harassment on the job.⁷⁹ Only seven states have explicit statutes that make individuals who have left their jobs due to sexual or other discriminatory harassment eligible for benefits.⁸⁰ According to the ICESA survey, however, such individuals are eligible for UI benefits in forty-four states.⁸¹ This discrepancy indicates that sexual harassment is recognized much more commonly by state UI programs as good cause for leaving employment than is indicated in current state law.

The remainder of the survey's section on voluntary leaving addressed personal issues. According to the survey, thirty-eight states do not consider new personal circumstances good cause.⁸² One set of questions addressed personal circumstance relating to domestic or marital obligations.⁸³ A few state statutes explicitly identify reasons related to marital obligations as *not* being good cause for voluntary termination.⁸⁴ In practice, however, many more states consider reasons related to marital obligations not to be good cause for voluntary separation. As Table 4 indicates, the ICESA survey found that forty-seven states disqualify a UI applicant for voluntarily leaving work to marry, thirty-eight states disqualify a UI applicant for leaving work to move with a spouse, and thirty-two states disqualify a UI applicant for leaving to perform marital or domestic obligations. This significant discrepancy between the survey results and the state statutes suggests that states are much more likely, in practice, to deny UI benefits when an employee leaves due to marital reasons than current law indicates.

Another set of questions focused on personal circumstances relating to physical condition, including illness, injury, or pregnancy.⁸⁵ The laws in twenty-eight states generally render individuals ineligible for benefits when they leave work due to an "illness."⁸⁶ The ICESA survey indicated that states are likely to render ineligible those who are pregnant (ineligible in at least

79. See Table 4, *supra* p. 108.

80. See Table 3, *supra* p. 107; see also Pearce & Phillips, *supra* note 3, at 77.

81. See Table 4, *supra* p. 108.

82. See *id.*

83. See *id.*

84. Six states automatically disqualify a UI applicant for voluntarily leaving work to marry; eight states automatically disqualify a UI applicant for leaving work to move with a spouse; and six states disqualify a UI applicant for leaving because of marital, domestic, or filial obligations. See COMPARISON, *supra* note 2, at 4-13, 4-49.

85. See *id.*

86. See Table 3, *supra* p. 107.

thirty-five states)⁸⁷ or who have an illness or injury (ineligible in thirty-six states),⁸⁸ unless they left employment under the advice of a physician (ineligible in only three states for both circumstances).⁸⁹

A final set of questions regarding personal circumstances addressed occasions when an individual leaves a job in good faith with the intention of accepting another job but circumstances then prevent the individual from accepting the new job.⁹⁰ According to state statutes, such an individual would be eligible to receive benefits in seventeen states.⁹¹ According to the ICESA survey, twenty-two states would most likely consider this individual eligible,⁹² suggesting that states are somewhat more lenient in granting benefits when an employee's new job does not work out than the laws indicate.

B. Misconduct

Misconduct is another category of disqualification related to job separation.⁹³ Examples of misconduct include a violation of company rules, insubordination, refusal to perform assigned work, and absence from work.⁹⁴ When an employee is discharged due to misconduct, states deny benefits for either part or all of the duration of the unemployment spell,⁹⁵ and some states reduce the individual's benefits further.⁹⁶ About half of the states also define "gross misconduct," for example arson, larceny, and forgery, and enforce stricter benefit restrictions in these cases.⁹⁷ Such restrictions may include denying benefits for longer periods of time or cancelling the individual's earnings history for purposes of determining benefits.⁹⁸

87. See Table 4, *supra* p. 108.

88. See *id.*

89. See *id.*

90. See *id.*

91. See Table 3, *supra* p. 107.

92. See Table 4, *supra* p. 108.

93. See Table 1, *supra* pp. 96-97.

94. [1C Fed.-St. L. Regs. Explanations] Unempl. Ins. Rep. (CCH) ¶ 1970, at 4451-5 to -9 (Jan. 8, 1990).

95. See Table 1, *supra* pp. 96-97.

96. See *id.* The asterisk (*) in Table 1 indicates this reduction.

97. See *id.*; COMPARISON, *supra* note 2, at 4-8.

98. See Table 1, *supra* pp. 96-97. The dagger symbol (†) in Table 1 indicates a cancellation of earned credit.

According to the ICESA survey results shown in Table 5, in most states, individuals who are discharged for *willfully*⁹⁹ violating an employer rule are ineligible for UI benefits. For example, if an individual willfully violated an employer rule and no harm resulted to the employer or other employees, the individual is ineligible in forty-two states. In most states, however, when individuals are discharged for *inadvertently* violating an employer rule, they are likely to be eligible for benefits.¹⁰⁰ Regardless of intent, individuals are slightly less likely to be eligible when the act results in harm to the employer or other employees.

The survey also posed some additional questions regarding misconduct that are not related to employer rules but addressed specific situations in which misconduct might be alleged. Of these additional circumstances, the survey revealed that individuals are least likely to be eligible when they test positive for drug use.

C. Availability for Work and Work Search Requirements

A claimant must be both able to work and available for work in order to be eligible for UI benefits. State laws vary with regard to the specifics of these requirements. In nine states, UI claimants must be able and available for work in their usual occupation or in an occupation that is consistent with their prior training or experience.¹⁰¹ In twelve states, UI claimants must be able and available for “suitable” work,¹⁰² which is defined separately by each state.¹⁰³ The remaining thirty-two states simply require that UI claimants be able and available for work.¹⁰⁴

99. One difficulty with misconduct is defining the concepts of both “willful” and “harm.” These are sometimes defined in detail in statutes but are often left to court interpretation.

