# Table of Contents

**Introduction** .................................................................................................................. 2

**Chapter 1 Benefit Basics** ................................................................................................. 3

  - Why Every State Should Pay 26 Weeks of Benefits
  - Waiting Weeks
  - Weekly Benefit Formulas
  - Partial Benefits
  - Seasonal Work/School Employee Denial Rules
  - Work Sharing/Short-Time Compensation

**Chapter 2 Challenges to UI as Earned Benefits** .......................................................... 23

  - Job Search and “Suitable Work”
  - Training and Community Service Mandates
  - Drug Testing
  - Defining “Misconduct”

**Chapter 3 Business Climate and Economic Impact** ......................................................... 39

**Chapter 4 Financing and Solvency** .................................................................................. 46
A Message from Christine L. Owens, Executive Director

A key strength of National Employment Law Project’s work is our partnership with labor organizations, community groups, worker centers, and legal aid advocates. In the arena of unemployment insurance, NELP benefits tremendously from its ability to know what is happening around the country through our network of partners in nearly every state. Those friends seek our assistance and input on UI legislation and administrative battles, and, in turn, we seek their help with critical UI fights in Washington, DC, and in state capitols.

In the spirit of this partnership, NELP has now updated Protecting Our UI Lifeline: A Toolkit for Advocates. The Toolkit is a follow up to our milestone 2004 publication Changing Workforce/Changing Economy: State Unemployment Insurance Reform Models for the 21st Century. This comprehensive publication (updated in 2006) still offers researchers and advocates ideas for UI reform that remain relevant in many states and is available at our website.

The 2014 Toolkit is designed as a ready-reference for our partners for both reform efforts and the defensive battles that we anticipate facing together in 2014 and beyond. Our emphasis in this revision is upon legislative developments we’ve seen since the 2011 publication of the Toolkit, some of which will undoubtedly serve as bad examples for other states in 2014. We have added new topics, including work sharing, as well. The short pieces here are designed to offer advocates talking points on these legislative topics as well as insights into the arguments offered by those seeking to undermine our UI lifeline through restrictive measures. Good luck and keep in touch.

About the Authors

A Toolkit for Advocates was produced and updated by NELP staff from our Access and Opportunity project, especially Rebecca Dixon, Mike Evangelist, Claire McKenna, George Wentworth, and Rick McHugh.

Copyright 2011 and 2014, National Employment Law Project
CHAPTER 1

BENEFIT BASICS

Why Every State Should Pay 26 Weeks of Benefits
Waiting Weeks
Weekly Benefit Formulas
Partial Benefits
Seasonal Work-Including School Denial Rules
Work Sharing/Short-Time Compensation
Questions and Answers about Why Every State Should Pay 26 Weeks of Unemployment Insurance Benefits

Question: Are states required by federal law to provide 26 weeks of state benefits?

Answer: No. There is a long-standing practice of paying 26 weeks of benefits in the US. Since the 1960’s and up until 2011, all 53 UI jurisdictions (with the exception of Puerto Rico) paid up to 26 weeks of state benefits. (Two states, Massachusetts and Montana, paid weeks beyond 26.) Although there is no federal law designating the maximum weekly duration of benefits, in 1962 the Department of Labor recommended that states provide at least 26 weeks of benefits if using a uniform duration formula or 30 weeks of benefits if using a variable duration formula.

Uniform duration means that every worker who is monetarily eligible for benefits qualifies for a full 26 weeks of benefits if their joblessness persists. Currently only 9 states have uniform duration of benefits. The remaining states use a variable duration formula that caps the total benefit amount based on a share of the worker’s base period wages, most commonly one-third of the base period wages. The duration period is calculated by dividing this total benefit amount by the weekly benefit amount. In many cases, this results in the jobless workers receiving less than 26 weeks of benefits even if they are unemployed for longer periods of time.

Two federal advisory bodies have accepted 26 weeks of state benefits as a standard duration for benefit payments. The Advisory Council on Unemployment Compensation, appointed jointly by Presidents George H.W. Bush and Bill Clinton, made this recommendation in 1995. Additionally, the congressionally-mandated National Commission of Unemployment Compensation, which performed the first comprehensive analysis of the unemployment insurance program, echoed this recommendation. In their Final Report, issued in 1980, they recommended that state programs provide a minimum of 26 weeks of benefits during a benefit year.

Question: How many states offer less than 26 weeks?

Answer: During the 2011 legislative session six states voted to reduce the maximum number of weeks of benefits available to laid-off workers; one state reduced its duration in 2012. Effective immediately, Arkansas changed its maximum duration to 25 weeks while South Carolina and Missouri changed their durations to 20 weeks. As of January 2012, maximum duration in Illinois ticked down to 25 weeks, whereas Michigan’s duration dropped to 20 weeks. Florida implemented a sliding scale where benefit duration may range from 12 to 23 weeks depending on the state’s unemployment rate (duration in 2013 is scheduled to drop to 19 weeks). Georgia reduced its duration to 19 weeks as of July 2012. North Carolina will pay no more than 20 weeks and as few as 12 under a new law taking effect in July 2013.
**Question:** What reasons are given for providing less than 26 weeks of benefits?

**Answer:** There are two main arguments against providing a maximum of 26 weeks of benefits. First, states may restrict benefits as a way of reducing the cost of their UI programs. With regards to reducing costs, some believe that cutting state benefit weeks simply shifts the costs of those weeks onto the federal government as the worker will access federal emergency unemployment compensation (EUC) sooner. Moreover, reducing the number of state weeks also results in a proportionate reduction in the maximum number of weeks of EUC a worker may collect. For example, in Michigan where state benefits were reduced to 20 weeks, a worker who exhausts his or her state benefits lost another 8 weeks of EUC benefits, for a total reduction of 14 weeks during 2012. Additionally, states relying upon the federal EUC program should not make permanent cuts to their weekly duration formulas based on an assumption that federal extensions will pick up the slack as EUC will eventually expire; possibly before the economy has fully recovered.

Secondly, proponents of reducing benefits claim that collecting unemployment insurance benefits is a disincentive to returning to work. Nationally the average UI benefit replaces only about one-third of the average worker’s weekly wage. The financial strain of trying to make ends meet on such a small fraction of prior earnings should provide adequate pressure for most workers to diligently search for work. In fact, a study using a nationally representative sample of unemployed workers found that workers who exhaust their state benefits look for work at the same intensity or at higher intensities as those who do not exhaust benefits. (See the disincentive fact sheet in Chapter 4 in this booklet for additional information on this topic.)

**Question:** What are the arguments for having at least 26 weeks of regular benefits?

**Answer:** While the once-accepted norm of paying up to 26 weeks was customary, rather than federally mandated, it did reflect years of debate followed by consensus among stakeholders. And, the breakdown in the 26-week norm is not based upon labor market changes or new policy arguments. Instead, it represents a raw attack upon the underlying consensus that formerly supported social insurance programs like UI.

Ironically, cuts in benefit duration arose while long-term unemployment increased. In 2007, before the recession began, the unemployment rate was five percent and about 36 percent of workers exhausted their state benefits. In 2010, the unemployment rate stayed above nine percent the entire year and the exhaustion rate reached 56 percent. In 2012, 47 percent of jobless workers exhausted their state benefits.

Of the over 11 million unemployed workers, about 37 percent are long-term unemployed, or have been looking for work for more than six months. There is little evidence that cutting benefit durations will result in workers finding jobs sooner. It is clearly evident that forcing workers off benefits before they find work creates human suffering and compels affected individuals to seek help from other social welfare programs and charities.
Sources:


Questions and Answers about Unemployment Insurance Waiting Weeks

Question: What is a “waiting week” in state unemployment insurance laws?

Answer: The “waiting period” or “waiting week” is a common feature of unemployment insurance (UI) laws. A waiting week occurs during the first week of a new spell of unemployment when a jobless worker satisfies all the requirements for eligibility, but does not receive any benefit payment for his/her first week of unemployment. As a result, unemployed workers that exhaust UI benefits draw their last payment (often the 26th and final payment) in their 27th week of unemployment. Claimants who do not exhaust benefits (varying in duration, but usually 26 weeks) are effectively denied one week of benefits in states with waiting weeks. This reduces benefit payment costs.

In 2011, 51 percent of benefit recipients found work prior to exhausting benefits so in states that have a waiting week this is tantamount to reducing these individuals’ UI benefits by one week. The average duration of a UI claim in 2011 was 17.5 weeks, since most jobless workers find work prior to exhausting benefits even in a terrible labor market.

Question: How many states have waiting weeks?

Answer: Eight states had no waiting week in 2013. The remaining states all have a waiting period of one week’s duration. In a few states, if a worker remains out of work past some specified number of weeks, the week of benefits withheld during the waiting week is paid.

Question: What reasons are given for having waiting weeks?

Answer: The main argument for waiting weeks is as a means of reducing costs of UI programs. Those supporting waiting weeks typically point out that workers get a paycheck in the week following their layoffs and can better afford a week without income at that stage in their period of unemployment. Another argument is administrative convenience. In the early days of unemployment insurance there was concern that paying benefits for longer durations would not be affordable, so waiting periods of two, and even four weeks, were found in state UI laws. In addition, it was not possible to pay claims rapidly in the early days of UI programs, so the delay was administratively necessary. By the 1960s, no state had a waiting period over one week in length and a few states had no waiting week. As prompt claims payment gained importance, more states repealed waiting weeks. By 1980 a majority of states did not have waiting weeks.

Congress passed an amendment to the federal-state Extended Benefits law in 1980. At that time, states without waiting weeks became financially responsible for paying 100 percent (rather than 50 percent as usual) of the first week of Extended Benefits. In the next year, 16 states adopted a waiting week. Since the early 1980s there has been little further legislative activity on waiting weeks. Recently, waiting week proposals have been revived, with Wisconsin adding one in 2011.
**Question:** What are the arguments against waiting weeks?

**Answer:** Most individuals working for a living do not have sufficient savings to sustain their families’ spending for essential goods and services in the event of job loss. Jobless individuals and their families already wait 21 days or more to get their first UI check with an uncontested claim. Most state UI programs replace only half of worker’s pre-layoff wages at most, with workers who receive maximum weekly benefits getting even lower wage replacement. As a result, weekly benefits replaced on average less than one third of pre-layoff wages for US workers. Therefore, asking families to suffer the additional burden of losing even that meager level of income replacement for an additional week is a recipe for hardship in many cases.

The public policy underlying UI programs is to boost the economy by maintaining consumer spending during layoffs. Reducing benefits by one week for all workers who do not exhaust benefits means that nearly half of the individuals who drew unemployment benefits lost one week of benefits.

