# UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA Richmond Division

ASHLEY COX, EMILY DIMOND, PENNY WILLIAMS, AMBER DIMMERLING, and LENITA GIBSON, on behalf of themselves and all others similarly situated,

## PLAINTIFFS,

v.

Civil No: \_\_\_\_\_

ELLEN MARIE HESS, in her official capacity as Commissioner of the Virginia Employment Commission,

DEFENDANT.

## **CLASS ACTION COMPLAINT**

COME NOW, the Plaintiffs, Ashley Cox, Emily Dimond, Penny Williams, Amber Dimmerling, and Lenita Gibson ("Plaintiffs"), on behalf of themselves and all others similarly situated, by counsel, and as for their Complaint against Defendant, they allege as follows:

## I. PRELIMINARY STATEMENT

1. This is a class action brought to obtain declaratory and injunctive relief requiring the Commonwealth of Virginia to correct its gross failures to provide Virginians necessary unemployment benefits within the timing otherwise mandated by Federal and State law. Data collected by the U.S. Department of Labor show that Virginia ranks 53<sup>rd</sup> of 53 jurisdictions in

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determining certain basic eligibility issues – with only 2% of cases decided in a timely manner.<sup>1</sup>

2. Ellen Marie Hess is the Commissioner of the Virginia Employment Commission ("VEC" or "Defendant"), and this action is brought against her in that official capacity for violations of federal and state law, including: (1) violations of Plaintiffs' procedural due process rights under the Fourteenth Amendment to the U.S. Constitution; (2) violations of the Social Security Act and its regulations; and (3) violations of state law governing unemployment benefits.

3. Unemployment benefits are intended to provide emergency cash assistance to workers who lose their jobs, to tide them over until they can find another job. Benefits are supposed to be available immediately: "as close to the nearest payday following termination" as possible. *Cal. Dep't of Human Res. Dev. v. Java*, 402 U.S. 121, 130 (1971). But for tens of thousands of Virginians, the unemployment benefits system has failed completely: either their claims for benefits have languished for months without any decisions made on their claims, or if they were lucky enough to begin receiving benefits, their benefits have been suddenly cut off without notice or explanation.

4. Making matters worse, these unconscionable bureaucratic failures have not just blocked access to regular state unemployment benefits. Significant federal aid – including additional federal payments of up to \$600 per week – has also been blocked, because those benefits are to be paid through the state unemployment system.

5. VEC's failures harm the most vulnerable Virginians. And they have fallen disproportionately on Black Virginians. Recent census data shows that 19.9% percent of Virginia's population identify themselves as Black or African American.

<sup>&</sup>lt;sup>1</sup> These data are described in paragraphs 32-36, *infra*. The survey includes all 50 states, plus the District of Columbia, Puerto Rico and the Virgin Islands.

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https://www.census.gov/quickfacts/VA (last visited March 31, 2021). Yet by late June 2020, over 45% of Virginians applying for unemployment benefits were Black. https://www.vec.virginia.gov/sites/default/files/news-12018-

VA%20Unemployment%20Claims%20Data-June%2027.pdf (last visited March 31, 2021).

6. All of this is occurring in the context of massive Federal funding and mandates to address the ongoing COVID-19 economic crisis through expanded and extended unemployment benefits. The Commonwealth's refusal to construct a process to ensure that these benefits promptly get to those who need them denies Virginians the promise of these federal commitments.

7. Plaintiffs are representatives of two proposed classes. Ashley Cox, Emily Dimond, and Penny Williams are representatives of the Delay Class: they applied for unemployment benefits in August, October, and November 2020, and as of the date of this Complaint, have neither received benefits nor been advised that their claims have been denied. Upon information and belief, there are thousands of others in a similar limbo status – denied access to the benefits they deserve and desperately need and denied a formal determination that would allow an appeal.

8. Plaintiffs Amber Dimmerling and Lenita Gibson are representatives of the Continued Claims Class: they began receiving unemployment benefits in March and April 2020, but their benefits later stopped without explanation. There are thousands in a similar posture. Members of this group are likewise denied access to desperately needed benefits and denied a decision that would allow an appeal.

## **II. JURISDICTION AND VENUE**

9. The Court has subject-matter jurisdiction over this action under 28 U.S.C. § 1331 (federal question), § 1343 (civil rights), and §§ 2201 and 2202 (declaratory judgment), because the action is brought under the federal Social Security Act, 42 U.S.C. § 503(a)(1), and under 42

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U.S.C. § 1983 to redress the deprivation of federal statutory and constitutional rights.

10. The Court has personal jurisdiction over the Defendant because it is organized in Virginia, and the actions at issue occurred (or failed to occur) in Virginia.

11. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to this claim occurred within this District, and the Defendant maintains its primary office in this District.

## III. PARTIES

12. Defendant Ellen Marie Hess is the Commissioner of VEC, the state agency responsible for administering the unemployment insurance program in Virginia, pursuant to the federal Social Security Act, 42 U.S.C. § 503 and the Virginia Unemployment Compensation Act, VA. CODE ANN. §§ 60.2-100 *et seq*. She is sued in her official capacity. Commissioner Hess and VEC act under color of state law within the meaning of 42 U.S.C. § 1983.

- 13. Plaintiff Ashley Cox is a resident of Wytheville, Virginia.
- 14. Plaintiff Emily Dimond is a resident of Madison, Virginia.
- 15. Plaintiff Penny Williams is a resident of Salem, Virginia.
- 16. Plaintiff Amber Dimmerling is a resident of Fredericksburg, Virginia.
- 17. Plaintiff Lenita Gibson is a resident of Portsmouth, Virginia.