100. Eligibility is denied in eight states when no harm occurred.

101. See COMPARISON, *supra* note 2, at 4-1 to 4-2, 4-25 to 4-27.

102. *Id.*

103. *Id.* at 4-9 to 4-10.

104. *Id.*

TABLE 5: CATEGORIZING NONMONETARY ELIGIBILITY STATUS UNDER VARIOUS CONDITIONS, BY NUMBER OF STATES, 1994
 ISSUE: "MISCONDUCT VIOLATIONS"⁷

| Individual Situation: | Eligible ^a (no. of states) | Varies ^a (no. of states) | Ineligible ^a (no. of states) |
|--|---|---|---|
| Individual <i>willfully</i> violated employer rule and employer/other employees were <i>harmed</i> | 0 | 1 | 52 |
| Individual <i>willfully</i> violated employer rule and employer/other employees were <i>not harmed</i> | 4 | 7 | 42 |
| Individual <i>inadvertently</i> violated employer rule and employer/other employees were <i>harmed</i> | 19 | 23 | 11 |
| Individual <i>inadvertently</i> violated employer rule and employer/other employees were <i>not harmed</i> | 30 | 15 | 8 |
| Individual did not <i>willfully</i> intend to harm employer/other employees | 31 | 19 | 3 |
| Individual could not reasonably foresee the harm the actions would create | 15 | 26 | 12 |
| Individual <i>inadvertently</i> commits act that results in large monetary loss to employer | 21 | 27 | 5 |
| Individual was repeatedly absent for valid personal reason | 17 | 25 | 11 |
| Individual tested positive for drugs but did not show any on-the-job possession or impairment | 6 | 27 | 19 |

SOURCE.—This table shows the results from a survey conducted by the Interstate Conference of Employment Security Agencies (ICESA). Surveys were received from all 50 states, as well as the District of Columbia, Puerto Rico, and the Virgin Islands. The survey is meant to reflect the expected UI agency result, assuming that nonmonetary eligibility decisions are consistent with the applicable state policies. Survey results are on file with the *University of Michigan Journal of Law Reform*.

^a The response categories are grouped as follows: "always eligible" and "usually eligible" are displayed as eligible, "often varies" is displayed as varies, and "rarely eligible" and "never eligible" are displayed as ineligible.

State laws generally recognize registration for work at a public employment office as evidence of the ability to work.¹⁰⁵ In addition, claimants must be actively looking for work or making a reasonable effort to obtain work in accordance with requirements specified in the state law.¹⁰⁶ This is a continuing eligibility requirement. If individuals are ineligible for benefits *solely* because they are deemed unable or unavailable for work, they may receive benefits as soon as that condition changes.¹⁰⁷ For example, a claimant who leaves work with “good cause,” such as an illness, may not meet the “able or available” test initially. Most states, however, would allow the individual to become eligible for benefits as soon as she had recovered from the illness and was able and available for work.

A nonseparation determination is often made from information gathered by the UI office—through claims forms and interviews—and from individuals’ responses to job referrals and offers from the Employment Service.¹⁰⁸ The frequency with which claimants must interact with a state’s UI office and the extent to which that office follows up on the information received affects how many nonseparation issues are detected and determined.¹⁰⁹

The ICESA survey addressed two primary issues that may affect eligibility for UI claimants seeking work: (1) whether an individual must be seeking part-time or full-time work and (2) whether an individual must be available for all possible work shifts, such as between midnight and 6:00 am, or on weekends.¹¹⁰ These are discussed below.

1. *Seeking Part-Time Work*—According to state law, only three states require a claimant to be available for full-time work in order to receive UI.¹¹¹ As shown in Table 6, the ICESA survey addressed this issue specifically for a variety of situations and found that, in general, individuals are ineligible for benefits in thirty-nine states if they are seeking only part-time work.¹¹² In thirteen states, the eligibility conditions vary

105. [1C Fed.-St. L. Regs. Explanations] Unempl. Ins. Rep. (CCH) ¶ 1950, at 4417-4 (Mar. 11, 1987).

106. See COMPARISON, *supra* note 2, at 4-3.

107. See *id.* at 4-1.

108. See *supra* Part I.B.

109. *Id.*

110. See Table 6, *infra* p. 115.

111. The states are Michigan, New Hampshire, and West Virginia. See COMPARISON, *supra* note 2, at 4-2.

112. This is based on calculating an average response for a series of eight situations.

significantly based on an individual's circumstances, and in only one state is an individual who is seeking only part-time work eligible for benefits under most conditions. This discrepancy between state law and the ICESA survey indicates that unemployed individuals seeking only part-time work are much less likely to qualify for UI than indicated in state law.