**Source:** U.S. Department of Labor Comparison of State Unemployment Insurance Laws (2013).
Questions and Answers about Unemployment Insurance Weekly Benefit Formulas

**Question:** How do states calculate unemployment insurance weekly benefit amounts?

**Answer:** Each state uses a one-year look back period to calculate eligibility. This period, usually called a “base period” or “base year,” is used first to determine if the jobless worker has sufficient recent wages to gain monetary eligibility. States use different amounts of wages or hours for monetary eligibility standards. Once monetary eligibility is established, states have developed statutory formulas for determining jobless workers’ weekly benefit amount and duration of benefits. In all states, a worker’s weekly benefit amount varies based on the worker’s past wages so as to replace a portion of their lost wages within minimum and maximum benefit limits set by state law. In 2013, the U.S. average weekly UI benefit was just less than $300.

Each state UI law uses a weekly benefit formula that seeks to replace a fraction (normally about 50%) of a worker’s lost wages as measured during that worker’s base period up to a maximum amount. Most states use one of four main kind of weekly benefit formulas, each designed to ensure that benefit payments are based on that worker’s customary pattern of full-time work, though some states laws provide a choice of formulas. In 2013, twenty six states used the “high-quarter” formula which determines weekly benefits as a fraction of wages in the highest quarter of earnings in the base period. Although most states use the same fraction of high quarter wages for all benefit levels, some favor a weighted schedule that uses a larger share of high-quarter wages for lower-wage workers. As a result, lower-wage workers get higher wage replacement levels in those states.

Fourteen states used the “multi-quarter” formula which most often uses a fraction of wages in the two highest quarters in 2013. Six states use the “annual-wage” formula which bases benefits on a fraction of annual wages. Seven states use the “average-weekly-wage” formula, which uses a fraction of average weekly wages in the base period to determine benefit amount. Annual wage and average weekly wage formulas can result in significantly lower benefits for all jobless workers whose earnings vary due to part-year employment or wage variations caused by fluctuating hours of employment. Notably, there is no situation in which using a weekly benefit formula other than the high quarter formula will benefit jobless workers.

**Question:** What is the range of minimum and maximum weekly benefit amounts in the states?

**Answer:** Minimum benefit amounts in the states range from $5 (HI) to $148 (WA) per week (excluding dependent allowances available in some states). Maximum weekly benefits range from $133 (PR) to $674 per week (excluding dependent allowances available in some states). State maximum benefit levels can be set as a fixed dollar amount or indexed to that state’s average weekly wage. In 35 states, the maximum benefit is indexed to between 47.6% to 75% of state average weekly wages. Indexing allows benefit amounts to grow in line with a state’s wage
growth and keep pace with increases in the cost of living. The bipartisan Advisory Council on Unemployment Compensation recommended in its 1995 report that states set their maximum weekly benefit to equal to two-thirds of a state’s average weekly wage with durations of six months. States that don’t have automatic adjustments in benefit levels must rely upon state legislatures to make adjustments, meaning that benefit levels are below reasonable levels.

**Question:** Can a change to a state’s benefit formula amount to a cut in benefits for workers?

**Answer:** Yes. If a state currently using a high quarter formula moves to a multi-quarter formula or an annual wage formula, claimants can experience a significant cut in their weekly benefit amounts. Workers who work only part of the year, those who have irregular schedules, or those who have uneven earnings due to seasonal wage fluctuations are most adversely affected by such a change.

For example, if a worker with a total of $12,500 in their base period has earned $7500 in their high quarter but only $2500 in their second highest quarter that worker could receive up to $288 per week in a high quarter formula state. Under these same circumstances in a state that uses the two highest quarters, this worker’s benefit would only be $192 per week. More dramatically, the worker’s benefit drops to only $120 per week in a state whose formula uses all four quarters.

**Sources:**


Questions and Answers about Partial Unemployment Insurance Benefits

**Question:** Under what circumstances may workers draw partial unemployment insurance benefits?

**Answer:** Typically, workers receive unemployment insurance benefits to protect against hardship during periods of total unemployment and wage loss. However, states also permit workers to receive benefits during periods of partial unemployment, also known as underemployment. This occurs when employees have their hours and earnings reduced because of slack demand. Workers who lost full-time work and claim full benefits but who accept temporary part-time work because it’s all they could find may also receive partial benefits.

Each state law specifies a definition of partial unemployment. Generally, claimants must work less than full time and earn around the value of their normal weekly benefit to qualify for partial benefits. Workers who are currently working part time may qualify as long as their current earnings are lower than normal.

**Question:** How do states calculate partial weekly benefit amounts?

**Answer:** States use different formulas to calculate partial unemployment benefits. As a starting point, most state UI laws will provide that partially unemployed workers can receive the difference between their part-time earnings and the full weekly benefit. In addition, most state programs will disregard a portion of their earnings, meaning the state does not deduct this amount from their full benefit. The purpose of a disregard is to hasten the claimant’s return to work. In theory, a claimant is more likely to accept a part-time job if her UI benefit is not steeply offset by her part-time earnings. Like the definition of partial unemployment, the amount of part-time earnings that states disregard varies. Most states disregard a certain percentage of the weekly benefit, while others allow a fixed (often low) dollar amount. Several other states define it as a share of part-time wages.

Using Idaho as an example, a claimant eligible for a full weekly benefit of $350 who earns $300 for 20 hours of work meets the state’s definition of partial unemployment as any week of part-time work paying less than 1.5 times the full benefit (or $525). The state disregards earnings worth 50 percent of a claimant’s full benefit, which in this case is $175. The remaining $125 in earnings is then deducted from the full $350 benefit, leaving a partial benefit of $225. The claimant takes home $525 in total (a $225 partial benefit plus $300 in earnings).

**Question:** Which states have the most generous definitions of partial unemployment?

**Answer:** First, states with more generous partial benefits will generally consider anyone working less than full time, and earning less than at least 100 percent of his or her weekly benefit to be partially unemployed. For example, claimants in Montana who earn less than twice their full
benefit are partially unemployed. The threshold in Connecticut, Delaware, and Idaho is 1.5 times the normal weekly benefit, and in Arkansas and Pennsylvania, 1.4 times.

Second, these states generally disregard a portion of the weekly benefit rather than a flat dollar amount. This ensures benefits keep up with wage growth. For example, Idaho and Delaware basically disregard earnings worth 50 percent of a claimant’s weekly benefit, while Arkansas disregards 40 percent (meaning it deducts from the full benefit wages worth 60 percent of that amount). Connecticut deducts two-thirds of a claimant’s part-time earnings from the benefit amount.

In ranking partial UI formulas, a state’s maximum benefit plays a key role. Since all states tie the definition of partial unemployment to a claimant’s weekly benefit, those with a higher maximum will have more eligible cases. Take Massachusetts, which considers anyone earning less his or her weekly benefit for part-time work as partially unemployed. With a maximum benefit of $679, this potentially includes a significant number of workers earning decent part-time wages.

Further, in states with generous benefits, where the disregard equals a portion of the weekly benefit, claimants may earn higher wages from part-time work before impacting their final benefit. Again, in Massachusetts, a claimant eligible for the maximum may earn as much as $226 (one-third of $679) before he sees a reduction in his weekly UI benefit.

**Question:** Which states have the least generous definitions of partial unemployment?

**Answer:** States with less generous partial benefits will generally define anyone earning less than their normal benefit for a week of part-time work as partially unemployed. Claimants in states that use this definition and that pay relatively low benefits are at a significant disadvantage. Alabama, Arizona, Florida, Louisiana, Mississippi, and Tennessee all have maximums below $300. This means that any claimant who accepts a part-time job paying more than this maximum benefit level cannot receive any benefits at all.

Incidentally, these states also have among the weakest disregard formulas, usually preferring a flat dollar amount to a portion of the full benefit or wages. For example, Alabama deducts from a claimant’s benefit all earnings above $15, while Arizona and Mississippi use thresholds of $30 and $40, respectively. In addition, Michigan claimants lose one full week of benefits from their potential entitlement for any week of partial benefits received, which is unique among states.

Unlike nearly every other state, New York bases its definition of partial unemployment on the number days of work rather than part-time earnings. Essentially, for every day in a week on which any work is performed, up to four days, a claimant’s weekly benefit is reduced by one-quarter. In other words, a claimant’s benefit is cut to zero once he or she works for any portion of four or more days in a week. This is the case even if a claimant is not paid. If she’s paid, she can’t earn more than $405, the current state maximum benefit.
By maintaining such low earnings disregards that are not linked to any variable measure like weekly benefits or part-time earnings—or in New York’s case, by not disregarding any earnings at all—these states are in effect discouraging the unemployed from returning to part-time work. For example, say a claimant in Alabama who is normally eligible for $265 (the maximum) has part-time earnings of $200. His check is reduced by $185 to $80 (the difference between his normal benefit and the value of his part-time earnings above the disregard). This leaves a final take-home income of $280, which exceeds the weekly benefit were the claimant totally unemployed by just $15 (the amount of the disregard). In this case, the claimant may elect to continue claiming a full benefit while she continues his search for a full-time job, in part because the financial incentive to do so is outweighed by the risk of trying a new part-time job.

Table 1 shows how a claimant who is normally eligible for a weekly benefit on par with the national average of $300 (or in the case of Florida and Alabama, the maximum payments of $275 and $265, respectively), with weekly part-time earnings worth $300, would fare in states with a range of partial UI formulas.

<table>
<thead>
<tr>
<th>State</th>
<th>Definition Partial Unemp.</th>
<th>Earnings must be less than</th>
<th>Earnings Disregard Formula</th>
<th>Earnings Disregarded</th>
<th>Partial Benefit</th>
<th>Total Income</th>
</tr>
</thead>
<tbody>
<tr>
<td>Idaho</td>
<td>WBA*1.5</td>
<td>$450</td>
<td>1/2 WBA</td>
<td>$125</td>
<td>$150</td>
<td>$450</td>
</tr>
<tr>
<td>Connecticut</td>
<td>WBA*1.5</td>
<td>$450</td>
<td>1/3 wages</td>
<td>$100</td>
<td>$100</td>
<td>$400</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>WBA</td>
<td>$300</td>
<td>1/3 WBA</td>
<td>$100</td>
<td>$100</td>
<td>$400</td>
</tr>
<tr>
<td>Florida</td>
<td>WBA</td>
<td>$275</td>
<td>8*7.25</td>
<td>$0</td>
<td>$0</td>
<td>$300</td>
</tr>
<tr>
<td>Alabama</td>
<td>WBA</td>
<td>$265</td>
<td>$15</td>
<td>$0</td>
<td>$0</td>
<td>$300</td>
</tr>
<tr>
<td>New York*</td>
<td>&lt;4 days work</td>
<td>$405</td>
<td>NA</td>
<td>$0</td>
<td>$0</td>
<td>$300</td>
</tr>
</tbody>
</table>

*Note: New York’s formula is based on days of any work; the table models four days of work.

Question: What are the key arguments in favor of strong partial benefits?

Answer: The share of the labor force working part time, either because their hours were cut or because it’s the only work they could find, has exceeded 5 percent since 2009 (in 2007, just 3 percent of the labor force could be characterized this way). As state economies slowly recover from the Great Recession, and legislators consider ways to repay steep federal UI loans, they must ensure their UI programs don’t discourage claimants from returning to work and do everything they can to prevent prolonged unemployment. When structured properly, partial UI benefits encourage claimants to return to part-time work while they continue to look for a permanent, full-time replacement. They receive lower benefit payments in combination with their part-time earnings. In turn, the state pays out fewer dollars of benefits and collects greater revenues from taxes on wages.
Research using unusually rich administrative data from Norway shows that providing jobless benefits to underemployed jobseekers “unambiguously” shortens durations of unemployment and reduces overall UI expenditures. The study authors focus on the impact of partial benefits on workers who were separated from full-time employment and drawing benefits. They find that part-time work supported by partial UI serves as a “stepping stone” towards regular, full-time employment.

Strong partial UI benefits also protect low-wage workers in service industries like retail and restaurants who must more often contend with unstable schedules. Even if an employee’s hours are cut, a strong partial formula will permit continued spending on basic necessities until her normal schedule resumes.

**Question:** What are the key arguments against?

**Answer:** There are few strong arguments against more expansive partial benefits formulas. Opponents may claim that partial benefits keep workers from finding permanent full-time jobs, but there is little evidence to support this claim. One reality of the current labor market is that many of the jobs being created in the recovery are part time. Unemployment insurance is intended to help jobless workers meet ongoing expenses until they find a job similar in wages, hours, and required skills to the one they lost. But for many who are unable to find similar work, taking a part-time job with the hope of it eventually becoming full time, or just to stay connected to the labor force, is the kind of action states should encourage. Making sure claimants are not financially penalized when they take part-time jobs is sensible public policy.

**Model legislative language:**

Idaho and Connecticut have among the strongest overall partial UI formulas, both because the thresholds by which they define partial unemployment are high (part-time earnings of less than 1.5 times the claimant’s full weekly benefit) and because they disregard a generous share of part-time earnings (in Idaho, 50 percent of a claimant’s full benefit, in Connecticut, one-third of wages). Both policies are shown here as models.

Current reform legislation in New York (A.7278a/S.6572) uses basically the same formula as Idaho, but with one adjustment to the disregard, providing for a minimum of $100. This ensures an adequate benefit amount for especially low-wage claimants. It, too, may also be held up as a model.

**Idaho, Title 72, Chapter 13, Employment Security Law**

Sec. 72-1312. Compensable Week. “Compensable week” means a week of unemployment, all of which occurred within the benefit year, for which an eligible claimant is entitled to benefits and during which:

1. The claimant had either no work or less than full-time work; and
2. No benefits have been paid to the claimant; and
3. The claimant complied with all of the personal eligibility conditions of section 72-1366, Idaho Code; and
4. The total wages payable to the claimant for less than full-time work performed in such week amounted to less than one and one-half (1 1/2) times his weekly benefit amount; provided however, that any benefits which a claimant receives for any week shall be reduced by:
   a. An amount equal to the amount received as pension, retirement pay, annuity, or any other similar payment which is based on the previous work of such individual which is reasonably attributable to such week, if the payment is made under a plan maintained or contributed to by the base period employer and the claimant has made no contributions to the plan;
   b. An amount equal to temporary disability benefits received under a worker’s compensation law of any state or under a similar law of the United States; and
5. All of which occurred after a waiting week as defined in section 72-1329, Idaho Code.

Sec. 72-1367. Benefit Formula. If the total wages payable to an individual for less than full-time work performed in a week claimed exceed one-half (1/2) of his weekly benefit amount, the amount of wages that exceed one-half (1/2) of the weekly benefit amount shall be deducted from the benefits payable to the claimant. For purposes of this subsection, severance pay shall be deemed wages, even if the claimant was required to sign a release of claims as a condition of receiving the pay from the employer. "Severance pay" means a payment or payments made to a claimant by an employer as a result of the severance of the employment relationship.

Connecticut, Title 31, Chapter 567, Unemployment Compensation.

Sec. 31-229. Benefit for partial unemployment. An eligible individual who is partially unemployed throughout a week, which shall be, at the discretion of the administrator, either a calendar week or a payroll week of seven consecutive days as determined by the administrator, shall be paid with respect to such week an amount equal to his benefit rate for total unemployment reduced by an amount equal to two-thirds, rounded to the next higher whole dollar, of the total remuneration, rounded to the nearest whole dollar, of any nature payable to him for services of any kind during such week, except service performed in the employ of any town, city or other political subdivision, which service is performed in lieu of payment of any delinquent tax payments to such town, city or other political subdivision. An individual shall be deemed to be partially unemployed in any week of less than full-time work if the total remuneration of any nature payable to him for services of any kind during such week, except service performed in the employ of any town, city or other political subdivision, which service is performed in lieu of payment of any delinquent tax payments to such town, city or other political subdivision, amounts to less than one and one-half times his benefit rate for total unemployment rounded to the next highest dollar. For purposes of this section, remuneration shall also include any holiday pay payable with respect to any such week, whether or not any service was performed during such week or was in any other way required for receipt of such
holiday pay. For purposes of this section, the administrator shall consider earnings derived from self-employment, but only to the extent such earnings are actually received or payable with respect to a given week of partial unemployment.

**Sources:**


Questions and Answers about Seasonal Work—Including School Denial Rules

Question: What is seasonal work?

Answer: Seasonal work involves jobs that exist for a specific time period, usually defined by the impact of weather or underlying business conditions on the business. For example, ski resorts operate in the winter and agricultural work is concentrated in the warmer seasons in many states. Construction and retail employers often have seasonal employees as well.

Because seasonal employment is not offered year round, seasonal workers typically experience unemployment during the “off season” period when their seasonal employers cannot offer them work. As a result, seasonal employers face higher unemployment insurance (UI) tax rates under “experience rating” mechanisms that raise UI payroll tax rates whenever former employees of a firm draw jobless benefits. However, because seasonal work by its nature is limited in duration, seasonal employers’ payroll taxes do not fully compensate trust funds for UI benefits drawn by their employees. In effect, seasonal employers use off season UI benefits to subsidize their limited labor utilization patterns. In response, some states have enacted seasonality provisions that limit seasonal workers’ ability to draw UI benefits during the off season period. More recently, states have tried to impose school denial rules developed for public educational entities upon employees of private firms who contract for services with schools.

Seasonality provisions in state UI laws vary. Despite calls for seasonal exclusions by some employers, most states have no specific statutes or regulations outside of what is mandated by federal unemployment insurance law. As a result, seasonal employees draw UI benefits on the same basis as other employees in most states.

Question: How do states with seasonal restriction determine which employers are seasonal?

Answer: The first step in developing a seasonality provision requires that states define “seasonal.” Currently states with seasonality provisions rely upon one, or a combination of the following factors:

• Industry, employer, or occupation type;
• Length of employer operating period;
• Types of worker.

Industries generally receive seasonal classification based on the length of operation as defined by state laws. Employees in seasonal industries receive the same designation by fact of employment in that industry. However, some states have additional requirements for both industries/employers and workers affected by seasonal classifications. In some instances, employers must also verify that certain proportions of their workforce or payroll is reserved exclusively for a seasonal operating period. States may also require employees to earn specified amount of wages in seasonal work before drawing UI benefits during the designated seasonal period.
Question: How many states have seasonal work laws?

Answer: Currently, 17 states (AR, AZ, CO, DE, IN, ME, MA, MI, MS, NC, OH, PA, SC, SD, TN, WI and WV) have seasonal provisions in their state UI laws. Since the early days of UI, seasonal work has been a subject of debate. The overall number of states with seasonality provisions has declined over the decades. According to Saul Blaustein, author of a leading UI history, during the beginning years of UI programs as many as 33 states adopted special laws limiting benefits for workers laid off from seasonal work. Blaustein said that these seasonal work limitations were motivated by fears that UI benefits paid to seasonal workers would be a drain on state trust funds and concerns that seasonal employers would face unduly high tax rates under experience rating. By 1971, more than half the states that had experimented with seasonality provisions had abandoned them. The number dropped to only 13 states with seasonality provisions in 1990.

While the total number of states with seasonality provisions has shifted downward over time, with some states experimenting with the provisions and others repealing them, seasonality provisions remain an active area for proposed legislation. In 2011, 10 states introduced some type of seasonal work legislation. Most of the bills sought to implement a new law or amend an existing one. In Maryland, a bill was passed to formally study the issue. The one bill to successfully pass was in the state of South Carolina. That state passed legislation that makes it easier for employers, and their employees, to be classified as seasonal. In general, seasonal workers do not receive benefits during the off-season if there is a reasonable assurance of work at the beginning of the next season.

Question: What are the main arguments in favor of seasonal work laws?

Answer: Saul Blaustein reports that early seasonal work limitations were motivated by fears that UI benefits paid to seasonal workers would be a drain on state trust funds and concerns that seasonal employers would face unduly high tax rates under experience rating. Similar concerns motivate contemporary advocates of seasonality provisions. Experience rating produces two related objections to seasonal work from employers. First, seasonal employers complain of their higher UI payroll tax rates. Second, non-seasonal employers complain about the degree to which they bear social costs for seasonal benefits that are not recovered from seasonal employers. While initially plausible, neither rationale for restricting UI benefits for seasonal workers holds up under serious scrutiny.

The objections of seasonal employers to higher costs are based upon the false assumption that since they are not “at fault” for seasonal work patterns, they should not bear higher costs related to that pattern of seasonal layoffs. However, experience rating is not based upon a concept of employer fault. In fact, the central rationale for experience rating is higher tax rates for employers that have laid off employees due to economic conditions. Proponents of experience rating do not characterize employers forced to lay off employers as bearing “fault” for those layoffs. But, under experience rating their tax UI rates increase without respect to their lack of fault. Seasonal employers can object to higher UI tax rates, but those complaints should
be directed against the limitations of experience rating rather than the inclusion of seasonal workers in UI programs. If states wish to address limitations of experience rating directly, rather than putting new burdens on seasonal employees, they can do so by raising taxable wage base levels and increasing low maximum tax rates.

Objections to seasonal workers getting UI benefits arising from non-seasonal employers concern the fact that no experience rating mechanism captures 100 percent of costs, including those originating from seasonal employment. And, in the case of seasonal employment, this cost shifting is often even more prevalent than with layoffs from other types of employment. But, the fact that some social costs are created as part of a social insurance program is not a compelling reason for denying UI benefits to seasonal workers. Seasonal workers are involuntarily unemployed when laid off at the end of a season, no less so than those laid off by employers for other economic reasons. And, for this reason, limiting their rights to UI benefits is bad policy.