In their responses to the ICESA survey, states reported that individuals seeking part-time work are eligible for benefits in only certain limited circumstances. For example, individuals who have a history of part-time work are eligible in thirteen states, students are eligible in nine states, and individuals who are under a physician's advice to work part-time due to a physical or mental condition are eligible in ten states.¹¹³ States, however, are extremely unlikely to consider individuals eligible for benefits when they seek part-time work due to compelling personal circumstances (three states), domestic circumstances (two states), or personal preference (no states).¹¹⁴

2. *Restricting Available Hours*—When individuals restrict their available hours, for example by excluding specific shifts, hours, or days, but remain available for the hours that normally are worked in their occupation in the locality, the ICESA survey results summarized in Table 6 indicate that forty-three states consider them eligible. If the individual is not available for the hours that normally are worked in her occupation in the locality, states are unlikely to consider her eligible, despite the presence of other potentially extenuating circumstances. Individuals restricting hours due to a physical or mental condition are eligible in twelve states,¹¹⁵ due to compelling personal circumstances in eight states, due to domestic circumstances in seven states, due to transportation limitations in six states, due

113. See Table 6, *infra* p. 115. Some states noted on the survey responses that individuals covered by the Americans with Disabilities Act *are* considered "available" for work when they are seeking part-time work. State survey responses are on file with the author.

114. See *id.*

115. Some states noted on their survey responses that individuals covered by the Americans with Disabilities Act *are* considered "available" for work when they are restricting their available hours. State survey responses are on file with the author.

TABLE 6: CATEGORIZING NONMONETARY ELIGIBILITY STATUS UNDER VARIOUS CONDITIONS, BY NUMBER OF STATES, 1994
ISSUE: "ABLE AND AVAILABLE FOR WORK"

| Individual Situation: | Eligible ^a (no. of states) | Varies ^a (no. of states) | Ineligible ^a (no. of states) |
|--|--|--|--|
| Individual is seeking part-time work: | | | |
| Due to personal preference | 0 | 6 | 47 |
| Due to compelling personal circumstances | 3 | 8 | 42 |
| Due to domestic circumstances (e.g., care giving) | 2 | 7 | 44 |
| On physician's advice, due to physical, mental, or medical condition | 10 | 9 | 34 |
| And has a prior part-time work history | 13 | 9 | 31 |
| And has student status | 9 | 9 | 35 |
| Aggregated response (based on all eight categories) | 1 | 13 | 39 |
| Individual is restricting hours available (excluding specific shifts, hours, or days) in seeking work: | | | |
| That satisfy those normally worked in occupation in locality | 43 | 5 | 5 |
| Due to personal preference | 3 | 8 | 42 |
| Due to compelling personal circumstances | 8 | 18 | 27 |
| Due to domestic circumstances (e.g., care giving) | 7 | 16 | 30 |
| Due to physical, mental, or medical condition | 12 | 22 | 19 |
| Due to transportation limitations | 6 | 14 | 33 |
| And has student status | 4 | 16 | 33 |

SOURCE.—This table shows the results from a survey conducted by the Interstate Conference of Employment Security Agencies (ICESA). Surveys were received from all 50 states, as well as the District of Columbia, Puerto Rico, and the Virgin Islands. The survey is meant to reflect the expected UI agency result, assuming that nonmonetary eligibility decisions are consistent with the applicable state policies. Survey results are on file with the *University of Michigan Journal of Law Reform*.

^a The response categories are grouped as follows: "always eligible" and "usually eligible" are displayed as eligible, "often varies" is displayed as varies, and "rarely eligible" and "never eligible" are displayed as ineligible.

to student status in four states. Finally, the survey indicates, by the large number of states responding in the "varies" category, that some specific or unique circumstances may allow an individual to be eligible for benefits even when hours are restricted.

D. Refusal of Suitable Work Without Good Cause

Refusal of suitable work is a nonseparation issue; however, it is treated as a disqualification, and laws in forty states and territories explicitly deny benefits on this ground for the duration of unemployment.¹¹⁶ Table 7 indicates how states penalize claimants who refuse to accept "suitable work." According to the ICESA survey, in forty-four states, individuals are eligible for benefits if they refused suitable work with "good cause." The definition of "suitable work," however, varies significantly by state¹¹⁷ and typically is not an absolute standard; rather, it is considered on a case-by-case basis.¹¹⁸

The definition of "suitable work" confronts complex issues regarding the number of hours and the exact type of work for which a UI claimant must be available. In order to protect workers from unreasonable job demands, most states define suitability with regard to health, morality, safety, and labor standards.¹¹⁹ In defining suitability, some state laws also include standards regarding travel distance to work¹²⁰ and length of unemployment.¹²¹

States also differ in their eligibility rules under the following circumstances: the job offer is not in their previous occupation, (eligible in twenty-four states); the job pays significantly less than prior employment, (eligible in thirty-one states); the job is

116. See COMPARISON, *supra* note 2, at 4-8 to 4-11, 4-41 to 4-43.

117. See *id.* at 4-9 to 4-10.

118. See Table 7, *infra* p. 118. The large number of responses in the "often varies" category demonstrates the prevalence of case-by-case analysis in this area.

119. See COMPARISON, *supra* note 2, at 4-9 (noting that all states must adopt specific labor standards set forth in the Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(5) (1994)).

120. Delaware, New York, and Ohio include travel distance to work in their definition of suitable work. See *id.* at 4-9.