Finally, it is worth noting that while the degree to which social costs are shifted to other employers is dictated by the experience rating mechanism created by each state law, 100 percent effective charging is neither practical nor desirable. Indeed, 100 percent experience rating would put some employers, both seasonal and non-seasonal, out of business.

**Question:** What are the main arguments against seasonal work laws?

**Answer:** Practical experience in the majority of states indicates that seasonality provisions are not necessary to deal with seasonal work. Expert opinion agrees. The Advisory Council on Unemployment Compensation (ACUC), a Presidentially-appointed, bipartisan group that met from 1993 through 1995, studied state seasonality provisions. In its 1995 report, the ACUC recommended that states repeal seasonal work exclusions and subject seasonal employees “to the same eligibility requirement as all other unemployed workers.” Saul Blaustein concludes his discussion of seasonal work with a similar recommendation.

Given these competing considerations, NELP believes that the best approach to state seasonality provisions is not having any specific seasonal work provisions. In short, involuntary unemployment is what UI programs are primarily concerned with, and seasonal employment involves involuntary unemployment that should be compensated under UI programs. In some cases, employers are required to have seasonal employment patterns and they need to employ workers in those seasonal jobs. Limiting UI benefits to seasonal employees shifts too much of the burden of seasonal employment upon the employees, who are no more responsible for their seasonal unemployment than other laid off employees who are unquestionably eligible for UI benefits.
Question: How should special seasonal work rules developed for public school employees laid off during summer vacations and school breaks apply to private sector employees?

Answer: Because employees of private contractors providing services to K-12 and post-secondary educational institutions have private employers subject to UI payroll taxation, they should not be subject to special rules that apply only to school employees laid off during school breaks and vacations. Starting in 2011, we saw state-level efforts to extend the “between and within terms denial rules” mandated by federal law for public school employees to private-sector employees who are working for firms who have contracted with schools to provide services (for example, cafeteria workers, school bus drivers, crossing guards, etc.). Examples of these restrictions arose in Michigan, Indiana, and Georgia (by rule). Since employees of these private firms have similar layoff patterns during breaks in the school year, advocates of more restrictive rules often argue that the same school denial rules should apply. However, this argument ignores the fact that the mandated school denial rules were designed for public and nonprofit agencies—who do not pay UI payroll taxes, but instead reimburse trust funds directly for any benefits paid to their employees. For this reason, school denial rules should have no applicability to for-profit, non-educational employers.

School contractor employees generally work as much as 39 weeks a year, and to advocate special seasonal treatment for these involuntarily jobless workers goes well beyond the normal scope of seasonal work provisions. Their wages are subject to UI payroll taxes, and, since employers have paid premiums on those wages, they should be insured when laid off.

Sources:

Saul Blaustein, Unemployment Insurance in the United States: The First Half Century (Upjohn Institute (1993)).


William Haber and Merrill G. Murray, Unemployment Insurance in the American Economy (Richard D. Irwin, Inc. 1966).
Questions and Answers about Work Sharing or Short-Time Compensation

Question: What is work sharing?

Answer: Work sharing, also known as short-time compensation, is a special UI program in which a UI payment (usually for 1 or 2 days) is used to partially compensate employees facing reduced hours of work imposed to avoid temporary layoffs. Under work sharing laws, participating employers submit a work sharing plan to their state UI agency explaining its proposed new work schedule. The plan affirms that using work sharing will avoid layoffs and that participating workers’ fringe benefits will continue. Under a typical plan, workers take a day off each week and are paid a UI benefit for that day while receiving wages for their other 4 days of work. In this way, instead of 20 percent of the affected workforce being laid off entirely, every member of the affected workforce is laid off for one day. As a result of this work sharing arrangement, individuals receive a combination of wages and UI benefits that approximates up to 90 percent of their typical weekly take-home pay. If the layoff is two days a week, then workers would get two days of UI benefits and three days of wages with a somewhat higher wage loss.

Under work sharing, UI benefits are calculated for days off work using the same formula as used with weekly UI benefits—typically replacing 50 percent of lost wages up to the state’s maximum weekly benefit. However, wages earned that week are not deducted as they would be under typical partial benefit formulas. As a result, UI benefits supplement wages for the group of workers while none of the workers suffer the impact of getting fully laid off (that is, at least a 50 percent wage reduction with loss of fringe benefits in some cases).

Question: What are the main reasons for states adopting work sharing laws?

Answer: There are currently 27 states (including DC) with work sharing laws on their books. While some of these laws were passed in the 1980s, recent Congressional action has increased interest in work sharing. The Layoff Prevention Act of 2012 was passed as part for federal extensions legislation in February 2012. It encourages states to adopt work sharing programs by providing $100 million in federal cost sharing funds for states with conforming work sharing programs enacted by August 22, 2014. These federal funds can be used to pay for administrative start-up costs related to work sharing, outreach/marketing for new programs, and reimbursing trust funds for initial years of work sharing benefits. With these federal funds available, the remainder of 2014 is expected to involve consideration of work sharing in the majority of the 24 states without work sharing programs (AK, AL, DE, GA, HI, ID, IL, IN, KY, LA, MS, MT, NC, ND, NE, NM, NV, SC, SD, TN, UT, VA, WV, WY). In addition, states with existing work sharing laws may need legislative or administrative actions to bring their laws into conformity with the nine federal requirements for federal cost sharing before the August 2014 deadline.
**Question:** What are the main arguments for work sharing?

**Answer:** Work sharing is a tool that can be used in the case of temporary layoffs to avoid full-blown layoffs of a portion of an affected workforce by using UI benefits to cushion the economic blow caused by having all workers in the affected unit work fewer hours. It is totally voluntary; no employer is required to use work sharing as an alternative to traditional layoffs. Employers who have used work sharing report that the need to keep a skilled or experienced workforce intact is the main reason they wanted to avoid layoffs and chose work sharing. By using work sharing these employers found that they avoided costs of recruitment, hiring, and training of replacements for laid off workers finding jobs elsewhere.

**Question:** What are the arguments made against work sharing?

**Answer:** Opposition to work sharing has largely been conducted as a “whisper campaign,” in the sense that there is rarely open opposition to work sharing. To a great extent, recent opposition to work sharing was based upon misunderstandings about what the program is about and how work sharing is used by employers in states that have the program. Once those unfounded questions were addressed, most states moved forward.

**Question:** What are the costs of work sharing to UI trust funds?

**Answer:** Some critics have claimed that work sharing creates higher costs for UI trust funds. Since all benefits paid under work sharing are subject to the same experience rating mechanism as those applying to benefit payments to individuals who have been totally unemployed, the logic of this argument is less than self-evident. That is, the cost in benefit payments for laying each of 100 employees off for one day per week is roughly equal to the benefit cost of laying off 20 employees for a full week.) To date, there is no evidence that work sharing is more costly than layoffs, but there is likewise no evidence that the impact of work sharing on UI trust funds is identical to the costs of layoffs.

**Question:** What are the best resources available to support work sharing efforts in my states?

**Answer:** In conjunction with the Center on Law and Social Policy, NELP has developed a website with many resources for agency staff and advocates that explains the details around the federal work sharing authorization law and includes model state legislation: [http://www.nelp.org/page/content/WORK-SHARING/](http://www.nelp.org/page/content/WORK-SHARING/). In addition, advocates and agency officials should visit the U.S. Department of Labor Short Time Compensation Website at [http://stc.workforce3one.org/](http://stc.workforce3one.org/) for further information and resources.
CHAPTER 2

CHALLENGES TO UI AS EARNED BENEFITS

Preface
Job Search and “Suitable” Work
Training and Community Service Mandates
Drug Testing
Defining “Misconduct”
Chapter Preface

Those creating the UI program in the 1930s deliberately decided to tie payment of UI benefits to prior participation in the workforce and to involuntary unemployment. They consciously differentiated UI benefits from needs-based “relief” or “work relief.” They believed that this distinction would create higher levels of public support for UI programs and relieve stigma associated with welfare programs. As a result, the program’s founders made clear that UI benefits were paid as a “right” to jobless workers and not as a handout.

Perhaps the founders should have saved themselves the trouble of creating these distinctions. In the 21st century a large proportion of the public and public officials put UI benefits in the same boat as food assistance or “welfare.” Without giving in to the opprobrium heaped upon programs assisting the poor—which are worthy of support and cost far less than most critics believe—defenders of UI programs must not avoid the central questions about the vital role of UI in our labor market. In short, UI is an “entitlement” for involuntarily unemployed workers as a matter of law and policy. And, it is worth defending on this basis.

In the current environment, public officials of all stripes openly consider limitations on UI programs that demonstrate that proponents of these measures don’t accept that jobless workers have “earned” their benefits by working prior to becoming involuntarily unemployed. As a result, there are many proposals to tie receipt of UI benefits to something more than being involuntarily unemployed and looking for work. Many of these proposals are put forwards as “helping” the unemployed, but they do not involve using greater public resources and proven tools to help jobless workers find scarce jobs. Instead, they focus on presumed flaws in the skills or work search efforts of jobless workers by proposing drug testing or mandatory training. Not surprisingly, many of these proposed forms of “assistance” for jobless workers have been tried (and failed) in welfare-to-work programs. In the coming years, we can expect to witness many more flawed efforts to “help” jobless workers.

Recent reports by NELP offer real answers to helping individuals find work that offer alternatives to less effective approaches. A number of states use state resources to provide actual job matching assistance for UI claimants, although ultimately the federal government needs to step up and provide greater resources for reemployment services and UI administration if real world help is going to assist jobless workers find work.

Sources:


Questions and Answers about Re-defining “Suitable Work” and Job Search Rules for Unemployment Insurance

**Question:** What are job search rules?

**Answer:** In every state, a jobless worker must be able to work and available for work in order to receive benefits. Being able and available for work is a condition that must be met each week to maintain eligibility for unemployment benefits. In line with this requirement, in most states workers must register for work at their local employment office and actively seek work each week. If a worker is offered “suitable work” and refuses it without good cause, then they lose their UI benefits.

Since there are only skeletal federal standards for benefits—in terms of qualifying requirements—states enjoy a good deal of flexibility in establishing and enforcing job search rules. One method states use to establish work search rules is to require, by statute or administrative rule, that workers make contact with potential employers each week. Most states do not require a strict number of employer contacts each week, instead choosing to require the number of contacts “customary for the occupation” or “as directed”. For the states that do require a specific number of contacts, they range from 1 to 5 contacts per week.

There is little evidence that these sorts of rote employer job contact rules actually increase job finding in weak labor markets. These requirements do, however, permit states to kick non-compliant individuals off UI benefits.