121. In some states, the definition of suitable work changes as the duration of the claimant's unemployment grows so that, over time, claimants must accept a lower offered wage. Florida, Georgia, Idaho, Iowa, Louisiana, Maine, Mississippi, Montana, North Dakota, Utah, and Wyoming include such provisions. See *id.* at 4-10.

for temporary or commission work when they have no prior history in that type of work (eligible in thirty states); the job is refused due to a physical or mental condition (eligible in twenty-eight states).¹²² In most states, however, individuals are *ineligible* if the job offer is for full-time work and they are seeking part-time work (ineligible in thirty-seven states), if the offer is refused due to domestic circumstances (ineligible in twenty-eight states), or if the offer is for temporary or commission work and they have a prior history of this type of work (ineligible in twenty-five states).¹²³

III. CONSISTENCY OF DETERMINATIONS WITHIN STATES

In five states, a different survey was distributed to approximately thirty state UI employees who determine nonmonetary eligibility either at the initial claims level or for lower-authority appeals.¹²⁴ The purpose of the claims-examiner survey was to determine the consistency with which determinations would be made by claims examiners *within* a state for a variety of specific circumstances.¹²⁵ The claims-examiner survey included questions that were used in the ICESA state survey, as well as additional hypothetical cases. The respondents were asked to determine eligibility in each set of circumstances.¹²⁶ Further, respondents were asked to rank categories of nonmonetary eligibility issues on the basis of general difficulty in making determinations.¹²⁷

122. *See id.*

123. *See id.*

124. *See* ACUC REPORT, *supra* note 2, at 118–19.

125. *Id.*

126. *Id.*

127. *Id.*

TABLE 7: CATEGORIZING NONMONETARY ELIGIBILITY STATUS UNDER VARIOUS CONDITIONS, BY NUMBER OF STATES, 1994
 ISSUE: "REFUSAL OF SUITABLE WORK"

| Individual refused: | Eligible ^a (no. of states) | Varies ^a (no. of states) | Ineligible ^a (no. of states) |
|---|--|--|--|
| A job with good cause | 44 | 9 | 0 |
| An offer of full-time work because of seeking part-time work | 2 | 14 | 37 |
| An offer of part-time work because of seeking full-time work | 13 | 28 | 12 |
| A job not in previous (customary) occupation | 24 | 27 | 2 |
| A full-time job due to domestic circumstances | 7 | 18 | 28 |
| A part-time job due to domestic circumstances | 13 | 22 | 18 |
| A job due to physical, mental, or medical condition | 28 | 20 | 5 |
| A job because it paid significantly less than prior employment | 31 | 20 | 2 |
| A job because of travel time or transportation problems | 9 | 32 | 12 |
| An offer of temporary or commission work (with no prior history of such work) | 30 | 22 | 1 |
| An offer of temporary or commission work (with recent history of such work) | 8 | 20 | 25 |

SOURCE.—This table shows the results from a survey conducted by the Interstate Conference of Employment Security Agencies (ICESA). Surveys were received from all 50 states, as well as the District of Columbia, Puerto Rico, and the Virgin Islands. The survey is meant to reflect the expected UI agency result, assuming that nonmonetary eligibility decisions are consistent with the applicable state policies. Survey results are on file with the *University of Michigan Journal of Law Reform*.

^a The response categories are grouped as follows: "always eligible" and "usually eligible" are displayed as eligible, "often varies" is displayed as varies, and "rarely eligible" and "never eligible" are displayed as ineligible.

In general, the responses to eligibility questions were quite consistent within each state in each set of circumstances. The area where claims examiners' answers were most likely to be internally inconsistent was *refusal of suitable work*.¹²⁸ It should be noted that a majority of respondents in these states ranked refusal of suitable work as the first or second most difficult type of eligibility case to determine.¹²⁹ Finally, a comparison of claims examiners' responses with those made by their respective state agency in the ICESA survey indicated that, in most instances, the two sets of responses were consistent. In two states, the expected agency result and the claims examiners' average responses differed somewhat on one of thirteen questions; in one state, responses differed somewhat on two of thirteen questions; and, in two states, there were no significant differences in response.¹³⁰ Overall, these results suggest that there is considerable consistency in the determinations of claims examiners within a state and that their decisions usually reflect the expected state agency result. It is important to note, however, that even small discrepancies in claims examiners' decisions can and do result in inconsistent eligibility determinations. Thus, an unemployed individual's actual ability to qualify for UI depends on who processes her claim, how much information is ultimately provided by the claimant and the employer, whether the claimant or the employer appeals an eligibility determination, and the outcome of that appeal process.

128. *Id.* at 119 (reporting inconsistent answers in four out of five states). In one state, for example, 52% of respondents said that an individual would remain eligible for UI if he refused a job offer with a 20% pay cut in the sixth week of unemployment, but 31% said that an individual would become ineligible. The remaining 17% indicated they needed more information. Claims-examiner survey responses are on file with the author.

129. *Id.*

130. The largest difference between the two survey responses occurred in a question regarding refusal of suitable work, for which the state's response to the ICESA survey indicated that the individual would "rarely" be eligible, whereas in the claims-examiner survey 59% of the examiners (17 out of 29) indicated that the individual would "usually" or "always" be eligible. The next largest discrepancy in responses to the two surveys on a given question was 28%, on a question that also involved a refusal of work. Claims-examiner survey responses are on file with the author.