**Question:** What is “suitable work”?

**Answer:** When a jobless worker is collecting unemployment insurance, 20 CFR 604.5 provides that an individual may limit their availability to jobs that are considered suitable for the individual as defined by state law. While states have varied definitions of what is considered “suitable work”, their laws generally consider factors such as the risk to a worker’s health, safety, and morals; the individual’s education, prior training, and earnings; duration of unemployment and potential for obtaining work in one’s customary occupation; and commuting distance of available work. States generally apply an analysis of these factors to each individual worker’s case in determining if there is a refusal of work.

**Question:** Are there limits to how states may define suitable work rules?

Yes. Federal UI law provides guidelines related to the kinds of jobs that workers can be made to accept as suitable. The Federal Unemployment Tax Act (FUTA) provides that states must consider labor market conditions and comply with certain labor standards in designing their suitable work laws. During times of high unemployment when state UI trust funds are strained, there can be political pressure to reduce costs by re-defining suitable work laws to make them more restrictive.
Section 3304 (a) (5) of FUTA limits the type of work an individual must accept when receiving unemployment compensation. It says in relevant part:

Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

The second of these labor standards provisions, which is known as the “prevailing conditions of work” standard, was designed to ensure that the UI program does not undermine existing labor standards by exerting downward pressure on wages and other conditions of work. In other words, if unemployed workers were forced, through potential denial of benefits, to take work whose conditions were less favorable than what is generally available in the locality, this could easily lead to a race to the bottom in terms of wages, hours and other working conditions. Some newer suitable work definitions definitely violate long-accepted understandings of the intent of the prevailing standards of work provision, but, to date, no court or administrative rulings have challenged any of the new work search requirements on state benefits.

**Question:** What are the most common suitable work restrictions?

**Answer:** The most common way that states make their suitable work laws more restrictive is by expanding the types of work that are considered suitable as the duration of an individual’s unemployment increases. Most commonly, this is done by restricting consideration of suitability to a comparison of only wages and lowering the wage that would be considered suitable as weeks of unemployment pass. These revised wage comparisons can be based on the individual’s prior wage, their weekly benefit amount, or even the minimum wage.

State restrictions vary widely in their specificity and severity. For example, in Idaho, individuals are required to expand their work search beyond their customary occupation and accept a lower wage as their unemployment spell drags on, without the law detailing any week or wage parameters. On the other hand, Wyoming has one of the most severe restrictions in that it considers a job that pays 50 percent of a worker’s prior earnings as suitable work after only 4 weeks on unemployment. See Table 1, for more detail.
Table 1. Suitable Work Laws by Duration of Unemployment

<table>
<thead>
<tr>
<th>State</th>
<th>Duration of Unemployment Suitable Work Laws</th>
</tr>
</thead>
<tbody>
<tr>
<td>Florida</td>
<td>After 25 weeks, suitable work is minimum wage and 120% of weekly benefit amount</td>
</tr>
<tr>
<td>Georgia</td>
<td>After 10 weeks, suitable work is minimum wage and 66% of high quarter earnings</td>
</tr>
<tr>
<td>Idaho</td>
<td>Individual is expected to expand search beyond customary occupation and accept a lower pay rate as unemployment weeks increase</td>
</tr>
<tr>
<td>Iowa</td>
<td>Suitable work 100% of high quarter wage for first 5 weeks, 75% for weeks 6 – 12, 70% for weeks 13 – 18, and 65% of high quarter wage after 18 weeks</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Suitable work is 60% of highest wage during base period</td>
</tr>
<tr>
<td>Maine</td>
<td>After 12 weeks, prior wages is not considered for suitable work</td>
</tr>
<tr>
<td>Michigan</td>
<td>Suitable work is 70% of gross pay prior to unemployment</td>
</tr>
<tr>
<td>Montana</td>
<td>After 13 weeks, suitable work is 75% of prior wage, but not less than minimum wage</td>
</tr>
<tr>
<td>North Dakota</td>
<td>After 18 weeks, suitable work is equal to maximum weekly benefit amount</td>
</tr>
<tr>
<td>Tennessee</td>
<td>After 13 weeks, suitable work is 75% of prior wage; after between 26 to 38 weeks, 70% of prior wage; after 38 weeks, is 55% of prior wage.</td>
</tr>
<tr>
<td>Utah</td>
<td>Work more likely to be considered suitable as the individual remains unemployed for a longer period of time and as prospects of securing local employment in his or her customary occupation diminish</td>
</tr>
<tr>
<td>Wyoming</td>
<td>After 4 weeks, suitable work is 50% of prior compensation</td>
</tr>
</tbody>
</table>

Source: US DOL Comparison of State UI Laws, 2012

**Question:** What is the most common way that states make their job search rules more restrictive?

**Answer:** States make their job search rules more restrictive by requiring a larger number of worker contacts per week and increasing documentation requirements. For instance, in Florida effective August 1, 2011, a claimant must each week provide the state agency with detailed information regarding contact with at least five prospective employers or the date on which he or she accessed services at a one-stop career center.
**Question:** What reasons are given for requiring stricter suitable work or job search requirements?

**Answer:** Proponents of stricter suitable work laws and job search rules often believe that UI benefits are preventing workers from accepting available work. They contend that tightening these rules help workers to get back to work even if it means taking lower paying work. For this reason, these restrictions are touted as cost saving measures.

**Question:** What are the arguments against requiring stricter suitable work laws and job search rules?

**Answer:** Restrictive suitable work provisions go hand in hand with stricter job search rules to undermine the ability of UI to both mitigate the economic blow of involuntary unemployment and preserve the laid-off workers bargaining ability in the labor market. UI was designed to allow workers a reasonable period of time to find replacement work that supports their standard of living and utilizes their highest level of skill and education.

For UI claimants who were previously employed in higher wage professions, the prevailing wage rate may be two to three times that worker’s weekly benefit amount. Nationally, the average weekly UI benefit is just under $300, while the average weekly wage is nearly $900. By requiring a worker to accept work paying a fraction of their prior wage or risk disqualification, states depress labor standards and drive down wages for all workers.

**Sources:**


Questions and Answers about Mandatory Community Service or Training as a Condition of Receiving Unemployment Insurance Benefits

Question: Can states require community service as a condition of receiving unemployment benefits?

Answer: No. While states have considerable flexibility in the design of their individual UI programs, state law governing the program must fit within the framework of federal unemployment compensation law. There are substantial federal conformity issues with states requiring unemployed workers to perform a set number of hours of community service work each week as a condition of UI eligibility. Since the federal-state UI program was established, federal law has clearly limited payment of UI benefits; they may be paid only “with respect to” an individual’s unemployment. In other words, states may not restrict benefit receipt based upon conditions unrelated to the “fact or cause” of worker’s unemployment.

Explicitly in their creation of the program, Congress intended that its scope be limited to compensation for an individual’s involuntary unemployment. In their 1935 Senate Report on the original Social Security Act, Congress differentiated unemployment compensation from other programs. Specifically, the Finance Committee stated that UI “differs from relief in that payments are made as a matter of right not on a needs basis, but only while the worker is involuntarily unemployed.” (Emphasis added.)

In a 1964 conformity decision, the Secretary of Labor pointed to the intent of Congress in explaining why a South Dakota state law that imposed a means test on unemployed workers was inconsistent with the withdrawal standard:

If the language of the Federal law is not in itself sufficiently plain to preclude the application of the income-from-earnings test as a condition of entitlement un-related to the fact or cause of unemployment, one need look only to the intent of Congress and its mandate for "genuine unemployment compensation laws" for the principle that unemployment compensation is to be paid as a matter of right without any test of means or other condition of entitlement not reasonably related to the insurance program or to the insured risk, involuntary unemployment. (Emphasis added.)

This intent is further codified in “the withdrawal standard”, which can be found in both the Federal Unemployment Tax Act (FUTA) and the Social Security Act (SSA). Section 3304(a) (4) of the FUTA says money withdrawn from the unemployment trust fund must be “used solely in the payment of unemployment compensation.” States must comply with the withdrawal standard in order for employers to receive their credit against the Federal unemployment tax. Additionally, Section 303(a) (5) of the SSA establishes the same withdrawal standard as a requirement for states to receive their administrative funds. The fact that a state’s unemployment trust fund can
only be used to pay benefits is further outlined in Section 3306 (h) of FUTA, which defines compensation as “cash benefits payable to individuals with respect to their unemployment”. These related, statutory provisions underlie the Labor Department’s longstanding objections to tying receipt of unemployment benefits to reasons that are unrelated to unemployment. In short, UI is earned through prior employment and paid in relation to subsequent involuntary unemployment and attachment to work. Other conditions should be unlawful.

**Question:** Can states mandate training for UI claimants?

**Answer:** Current law requires that each state have a provision that permits claimants to participate in “approved training.” Most states have narrowly applied this provision. And because there are insufficient resources and qualified training providers to train more than a small number of UI claimants, no state has attempted to mandate training for UI claimants.

Rather than mandating training across-the-board, with added resources states could offer UI claimants opportunities to participate in training that can build on their existing skills and lead quickly to jobs. At present, even this sort of targeted program is beyond the means of most states and not available with scarce federal workforce development and employment services funding.

**Question:** How many states require community service of UI claimants?

**Answer:** Although lawmakers in several states introduced such legislation since 2011, thus far, no state has a law requiring community service work from UI claimants as a condition of eligibility. Federal proponents of community service have surfaced as well, authorizing demonstration projects to test training subsidies or using UI benefits as reimbursements for hiring jobless workers in Middle Class Tax Relief and Job Creation Act of 2012.

**Question:** What reasons are given for requiring community service of UI claimants?

**Answer:** Proponents of mandatory community service work for UI claimants have given various reasons for their legislation. Some lawmakers insist that the unemployed should give back to the community as a way of earning their benefits. Others have said the volunteer work is an opportunity for the unemployed to network, learn a new skill, or just get out of the house. Still others have questioned the work ethic of unemployed workers.

The UI program already assesses a worker’s connection to the labor force. In fact, state statutes governing eligibility and disqualification are designed to ensure that workers who collect benefits were previously attached to the labor force and have the capacity to rejoin it. The UI program is meant to provide a modest wage replacement for eligible individuals during a period of unemployment. In order for an involuntarily unemployed individual to be entitled to benefits, they must show their attachment to the labor force as measured by a threshold amount of wages earned prior to job loss. In addition, the worker must be able and available for work each
week that benefits are collected. The claimant must also search for work and be willing to accept suitable offers of work.

**Question:** Can states use UI trust funds or federal UI administrative dollars to pay for community services or training?

**Answer:** Not under current law. However, there have been increased calls in recent years for “demonstration projects” or changes in federal law to permit states to use UI trust funds and/or federal UI administrative dollars to pay for training or community services to UI claimants.