IV. VALIDITY OF ICESA SURVEY RESULTS

On the issue of seeking only part-time work, the ICESA survey results also can be compared to a legal review of each state's statute, regulations, and administrative and judicial case law.¹³¹ This comparison indicates how accurately the ICESA survey results reflect a legal review of statutes, rules, and case law. This comparison is displayed in Table 8. The legal review indicates that in twenty-four states an individual seeking part-time work is *ineligible* for UI benefits.¹³² In 96% of those states (twenty-three of twenty-four), the results of the ICESA survey also conclude that the individual is generally ineligible, indicating that the legal review is good at predicting ineligibility. In the only remaining state, the survey indicated that eligibility varied.

The legal review indicates that, in ten states, an individual limiting work search to part-time work is *eligible* if he meets certain requirements.¹³³ An individual seeking part-time work was required to show either that he had a history of part-time work or that he had good cause to seek part-time work.¹³⁴ Of the ten states in which the legal review identified such individuals as eligible, the ICESA survey found that in eight of the states individuals are eligible if they have a prior part-time work history; in seven of the states individuals are eligible if they have a medical condition; and in five of the states individuals are eligible if they have compelling personal reasons.¹³⁵ Thus, there was significant overlap in the survey responses and

131. Cf. NELP Review, *supra* note 36, at 2 (noting that their summary of administrative case law is not definitive but is based on the *Unemployment Insurance Reporter* published by Commerce Clearing House).

132. In addition, of 19 states, the legal review identified 12 states with no authority on the issue and seven states with conflicting authority between the statute and other sources. For these states, the survey results conclude that the individual in question would be eligible in one state and ineligible in 12 states and that eligibility would vary in six states. See Table 8, *infra* p. 121.

133. See NELP Review, *supra* note 36.

134. See *id.* Only Colorado requires that an individual have a history of part-time work. Four states require that an individual have "good cause" for the restriction or that the restriction is "beyond their control" (California, Delaware, District of Columbia, and Illinois); two states require a combination of these two (Massachusetts and New Jersey); two states require that the individual seek a minimum number of working days per week (Montana and Washington); and Ohio has no restrictions. See *id.*

135. See ACUC REPORT, *supra* note 2, at 119-20.

the legal review. These results suggest that the ICESA survey is a valid reflection of states' legal positions on nonmonetary eligibility conditions.

TABLE 8: COMPARING THE ICESA SURVEY RESULTS TO A LEGAL REVIEW, BY NUMBER OF STATES, 1994

ISSUE: "ABLE AND AVAILABLE FOR WORK—SEEKING ONLY PART-TIME WORK"

| NELP Review Results | ICESA Survey Results | | |
|----------------------------------|--|--|--|
| | Eligible ^a (no. of states) | Varies ^a (no. of states) | Ineligible ^a (no. of states) |
| Eligible (10 states) | 0 | 6 | 4 |
| Ineligible (24 states) | 0 | 1 | 23 |
| No Authority (12 states) | 0 | 3 | 9 |
| Conflicting Authority (7 states) | 1 | 3 | 3 |

SOURCES.—This table shows the results from a survey conducted by ICESA and a legal review conducted by the National Employment Law Project (NELP) (1994). The survey is meant to reflect the expected UI agency result, assuming that nonmonetary eligibility decisions are consistent with the applicable state policies. Surveys were received from all 50 states, as well as the District of Columbia, Puerto Rico, and the Virgin Islands. Survey results are calculated based on an average response for a series of eight situations. The NELP review includes a review of state statute, rules and regulations, and administrative and case law. ICESA survey results and the NELP review are on file with the *University of Michigan Journal of Law Reform*.

^a The response categories are grouped as follows: "always eligible" and "usually eligible" are displayed as eligible, "often varies" is displayed as varies, and "rarely eligible" and "never eligible" are displayed as ineligible.

V. POLICY DISCUSSION

Overall, the survey results suggest a number of issues that merit additional consideration. First, the results confirm that nonmonetary eligibility requirements vary significantly among states and that eligibility results are often case specific. These conditions exacerbate the problems created by the general lack of published information regarding state nonmonetary eligibility conditions and are likely to increase misunderstandings and costs among claimants and employers regarding nonmonetary eligibility. Without clear information regarding nonmonetary eligibility criteria, unemployed individuals may be more likely

to assume that they are not eligible for UI and forego UI benefits that they may deserve, or they may be more likely to pursue fruitless appeals on eligibility determinations, which increases costs to the individual, his employer, and the UI appeals process. Similarly, when employers do not know under which conditions their former employees are eligible, they cannot adjust their employment policies accordingly; nor can they adequately decide whether to contest or appeal a former employee's application for benefits. While employers, in general, have more knowledge of the UI system than do their employees, because they encounter the system more frequently or may hire a cost management company that specifically monitors their UI claims, small and multistate employers face more problems.

Such misunderstandings harm both employers and claimants and also place strains on the resources of the UI system by causing additional appeals. The lack of clear information also hinders the ability of the UI office to make consistent nonmonetary eligibility determinations.¹³⁶

Second, the application of many of the nonmonetary eligibility requirements creates problems for a number of specific groups. Despite the many changes in the labor market since the inception of the UI program, there have been few modifications in UI nonmonetary eligibility requirements in order to accommodate the realities of today's labor market.¹³⁷

There have been numerous changes in the labor market since the UI system was created in 1935. At that time, the labor force consisted primarily of men who worked full-time.¹³⁸ Women were primarily full-time homemakers.¹³⁹ Today, women comprise almost half of today's labor force,¹⁴⁰ and a significant number of individuals work part-time.¹⁴¹ At the inception of the UI system, there was typically one nonworking parent at home; the increase in women's labor force participation, however, has

136. CORSON ET AL., *supra* note 3, at 133-34.

137. Dahm & Fineshriber, *Labor Force*, *supra* note 3, at 740 (discussing the need for the UI system to recognize the characteristics of all parts of the nation's work force).

138. BARBARA R. BERGMANN, *THE ECONOMIC EMERGENCE OF WOMEN 19-21* (1986). In 1940, women made up 25% of the labor market. *Id.* at 20 tbl. 2-1.

139. *Id.* at 10.

140. In 1995, women were 46% of the total labor force. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *EMPLOYMENT AND EARNINGS* 164 tbl. 5 (1996).

141. In 1995, 25% of employed women age 20 and over worked part-time, whereas only 8% of employed men age 20 and over worked part-time. *Id.* at 168 tbl. 8.

resulted in a large number of two-earner families.¹⁴² Despite women's increased participation in the work force, women continue to bear a disproportionate share of care-giving responsibilities.¹⁴³ As a result, women enter and exit the job market frequently, due to both child-bearing and care-giving responsibilities.¹⁴⁴ This can be seen where women are much more likely than men to be unemployed because they are re-entering the labor force.¹⁴⁵

Finally, there has been an increased dispersion in the income distribution of families, resulting in an overall increase in the number of families in poverty.¹⁴⁶ These trends point generally to four groups of workers who face particular difficulty receiving UI under the current nonmonetary eligibility conditions: women, low-wage workers, contingent workers—i.e., part-time or temporary workers—and members of two-earner families. Although there is some significant overlap in these four categories, they are discussed separately.

A. Women

Women are more likely than men to be the care givers in a family, despite their increasing labor force participation. In addition, they are more likely to be single parents. As a result, women are disproportionately affected by responsibilities that are borne by single parents, as well as by parents in two-earner families. When both short-term and long-term domestic and care-giving emergencies arise, the burden is likely to fall

142. In 1960, the labor force participation rate of married women with children was 28%; in 1993, the figure had more than doubled to 68%. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1994, at 402 tbl. 626 (1994).

143. See, e.g., BERGMANN, *supra* note 138, at 256–58; ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989).

144. See BERGMANN, *supra* note 138, at 22–25.

145. Among unemployed women age 20 and over, 41% are reentrants and 44% are job losers and persons who completed temporary jobs. Among unemployed men, the numbers are 25% and 63%, respectively. Unpublished Data from Bureau of Labor Statistics, U.S. Dep't of Labor (1994) (on file with the *University of Michigan Journal of Law Reform*).

146. In 1970, 10.1% of families lived in poverty; in 1980, 10.3% of families lived in poverty; and, in 1993, 12.3% of families lived in poverty. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995, at 484 tbl. 752 (1995).

on women and single parents, who are more likely to leave their jobs to handle these emergencies. In the majority of states, these individuals would be ineligible for benefits for leaving employment without good cause, because this is a personal reason unrelated to the job.¹⁴⁷ In addition, even if an individual were able to receive UI in one of the few states that considered domestic responsibilities good cause for leaving a job,¹⁴⁸ she may be considered unavailable for work if she restricted her hours of availability due to care-giving responsibilities.¹⁴⁹

Women also face the problem of receiving UI benefits during and after pregnancy.¹⁵⁰ According to federal unemployment insurance law, a woman cannot be denied unemployment insurance "solely on the basis of pregnancy."¹⁵¹ Still, in most states, women who leave work because of pregnancy only maintain their eligibility if they left upon the advice of a physician.¹⁵² Even if the separation is viewed by the state as valid, the woman may be considered unavailable for work simply for leaving her previous job because of pregnancy or in order to seek a different type of job because her previous one is no longer suitable.¹⁵³ She also may be considered unavailable if she needs to restrict her hours due to the pregnancy.¹⁵⁴

Finally, women who quit after experiencing sexual harassment at work may not receive UI.¹⁵⁵ The same is true for men who are sexually harassed, and others who experience discriminatory or personal harassment. As noted above, while only seven states have explicit statutes allowing individuals to

147. See Table 3, *supra* p. 107 (summarizing state statutes); Table 4, *supra* p. 108 (summarizing ICESA survey results). For further discussion of various difficulties women face in obtaining UI, see Laurie J. Bassi & Amy B. Chasanov, *Women and the Unemployment Insurance System, in THE AMERICAN WOMAN 1996-97: WOMEN AND WORK* (Cynthia Costello & Barbara Kivimae Krimgold eds., 1996); Dahm & Fineshriber, *Disqualifications*, *supra* note 3; Dahm & Fineshriber, *Labor Force*, *supra* note 3; Maranville, *Feminist Theory*, *supra* note 3; Maranville, *Changing Economy*, *supra* note 3; McHugh & Kock, *supra* note 3; Thompson, *supra* note 3.