As noted above, under the Social Security Act—which governs federal UI administrative funding of state agencies—and under the Federal Unemployment Tax Act, the so-called “withdrawal standard” mandates that all trust fund withdrawals “shall be used solely in the payment of unemployment compensation.” Additionally, compensation is defined as “cash benefits payable to individuals with respect to their unemployment.” Activities that are not directly related to operating a conforming state UI program are not reimbursable by federal UI administrative funding, so using these funds to administer mandated community services or training would likewise be barred under current law.

Despite these statutory provisions, the U.S. Labor Department from 2003 to 2009 tolerated a program known as “Georgia Works” where that state used UI benefits to pay individuals engaged in services to employers for up to 24 hours a week under the guise of assisting in their return to work. And, there has been further interest in promoting so-called alternative uses of trust fund during federal extensions debates in 2011 to the present. For these reasons, monitoring proposals that involve raiding state UI trust funds or piloting demonstration projects should be a priority for advocates.

A significant objection to these alternative uses of UI trust funds is that employers unwilling or unable to engage in these demonstration projects would subsidize other employers who used UI trust fund expenditures for community services or training to gain competitive advantages by avoiding paying market wages or typical training costs for claimants engaged in those activities.

**Sources:**


Questions and Answers about Drug Testing as a Condition of Receiving Unemployment Insurance Benefits

**Question:** Can states require passage of a drug test as an initial condition of eligibility for receiving unemployment benefits?

**Answer:** Yes, but only in limited circumstances. States are prohibited from requiring that all claimants submit to or pass a drug test as a condition of initial eligibility for unemployment benefits, since submitting to or passing a drug test is unrelated to the fact or cause of the individual’s unemployment (see fact sheet on community services and UI for more details on fact or cause). In 2012 Congress provided limited authority for drug testing as a condition of initial eligibility for certain claimants. The Middle Class Tax Relief and Job Creation Act of 2012 (P.L. 112-96) amended the Social Security Act to allow state UI programs to conduct drug testing in the following two circumstances considered related to the fact or cause of a worker’s unemployment. The first is if a claimant was discharged for unlawful use of drugs. The second is if the only work that is suitable for the individual is in an occupation that regularly conducts drug testing. The position must meet the state’s definition of suitable work. The U.S. Department of Labor is required by the law to define in regulations those jobs that conduct regular drug tests; guidance is expected to be released in 2014.

There are conditions states must follow in implementing any UI drug testing programs. They should use a test that meets the standards of Mandatory Guidelines for Federal Workplace Drug Testing Programs, or the U.S. Department of Transportation procedures. Additionally, in accordance with the Social Security Act (SSA) Section 303(1)(1), states must establish procedures to ensure that there are no delays in UI eligibility determinations due testing requirements.

For claimants who fail drug tests, states may cancel wage credits or impose a total denial of benefit rights as permitted under SSA Section 303(1).

**Question:** Can states require passage of a drug test as a condition of continuing eligibility?

**Answer:** Yes, under certain circumstances, drug testing MAY be permissible as a condition of continuing eligibility, but the implementation of such testing must still conform to federal unemployment compensation law. States have sought to address the barriers against imposing continuing eligibility requirements by instead passing legislation or implementing regulations that equate the failure or refusal of a pre-employment drug screen with a refusal of suitable work. The claimant is then disqualified under that state’s law for refusing suitable work.
**Question:** Can states require claimants to pay for drug testing?

**Answer:** No, states may not require UI claimants to pay the costs of drug test. However, because drug testing would be an eligibility requirement under state UI law, it would be an expense of administering the state law. Consequently, it may be paid from the state’s federal UI administrative grant if drug testing is imposed within the limitations of federal law as discussed above.

States have proposed two options that shift the cost of drug tests onto unemployed workers. One option they have proposed is to deduct the cost of the test from claimants’ benefits. Another option would be to require that the claimant pay for the test out of pocket as an up-front cost. There are federal conformity issues with both options.

The Federal Unemployment Tax Act (FUTA) and the SSA both require that state unemployment insurance (UI) trust funds be used only for payment of benefits. Specifically, Section 3304(a) (4) of the FUTA restricts the use of money withdrawn from the unemployment trust fund specifying that it be “used solely in the payment of unemployment compensation”. This “withdrawal standard” is a condition that a state must meet in order for employers to receive their credit against the Federal unemployment tax. Additionally, Section 303(a)(5) of the SSA establishes the same “withdrawal standard” as a stipulation for states to receive their administrative funds. The fact that a state’s unemployment trust fund can only be used to pay benefits is further outlined in Section 3306 (h) of FUTA, which gives the definition of compensation as “cash benefits payable to individuals with respect to their unemployment”. Whether withdrawn directly from the trust fund or deducted from a worker’s benefit, the expense of administering a drug test is not a cash benefit with respect to a worker’s unemployment and deducting the cost of drug tests would violate the withdrawal standard.

Moreover, Section 303(a)(1) of the SSA establishes that state law must outline methods of administering the UI program that insure “full payment of unemployment compensation when due”. These “methods of administration” are a requirement for states to receive their federal administrative grant. DOL has construed this section to mean that a state may not transfer the costs of administering the state law to the claimant. Charging a worker more than *de minimus* costs for drug testing would be passing the cost of administration along to the worker and would endanger a state’s federal UI administrative funding.

**Question:** How many states require drug testing of UI claimants?

**Answer:** Ten states have some form of drug testing in law or regulation. Mississippi (2012) and Texas (2013) have passed laws based on the additional authority provided by Congress in 2012, but must wait for the federal regulations before implementation. Seven states (AR, AZ, GA, IN, MI, SC, and TN) have laws or regulations that equate failure or refusal of pre-employment drug...
screen with refusing suitable work. Two of these states rely upon employers to voluntarily advise state agencies when individuals fail drug tests during pre-employment screenings. In 2013, Kansas passed a drug testing law to test all UI claimants at initial eligibility. This law does not conform with federal law and has not been implemented as of early 2014.

**Question:** What reasons are given for drug testing of UI claimants?

**Answer:** State lawmakers often claim this legislation is designed to deter drug use among the unemployed. They cite the prevalence of employer drug-free workplace policies and the use of a drug test as a pre-employment screening tool as evidence of the need for unemployed workers to be screened as a condition of receiving benefits. The other reason states have given is cost. They assume there will be significant savings from benefits that are not paid to workers who fail the tests.

However, this broad approach can also be rooted in a blanket assumption voiced by some policymakers that assumes unemployed workers are to blame for their unemployment as well as mean-spirited efforts to paint the unemployed as lazy drug abusers. It is important to note that the unemployment insurance program is designed to assist workers who have lost their jobs involuntarily, generally for economic reasons.

States already have methods for denying benefits to workers who lost their jobs for a drug-related reason. In fact, 20 states currently have provisions that classify any job loss connected to drug use or a failed drug test as willful misconduct. It is important to note that the remaining states would also likely treat a drug-related discharge as disqualifying misconduct even though it is not explicitly referenced in their discharge statutes.

**Question:** What are the arguments against drug testing UI claimants?

**Answer:** Large-scale government drug-testing would be very expensive, and the cost would greatly outweigh any benefits gained from identifying the small number of individuals using drugs (see below). At a time when there are not enough resources to adequately fund and staff state UI programs, layering on a bureaucratic new qualifying requirement would be expensive and impractical.

As a conservative figure, the Substance Abuse and Mental Health Services Administration (SAMHSA) estimates that the cost for drug testing to be between $25 and $75 per test. Given the federal law conformity issues raised by attempting to assign the cost of testing to claimants, it would be very costly if a state had to absorb the cost of drug testing thousands of unemployed workers. In March 2011, the Texas Legislative Budget Board produced a fiscal note examining the cost of implementing a program to drug test all the unemployed in that state. The Board
estimated the full year cost of implementing such a program to be nearly $30 million. This included over $27 million for the drug testing vendor alone.

Two recent examples of drug testing recipients of federal assistance show the folly in such programs. A Florida drug testing program in the TANF cash assistance program, which has since been struck down by a federal court on constitutional grounds, revealed positive results in only two percent of applicants, a rate substantially below the CDC’s estimate of 8.5 percent drug-use rate in the general population.

An Indiana requirement to drug test unemployed applicants for a government training program yielded an even more paltry one percent positive result. Indiana spent $45,000 to drug test approximately 1,240 people, and only 13 individuals tested positive. Spending an average of $3,500 to root out one drug user is hardly a good use of scarce resources.

Initiatives like this only scapegoat those who need, and are entitled to depend upon, basic social insurance programs. Drug testing programs are inconsistent with the UI program’s purpose and history, insensitive to the realities of today’s economy, and insulting to millions who are shouldering the greatest burdens of job loss and inability to find new work.

Sources:

U.S. Department of Labor Comparison of State Unemployment Insurance Laws (2013)

U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration (SAMHSA) Drug Testing Facts and Statistics Fact Sheet


“1 Percent Fail Indiana Job Training Drug Test,” Huffington Post, January 4, 2012
Questions and Answers about Properly Defining Misconduct

U.S. workers are virtually all “at will” employees. This means that they can be discharged by employers for any reason that is not otherwise prohibited by statute, contract, or public policy. In 2012, there were 2.7 million individuals whose claims for UI included a determination involving a discharge. Payment of UI benefits to these discharged individuals is based upon the definition of “misconduct” applied in most states. In a minority of states, “just cause” or “wilful misconduct” or similar words are employed in a state’s UI law.

**Question:** How do UI disqualification rules apply to discharged workers?

**Answer:** At their core, the purposes of unemployment insurance involve compensating “involuntary unemployment,” and, for that reason, the focus in discharge cases is on voluntary unemployment defined as misconduct. In other words, most states recognize that while many discharged workers may have given employers a valid reason for firing them; they have not taken willful actions serious enough to justify treating them as voluntarily unemployed and denying them unemployment benefits.

The recognition of the importance of “willful” actions in establishing disqualifying misconduct was first articulated by the Wisconsin Supreme Court in the leading case of *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 259-260, 296 N.W. 636 (1941).

The term ‘misconduct’ * * * is limited to conduct evincing such wilful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed ‘misconduct’ within the meaning of the statute.

Most states, including those with “just cause” statutory language in lieu of the more traditional misconduct standard, nonetheless have court cases adopting a restriction similar to *Boynton*’s against disqualifying individuals who have been discharged for reasons falling short of willful or intentional action. In summary, those individuals protected by the narrower *Boynton Cab* standard are those who are properly fired, but who nonetheless should not be treated as “voluntarily” unemployed and thereby disqualified from UI benefits.
Question: Why do some employer associations support broader definitions of misconduct?

Answer: Many employers (and legislators) wrongly believe that if employers fire someone, then that individual should not get unemployment benefits. The employer’s right to discharge an employee is not, and should not be, determinative as to payment of unemployment insurance benefits. Common areas of concern expressed by employer groups seeking broader definitions of misconduct involve payment of benefits following discharges for absenteeism, employer rule violations, and poor work performance. These are exactly the types of discharges that are not defined as misconduct under standards following *Boynton Cab*.