148. See Table 3, *supra* p. 107; Table 4, *supra* p. 108.

149. See Table 6, *supra* p. 115.

150. See Mark R. Brown, *A Case for Pregnancy-Based Unemployment Insurance*, 29 U. MICH. J.L. REF. 41, 44-54 (1996).

151. 26 U.S.C. § 3304(a)(12) (1994).

152. See Table 4, *supra* p. 108.

153. See Table 7, *supra* p. 118 (refusing a job offer); see also McHugh & Kock, *supra* note 3, at 1430-33.

154. See Table 6, *supra* p. 115.

155. See Table 3, *supra* p. 107; Table 4, *supra* p. 108. For a review of statutory provisions and case law, see Pearce & Phillips, *supra* note 3.

receive UI if they leave their jobs due to sexual or other discriminatory harassment, the ICESA survey indicated that individuals are likely to be eligible in at least forty-four states.¹⁵⁶ Thus, it appears that harassment is viewed in most states as a valid reason for leaving a job. In states with either statutes or case law, however, there may be problems in how sexual harassment is defined, with regard to exact behavior and to whether management was notified and given the opportunity to correct the problem. For example, the Wisconsin statute limits UI eligibility to those employees who leave their jobs because sexual contact was made a condition of continued employment or promotion.¹⁵⁷ In contrast, Rhode Island's statute notes only that "voluntarily leaving work with good cause shall include sexual harassment against members of either sex."¹⁵⁸ These specific requirements, with which most workers are not familiar, may render an individual who has left her job due to harassment ineligible for UI benefits.

B. Low-Wage Workers

Low-wage workers, who are disproportionately likely to be women, minorities, and part-time workers,¹⁵⁹ are disproportionately affected by two specific characteristics of nonmonetary eligibility requirements. First, low-wage workers may have difficulty locating affordable child care, given the high cost and high demand of such services.¹⁶⁰ When there are changes in their access to child care or changes in their work schedule, these workers may be unable to make a quick adjustment. This could result in an initial disqualification, such as for leaving work without good cause,¹⁶¹ or it could pose significant problems during job search when they are receiving

156. See Table 4, *supra* p. 108.

157. WIS. STAT. § 108.04(7)(i) (1992).

158. R.I. GEN. LAWS § 28-44-17 (1995).

159. Among workers 16 years and older who are paid hourly rates, 6.2% are paid at or below \$4.25 per hour. By gender, 4.7% of men and 7.8% of women are paid at or below minimum wage. By race or ethnicity, 6.1% of Whites, 6.5% of Blacks, and 8.6% of Hispanics are paid at or below minimum wage. By hours worked, 3.1% of full-time workers and 15.5% of part-time workers (defined as working fewer than 35 hours per week) are paid at or below minimum wage. BUREAU OF THE CENSUS, *supra* note 146, at 436 tbl. 682.

160. Thompson, *supra* note 3, at 760–63.

161. See Table 4, *supra* p. 108 (marital or domestic obligations).

UI.¹⁶² For example, an individual may be considered unavailable for work if he or she cannot afford full-time child care while unemployed because of his or her inability to accept full-time employment.¹⁶³

A second significant problem that disproportionately affects low-wage workers is access to transportation to and from work. Even in some urban areas, transportation may only be available at certain times during the day or on certain days of the week. In rural areas, the availability of public transportation is likely to be even more limited. Low-wage workers may not be able to adjust to an employer's unilateral changes in their work schedule if existing sources of transportation are not available to accommodate the new schedule. In addition, even if low-wage workers have a valid separation reason, they may be considered unavailable for work and ineligible for UI benefits if they restrict their available hours for work to accommodate available public transportation.¹⁶⁴

C. Part-Time and Temporary Workers

Part-time and temporary workers,¹⁶⁵ who are more likely to be women,¹⁶⁶ are disproportionately affected by a number of nonmonetary eligibility provisions. Even if part-time workers meet all monetary eligibility requirements, the decision to seek only part-time work results in a determination that one is unavailable for work and temporarily ineligible for UI benefits in most states.¹⁶⁷ Working mothers make up a significant percentage of part-time workers, and their wages from employment often represent an essential part of household income. Both the Advisory Council on Unemployment Compensation

162. See Table 6, *supra* p. 115 (restricting hours due to domestic circumstances).

163. See *id.*

164. See Table 6, *supra* p. 115 (due to transportation limitation).

165. For a discussion addressing difficulties part-time workers face in obtaining UI, see generally Dahm & Fineshriber, *Part-Time Employment*, *supra* note 3; Maranville, *Changing Economy*, *supra* note 3.

166. In 1995, women were 71% of all part-time workers age 20 and over and 41% of all full-time workers age 20 and over. See BUREAU OF LABOR STATISTICS, *supra* note 140, at 168 tbl. 8.