In 2013, there were a number of state legislative proposals seeking to expand the definition of misconduct in order to deny benefits to more individuals who have been fired. Indeed, Wyoming Governor Matthew Mead and Missouri Governor Jay Nixon both vetoed bills expanding the misconduct definition that passed legislatures in those states. Both vetoes were upheld. NELP believes that similar efforts to broaden disqualifications for those discharged will surface in 2014.

In discharge cases, employers oppose payment of benefits in part because when discharged individuals later draw unemployment benefits, those benefits are charged to their former employers’ experience rating accounts and result in higher UI payroll taxes. Despite higher employer costs, denying benefits to more of those among the ranks of the discharged would represent a significant departure from long-accepted practices in the administration of UI programs. Unemployment benefits are paid to accomplish many purposes that are broader than providing temporary income to jobless workers. More importantly, they are not paid as a penalty imposed upon employers. Unemployment benefits support continued purchasing of goods and services by jobless workers from other businesses. Denying benefits to those who do not commit misconduct as traditionally defined will only punish those workers while shifting the costs of their unemployment to their families, social service agencies, charities, and faith-based organizations.

Question: What are the arguments against broader definitions of misconduct?

Answer: Payment of unemployment benefits in discharge cases that involve involuntary unemployment complements—rather than undercuts—employers’ power to discharge those workers freely. As noted by law professors Michael Graetz and Jerry Mashaw in their 1999 book *True Security*, social insurance protections are “crucial to a society’s ability to structure economic risks in ways that are energizing rather than demoralizing,” and they “sustain and bolster a market economy.” In other words, employer power to discharge workers “at will” must be balanced by a reasonable safety net that pays unemployment benefits for those fired for reasons that fall short of intentional conduct that can be deemed equivalent to voluntary unemployment.
Sources:


Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941).

Governor Matthew Mead, Veto Message (House Enrolled Act 107), March 14, 2013 (available online).

Governor Jerimiah (Jay) Nixon, Veto Message (House Bill No. 611), July 2, 2013 (available online).
CHAPTER 3

BUSINESS CLIMATE AND ECONOMIC IMPACT
Questions and Answers about Business Climate and Unemployment Insurance

**Question:** Have unemployment insurance costs risen dramatically in recent decades on employers making it necessary to cut benefits rather than increase employer taxes to restore trust fund balances in insolvent states?

**Answer:** No. Employer UI contribution rates reached an all-time low prior to the severe recession of 2008-2009.

Between 1995 and 2005, 31 states reduced UI taxes by at least 20 percent. As a result of these tax cuts, UI contributions as a percentage of wages fell to an all-time low during the first decade of the 2000s (Table 1). Compared to the 1990s, the percentage of unemployed workers who actually receive benefits remained below 40 percent and the generosity of benefits relative to wages (i.e., replacement rate) was unchanged for decades.

<table>
<thead>
<tr>
<th>Decade</th>
<th>Recipiency Rate (% of unemployed receiving UI)</th>
<th>Replacement Rate (average weekly benefit as a % of average weekly wages)</th>
<th>Employer Contribution Rate (% of total wages)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950s</td>
<td>49%</td>
<td>33%</td>
<td>0.98%</td>
</tr>
<tr>
<td>1960s</td>
<td>42%</td>
<td>35%</td>
<td>1.10%</td>
</tr>
<tr>
<td>1970s</td>
<td>38%</td>
<td>36%</td>
<td>1.00%</td>
</tr>
<tr>
<td>1980s</td>
<td>35%</td>
<td>36%</td>
<td>1.11%</td>
</tr>
<tr>
<td>1990s</td>
<td>36%</td>
<td>35%</td>
<td>0.76%</td>
</tr>
<tr>
<td>2000s</td>
<td>39%</td>
<td>35%</td>
<td>0.65%</td>
</tr>
</tbody>
</table>

Source: Employer contribution and replacement rates are from the U.S. Department of Labor, *Financial Data Handbook 394*. The recipiency rate is from the U.S. Department of Labor, *Unemployment Insurance Chartbook*.

**Question:** How do the costs of unemployment insurance stack up with other employer costs such as wages and benefits?

**Answer:** Unemployment insurance costs are modest relative to wages and employee benefits.

For each dollar of wages earned by workers, businesses pay about one cent in federal and state UI taxes. On average, private sector workers earn just over $28 of wages and benefits for each hour worked (Table 2) of which UI accounts for only $0.23. Compared with other benefits such
as health care and paid leave, UI makes up a small fraction of total compensation. The portion of compensation attributable to UI increased since the start of the recession as a result of automatic tax increases resulting from insolvent state trust funds. But because UI costs are minor relative to wages and other benefits, the UI-related increase accounted for only $0.04 of a total compensation increase of $2.17.

Table 2. Hourly Cost to Businesses of Wages and Benefits

<table>
<thead>
<tr>
<th></th>
<th>2007</th>
<th>2011</th>
<th>Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total compensation</td>
<td>$26.09</td>
<td>$28.26</td>
<td>$2.17</td>
</tr>
<tr>
<td>Wages and salaries</td>
<td>$18.44</td>
<td>$19.93</td>
<td>$1.49</td>
</tr>
</tbody>
</table>

**Other Benefits**

- Insurance (i.e., health, life, and disability) | $1.99 | $2.28 | $0.30
- Paid leave | $1.78 | $1.92 | $0.15
- Social Security and Medicare | $1.55 | $1.66 | $0.12
- Retirement and savings | $0.91 | $1.02 | $0.11
- Federal and state unemployment insurance | $0.19 | $0.23 | $0.04

Unemployment insurance % of hourly compensation | 0.73% | 0.82%


Note: Not all benefits are listed.

**Question:** How have corporate profits fared during the economic downturn?

**Answer:** Corporate profits are at an all-time high. Meanwhile, there are still 4 million fewer jobs than when the recession started. As a result of rising corporate profits and lagging employment, the share of national income going to corporations increased substantially during the post-recession recovery period and remains close to record levels (Figure 1). In comparison, employee compensation including wages and benefits, as a percentage of national income, has fallen steadily from a historical peak in 1980 to a 45-year low.
Question: Have record corporate profits translated into additional hiring?

Answer: U.S. tax policy, which allows multinational corporations to defer paying U.S. taxes on foreign profits for as long as those profits remain abroad, favors foreign job creation over domestic hiring (Sullivan 2011, 3–4; Clausing 2012). To avoid paying taxes, corporations shift profits to low-tax jurisdictions by physically relocating operations abroad and by taking advantage of accounting loopholes.

Today, U.S. companies hold an estimated $1.7 trillion of profits abroad, making this cash unavailable to invest in domestic factories, to train existing employees, and to hire U.S. workers (Sullivan 2012). Contrary to claims that foreign investment leads to domestic job creation, multinationals generated nearly 2.4 million jobs abroad while slashing the domestic workforce by 1.9 million between 1998 and 2008 (Sullivan 2011, 4).

In 2011, just 70 U.S. companies accounted for $1.2 trillion of profits held abroad, with GE and Pfizer, the largest abusers, holding $102 billion and $63 billion of profits overseas, respectively (Rubin). Meanwhile, technology giants, Apple, Google, and Microsoft increased profits abroad by 40 percent in 2011 (Rubin), even as Apple drew sharp criticism for manufacturing its entire product line using cheap labor in countries such as China (Barlett and Steele).
Sources:


Clausing, Kimberly A. “A challenging time for international tax policy.”


Does Unemployment Insurance Discourage Work and Increase Unemployment?

**Question:** Does unemployment insurance (UI) encourage jobless workers to avoid accepting work and increase the unemployment rate?

**Answer:** Some impact from receiving UI benefits should be expected given economic incentives. According to a September 2011 study by Berkeley economist Jesse Rothstein, the answer is not very much. Rothstein finds that in the absence of extended federal benefits, the unemployment rate would have been about 0.2 to 0.6 percentage points lower in 2010. Over half of the impact of UI found on the unemployment rate was due to UI recipients staying in the labor force and actively searching for work, something that should be seen as a positive impact of UI. Rothstein’s study finds a smaller effect of UI, but takes a broader look at UI than earlier papers.

**Question:** Does UI increase the duration of unemployment?

**Answer:** Using data from the current recession, economists at the Federal Reserve Bank of San Francisco estimate that federal UI benefits increased the duration of unemployment by 1.6 weeks. Studies of the impact of UI on claimant’s unemployment duration have found various estimates of the impact over the years in roughly the same range as this recent study.

**Question:** Isn’t there evidence of a “spike” in the exit rate from unemployment around the expiration of jobless benefits.

**Answer:** The spike was observed in earlier studies focused on UI payment data. More recently, the magnitude of this “spike” was much smaller in studies by Harvard economist Raj Chetty (and others) where jobless spell lengths were defined as time from job loss to the next job as opposed to time spent in UI programs. Measuring the time to reemployment is a better and more relevant measure of the economic efficiency of unemployment benefits.

**Question:** How can I frame a response to the disincentive argument?

**Answer:** Because there is a multitude of data on UI, it is among the most studied benefit programs. Jobless workers are not that different from employed workers, so it is foolish to deny that UI benefits have some impact on behavior. Many earlier studies of UI looked only at the behavior of UI claimants, ignoring the fact that a significant number of jobless workers do not draw UI benefits. These studies also neglected the positive impact that unemployment insurance has on consumer spending and the overall economy. What amounts to, at most, a few tenths of percent difference in the unemployment rate is a small price to pay for a program that boosts consumer demand while supporting labor market attachment while keeping unemployed workers in their homes and food on their families’ tables.
Sources:


CHAPTER 4
FINANCING AND SOLVENCY
Experience Rating: Myths and Realities

The purpose of this chapter is to give readers an introduction to UI financing with an emphasis on experience rating. Experience rating is sometimes a source of confusion in UI policy debates, and this chapter is a quick guide for non-experts. On the broader questions of UI financing, NELP has many resources on its website, some focused on specific states, which can provide further background for those interested. In 2012, NELP published a new analysis confirming that states can avoid the worst impacts of trust fund insolvency by accumulating adequate trust fund reserves prior to recessions. This report is worth reviewing if your state is facing UI financing issues. See Mike Evangelist, “Lessons Left Unlearned,” National Employment Law Project (July 2012).

There is clear evidence that trust fund reserves protect states from attacks on benefits by avoiding solvency crises which have triggered many negative changes in state UI programs since 2011. In our view, advance funding of UI is much more important to jobless workers than experience rating in terms of the interests of jobless workers. And, this belief has been reinforced by events in recent years.

Experience rating is a process through which UI payroll tax rates on contributing employers are adjusted in relation to layoffs of individual firms’ employees or former employees.¹ In other words, as UI benefit payments to a firm’s laid off employees rise, tax rates on the firm are increased in subsequent years. Conversely, in the absence of UI benefit payments, UI payroll tax rates on employers fall. Thus, based upon the firm’s “experience” with unemployment, its tax rate is more or less determined between the limits set by minimum and maximum rates in state UI law. (In addition to individual firms’ experience rates, many states adjust UI payroll taxes according to other factors, including the overall health of trust fund reserves.)

All states have adopted experience rating in order to meet federal requirements providing a FUTA tax credit for employers whose wages are subject to a state UI experience rated tax. While all states have UI experience rating in order to satisfy this requirement, there is considerable variation in how states implement it. First, states vary according to the portion of wages subject to UI taxes (taxable wage base), their minimum and maximum UI tax rates, how fast their tax rates adjust within the resulting range of rates (usually from 3 to 5 years), and the experience rating formula used. Second, the mix of these state policies impacts the degree to which a state’s experience rating method “effectively charges” benefit costs to a particular firm and recovers those costs for its trust fund.²

From the outset, it is important to understand that, in the real world, “perfect” or “complete” experience rating—where every benefit dollar is collected from the specific employer involved—is not possible.³ Nor, is complete experience rating desirable. While we explain both these points in more detail later, the simplest explanation is that some firms with high experience would be hurt competitively by UI taxes if they were required to bear the full costs of UI benefits paid to
former employees. On the other end of the experience rating scale, since all employers have employees insured by UI programs, all employers should pay some minimum UI tax (in effect, an insurance premium) to reflect the social benefits of UI programs to each firm, their employees, and the overall economy. So, with respect to experience rating, a reasonable goal is to determine the mix of tax policies that a state’s policymakers and interest groups find acceptable in order to finance its UI program. An unreasonable goal is to try to keep adjusting UI taxes in a futile effort to reach complete or perfect experience rating or to avoid upward tax adjustments required to properly finance UI programs.

**Some UI Financing Basics**

UI payroll taxes are not imposed on all wages. The portion subject to taxation is referred to as the “taxable wage base.” During 2011, state taxable wage bases ranged from $7000 (the federal minimum) to $37,300. Fifteen states have taxable wage bases over $20,000. All states have maximum and minimum UI tax rates. In 2011, minimum tax rates ranged from zero or near zero, to 2.68 percent of taxable wages. Maximum UI tax rates ranged from 12.27 percent of taxable wages to 5.4 percent (the lowest maximum rate permitted under federal law).

Seventeen states automatically adjust their taxable wage bases with growth in state wages, a practice called “indexing.” Having a higher taxable wage base and indexing that tax base are two important policies that have contributed significantly to states’ UI trust funds remaining solvent over the years. In addition, having a higher taxable wage base permits more effective charging under experience rating, something that many employers and economists claim is a worthwhile policy, but often oppose in practice by arguing for lower rates and lower taxable wage bases.

In short, where employers fit in each state’s experience rating mechanism depends upon choices expressed in state UI laws.

**Types of Experience Rating Formulas**

Depending upon the reference consulted, it is generally said that there are four or five experience rating formulas used by states. These formulas are essentially a method of comparing each experience-rated firm’s benefit costs to its payroll or contributions. Formulas vary in terms of how they measure experience, the number of years used in the formula, and the importance of factors used to set rates.

In practice, there are two main experience rating formulas used by the great majority of states. These are termed the “benefit ratio” and “reserve ratio” methods. In 2012, sixteen states used the benefit ratio formula, while 34 states were reserve ratio states. The remaining states are Alaska, Delaware, Michigan, Oklahoma, and Pennsylvania. Michigan and Pennsylvania have a variant of benefit ratio formulas combined with other factors, while Alaska has a unique formula called payroll variation, and Delaware and Oklahoma use a formula called benefit wage ratio.
The reserve ratio method of experience rating takes into account tax contributions over each employer’s entire experience, as well as each firm’s benefit payments and payroll. Under the reserve ratio formula, the reserve ratio (benefits minus contributions, usually over the life of the UI program) is divided by each firm’s payroll to arrive at a basic tax rate for each firm. In its essence, the reserve ratio formula is a cost-accounting formula, since each employer’s rate is designed to recover that employer’s cost to the trust fund over the life of the program. Typically, in addition to the rate assigned by each firm’s reserve ratio, a tax schedule that takes the overall trust fund’s reserve balance into account is employed to set each firm’s tax rate applied to the state’s taxable wage base. When trust fund reserves are lower, the tax schedules are designed to slide upward and increase contributions, and vice versa.

Under the benefit ratio method, the amount of benefits paid to a firm’s employees over the specified number of past years is compared to the firm’s average payroll over those same past years (usually 3 to 5 years). The resulting ratio places the firm in a rate class. A social cost factor, if any, is added to the experience rate set by the benefit ratio, and the overall tax rate for each firm is applied to the state’s taxable wage base. The social cost factor is related to the overall solvency of the state’s trust fund. The benefit ratio formula is thought to provide more assurance of solvency than other methods because it relates contributions directly to benefit costs over a relatively short time frame. Benefit ratio states are also thought to have more volatile tax rates, due to the shorter time frame used for this experience rating method.

States also differ in terms of how they charge employers when a claimant has more than one employer in his or her base period. The base period is the four quarter period that precedes the filing of a claim. Fourteen states charge the most recent “separating” employer, while 34 others charge all base period employers in proportion to the base period wages each paid.

The Experience Rating Index

Since the 1980s, the U.S. Department of Labor has published an experience rating index (ERI). The ERI takes into account three different types of uncharged benefits that impact the degree of experience rating in a state. Ineffective charges arise mainly from charges to firms that are already at the maximum rate, meaning additional charges cannot be effectively collected. Inactive charges are benefits paid to former employees of inactive accounts, mainly firms that are no longer in business. And, noncharged benefits are those benefits that are not charged due to the operation of law.

ERI is computed by subtracting from 100 the following: 1) the percentage of ineffectively charged benefits, 2) the percentage of charges to inactive firms, and 3) the percentage of noncharged benefits. The resulting figure provides a rough guide to how completely a state’s experience rating mechanism charges benefits paid in that state. We say rough guide because ERI is an annual figure and all experience rating methods take a number of years to recapture benefit costs. There is also a lag between when benefits are paid and when taxes to pay those
benefits are increased in all experience rating methods. Since ERI assesses benefits and taxes in an annual snapshot, it will never show that all benefits are charged in a particular year. For these and other reasons, ERI provides guidance about how a specific state is performing from year to year within its own terms, but doesn’t really provide good information for comparing experience rating among states.

Because ERI is a USDOL published figure, it is sometimes used as a sort of score by proponents of experience rating, as if states with higher ERIs are doing better than states with lower ERIs. Ironically, some of the same observers who call attention to the ERI are less likely to call attention to other annually released measures like USDOL’s “adequate financing rate”. Raising a state’s adequate financing rate would address a state’s forward financing requirements, and some of the steps required to produce adequate financing would indirectly improve ERI scores as well. However, adequately financing trust funds is significantly more important overall to states than achieving a high ERI score.

Why Complete Experience Rating Is Not Practical

In economic theory, taxing layoffs through experience rating influences employer behavior and lowers unemployment. But, the degree of influence on employers’ actions has varied from study to study. Regardless of its underlying economic theory, the pertinent question regarding experience rating here is the degree to which more complete experience rating should be a priority of state policy.

As we already explained, complete experience rating is not a desirable policy because it would impact the competitiveness of high cost firms, putting some firms out of business. In addition, UI programs should recognize that even “no cost” firms derive advantages from having UI programs in place. For that reason, asking firms to pay some minimum contribution for the insurance provided to employees is a valid UI financing policy. Conversely, zero or very low minimum rates are bad UI financing policy. In addition, having low maximum tax rates will shift costs among the members of a state’s employer community.

There are several reasons built into how experience rating works that ensure that it is not complete. As noted, ineffective charges and inactive charges are a reality in any state. Employers go out of business. Maximum tax rates and taxable wage bases limit how high tax rates can go. And, new employers and reimbursing employers are not subject to experience rating. For these reasons, even those that accept conventional wisdom supporting experience rating as a means of lowering unemployment should adopt a measure of humility.

Conclusion

In summary, the idea that more complete experience rating is desirable and that experience rating should be a priority of state policy is a somewhat ephemeral goal. The experience rating method used by each state reflects political as well as policy judgments. Essentially, states are
deciding on what basis to raise UI taxes, how quickly to impose higher taxes on employers when benefit payments rise, and how much individual firm responsibility is desirable when allocating those costs among the entire employer community. In the long run, the experience rating formula used by a state is less important than other UI financing policies. In particular, having higher taxable wage bases, indexing taxable wage bases, establishing more than token levels of minimum tax rates, and retaining a philosophy of forward financing are all more important questions than the degree of experience rating applied in a state or the specific experience rating mechanism adopted.

Endnotes


2 Most state, local, educational, and non-profit employers do not pay UI payroll taxes. They are so-called “reimbursing employers.” These employers are billed quarterly for any UI benefits paid to former employees and are, thus, not subject to experience rating.

3 “The volume of benefits that are ‘ineffectively charged’ will be reduced by either a higher tax base or higher tax rate, both of which will permit more effective operation of experience rating. There will always be some ‘ineffectively’ charged benefits because there are practical limits to how high maximum tax rates can be pushed.” William Haber and Merrill G. Murray, Unemployment Insurance in the American Economy (Richard D. Irwin, Inc. 1966), p. 352-353.


5 For a list of the 17 states with indexed taxable wage bases, see National Employment Law Project, Briefing Paper: “Indexed State Taxable Wage Bases: Taking A Significant Step Toward Better UI Financing,” (February 2004), available at <www.nelp.org>. Louisiana’s wage base is subject to being raised or lowered according to its trust fund balance, and this is a solvency measure, not wage base indexing.


7 U.S. Department of Labor, Comparison of State UI Laws (July 2011), Table 2-3 and 2-4. NELP considers Michigan and Pennsylvania as hybrid mechanisms, while USDOL treats them as benefit ratio states.

8 U.S. Department of Labor, Comparison of State UI Laws: 2011, Tables 2-9 to 2-12.


10 Another, less-noticed consequence of charging base period employers undercuts experience rating. If the separating employer is not a base period employer as defined under state law, that employer effectively gets a “free” layoff. This gap in benefit charging was first identified in a study by Paul Burgess and Stewart Low using UI administrative data from Illinois. They found that more than a quarter of layoffs fell within the period between the end of the base period and the filing of the claim, effectively relieving the employer involved from benefit charging. Paul Burgess and Stewart Low, “Unemployment Insurance and Employer Layoffs.” UI Occasional Paper 93-1 (U.S. Department of Labor, 1993).
Protecting Our UI Lifeline: A Toolkit for Advocates

National Employment Law Project
75 Maiden Lane, Suite 601
New York, NY 10038

© 2014