167. See Table 6, *supra* p. 115. Unemployed women are more likely than unemployed men to seek part-time work. In 1995, 20% of unemployed women age 20 and over were looking for part-time work, compared with 8% of unemployed men age 20 and over. See BUREAU OF LABOR STATISTICS, *supra* note 140, at 168 tbl. 8.

and the National Commission on Unemployment Compensation have recommended abolishing the automatic disqualification, which exists in the vast majority of states, for individuals seeking part-time work.¹⁶⁸ This eligibility requirement neglects the important role of permanent part-time workers in today's economy: employers depend on the flexibility that they can achieve with a part-time labor force, and employee's part-time wages are often an important contribution to family income.¹⁶⁹ Seeking part-time work also can lead to a disqualification for refusing suitable work, which in many states results in a denial of UI benefits for the duration of unemployment.¹⁷⁰

Another set of issues directly affects the UI eligibility of individuals working for temporary-help agencies. In many states—between twenty and twenty-five, depending on the specific type of disqualification—unemployed individuals who meet the UI monetary eligibility requirements are nevertheless ineligible for benefits when they complete a work assignment with a temporary agency,¹⁷¹ or have a prior history of temporary or commission work and refuse a subsequent offer of temporary or commission work.¹⁷² This restriction could make it difficult for the growing number of temporary workers to seek and find permanent work.

D. Two-Earner Families

There are a number of nonmonetary eligibility issues that face single, working parents or two-earner families. The growth in the number of two-earner families, and the corresponding decrease in the number of families with one nonworking parent, is a result of women's increased labor force participation. When both parents work, it is much more difficult for families to adapt to new or changing care-giving responsibilities or to changes in scheduled work hours. For example, in at least thirteen states, individuals who leave their job due to a

168. ACUC REPORT, *supra* note 2, at 18–19; NATIONAL COMM'N ON UNEMPLOYMENT COMPENSATION, UNEMPLOYMENT COMPENSATION: FINAL REPORT 48–49 (1980).

169. See NATIONAL COMM'N ON UNEMPLOYMENT COMPENSATION, *supra* note 168, at 48.

170. See Table 1, *supra* pp. 96–97; Table 7, *supra* p. 118.

171. See Table 4, *supra* p. 108.

172. See Table 7, *supra* p. 118.

change in their employment situation, such as a change in scheduled work hours, are determined to be ineligible for benefits.¹⁷³ As mentioned earlier, these types of care-giving responsibilities are more likely to be assumed by women but may affect either working parent. These types of changes in an employment situation could cause significant hardship for workers with child care and other care-giving responsibilities.

Another eligibility issue facing two-earner families arises if the family needs to move, because one spouse or partner either accepts a job in another location or is transferred by his or her current employer.¹⁷⁴ As society and the job market become increasingly mobile, this type of situation occurs more frequently. In these instances, one spouse may be temporarily unemployed and searching for a job in the new location. In at least thirty-eight states, the individual is likely to be ineligible for UI,¹⁷⁵ because moving with a spouse is not considered good cause for voluntarily leaving a job.

CONCLUSION

The ICESA survey results suggest two primary areas for policy reform. First, clarification of nonmonetary eligibility conditions in state law and distribution of information explaining these conditions to both claimants and employers would help to remedy the current lack of understanding concerning these determinations. Second, the current nonmonetary eligibility conditions among the states should be revised so that state UI systems are more responsive to the realities of today's labor market. These conditions should ensure that the system is responsive to the needs of individuals who have a significant attachment to the labor force but face a number of work and family situations that restrict their UI eligibility under current policy in most states. It is important to address, briefly, the financing issues that would likely arise when expansions in UI eligibility are proposed.

The UI program is funded through a system of experience rating, under which individual employers finance the UI

173. See Table 4, *supra* p. 108.

174. McHugh & Kock, *supra* note 3, at 1429-30.

175. See Table 4, *supra* p. 108.

benefits received by their former employees.¹⁷⁶ It is conceived as a fault-based system where employers must bear the risk of their layoff policies.¹⁷⁷ As a result, members of the business community are likely to oppose any perceived expansions in benefit eligibility by their state legislative bodies. This makes it difficult for state policymakers to make changes in their UI program to reflect changes in the structure of the labor market without disfranchising the community whose responsibility it is to finance the benefits. Nonetheless, the special problems of women, low-wage workers, contingent workers, and two-earner families may result in a job separation that the employee considers to be involuntary or for a good cause but that the employer believes is a voluntary leaving without good cause. Without existing federal standards on nonmonetary eligibility criteria, some states have tried to reduce employer opposition to benefits in some areas by socializing those costs that are deemed to be neither the employer's nor the employee's fault.¹⁷⁸ This is done by not "charging back" to individual employers the costs of certain types of benefits, such as those prompted by circumstances beyond the employer's control.¹⁷⁹ For example, some states do not charge back the UI benefit costs to employers when their employees voluntarily leave a job due to a good personal cause.¹⁸⁰ This type of solution can bridge the gap between the labor market of the 1930s and 1990s without passing on large shares of the burden to the individual employer involved but instead spreading the risk, and cost, among employers in the state.

176. COMPARISON, *supra* note 2, at 2-4. For more information on experience rating generally, see ACUC REPORT, *supra* note 2, at 73-89.

177. COMPARISON, *supra* note 2, at 2-4.

178. See ACUC REPORT, *supra* note 2, at 78.

179. COMPARISON, *supra* note 2, at 2-9.

180. *Id.* at 2-10. Many state UI programs routinely do not charge back benefits when workers quit their last job for good cause related to the employer. ACUC REPORT, *supra* note 2, at 78. For more data on noncharging by states, see COMPARISON, *supra* note 2, at 2-31 to 2-34; Federal-State Unemployment Compensation Program: Proposed Letter on Noncharging, 52 Fed. Reg. 43,686 (Nov. 13, 1987).