# IV. FACTS

#### A. <u>Virginia's Unemployment Compensation System</u>

18. Virginia's unemployment compensation system is part of a cooperative federalstate program established during the Great Depression. The purpose of the program (codified at Title III of the Social Security Act, 42 U.S.C. § 501 *et seq.*) is to provide cash assistance to workers as quickly as possible after they lose employment. *Java*, 402 U.S. at 130 ("The objective of

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Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee.").

19. Speed in delivering benefits is a key feature of the unemployment compensation program. *Id.* at 130, 131–32 (the goal of Congress was to make benefits available "on the nearest payday following the [employee's] termination . . . to the extent that this was administratively feasible"). Accordingly, the Social Security Act requires state unemployment programs to maintain "methods of administration . . . reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1). Following the direction of the Supreme Court in *Java*, the U.S. Secretary of Labor interpreted the "when due" requirement in the Social Security Act "to require that a State law include provision for such methods of administration as will reasonably insure the full payment of unemployment benefits to eligible claimants with *the greatest promptness that is administratively feasible*." 20 C.F.R. § 640.3 (emphasis supplied).

20. In addition to regular state unemployment benefits, significant federal benefits are also paid through the state unemployment system, including: Pandemic Unemployment Assistance (which provides unemployment-type benefits to self-employed, independent contractors, and gig economy workers), Pandemic Unemployment Compensation (which aimed to provide \$600 weekly supplements to unemployment insurance payments for payable benefit weeks before July 31, 2020), Lost Wages Assistance (which aimed to provide \$300 weekly supplements, for several weeks in the fall of 2020, to payable benefit weeks where the claimant was eligible for \$100 or more in underlying state benefits), and Pandemic Emergency Unemployment Compensation (which provides additional weeks of benefits, once someone's regular unemployment or PUA benefits are exhausted), and Extended Benefits (which aimed to provide additional weeks of

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benefits once someone's PEUC benefits were exhausted, for much of 2020).

21. Virginia's unemployment program is set out in the Virginia Unemployment Compensation Act, VA. CODE ANN. §§60.2-100 *et seq*. The Virginia Supreme Court ruled that this statute's purpose was to "provide funds for those temporarily unemployed [and is] . . . "remedial in character [and] . . . should be liberally construed so that those justly entitled to compensation may not be denied, and the purpose of the legislation thus effectuated." *Ford Motor Co. v. Unemployment Comp. Comm'n*, 63 S.E.2d 28, 33 (1951).

22. The process of applying for unemployment benefits in Virginia involves two basic steps that are relevant here: (1) filing an initial application for benefits ("initial claim") and (2) filing a separate claim for each week of unemployment ("continued claim"). *See* <u>https://www.vec.virginia.gov/unemployed/claims-information/our-claims-processes</u> (last visited March 31, 2021).

## 1. Initial Claims

23. After an initial claim is filed, VEC takes two steps. First, it issues a "monetary determination," which involves checking data available through the Social Security Administration to determine if there are enough wages in covered employment during a defined prior period and, if so, the amount of unemployment compensation available to the claimant. *See <u>https://www.vec.virginia.gov/unemployed/resources/your-unemployment-benefit-rights-</u> and-responsibilities (last visited March 31, 2021). The amount of a claimant's benefit is normally based on the wages the claimant was paid during a defined prior period. <i>Id*.

24. Second, the Commission normally sends a questionnaire to the claimant's last employer "requesting information regarding [the claimant's] employment and separation." *Id.* In Virginia, unemployment benefits are only available to employees who lose their jobs

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because of no (or minimal) fault of their own. *Id.*; *see also* VA. CODE ANN. § 60.2-618(1), (2) (benefits not available to individuals who are "unemployed because [they] left work voluntarily without good cause" or were "discharged for misconduct connected with [their] work"); VA. CODE ANN. § 60.2-612(2) (no benefits for workers on strike).

25. If information available to VEC indicates that the claimant may not be entitled to benefits, the claim is referred to a "representative designated by [VEC] as a deputy" to make a "non-monetary determination" (*i.e.*, a determination involving matters *other* than the amount of a benefit). VA. CODE ANN. § 60.2-619(A)(1). Nonmonetary determinations fall into two categories: "separation issues" which concern the circumstances surrounding the claimant's loss of employment and "nonseparation issues" which concern all other issues affecting the claimant's eligibility for unemployment benefits (other than those already addressed by the monetary determination).

26. The VEC deputy's job is to "*promptly* examine the claim" and determine whether benefits are appropriate, *id.* (emphasis supplied), and then "*promptly*" inform the claimant of the decision, and "*promptly*" inform the former employer – so either party may appeal the deputy's determination. VA. CODE ANN. § 60.2-619(C) (emphasis supplied). In the meantime, if the deputy determines that benefits are appropriate, "[b]enefits shall be paid *promptly* in accordance with" the deputy's decision. VA. CODE ANN. § 60.2-619(E) (emphasis supplied).

27. Guidance from United States Department of Labor ("DOL") states that nonmonetary determinations must be made within approximately 21 days to be considered "timely" for the purposes of the Social Security Act. Unemployment Insurance Program Letter ("UIPL") No. 1145 Attachment ¶ IV, available at

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https://wdr.doleta.gov/directives/attach/UIPL/uipl\_pre1975/uipl\_1145a.cfm (last visited March 31, 2021) (Exhibit A).<sup>2</sup>

## 2. Continued Claims

28. In addition to the initial claim, a person seeking unemployment benefits in Virginia must also file a benefit request for each week of unemployment: "To receive a payment for benefits, [a claimant] must file a weekly request for each week" for which benefits are sought. <u>https://www.vec.virginia.gov/unemployed/resources/your-unemployment-benefit-rights-and-responsibilities</u> (last visited March 31, 2021). In the weekly benefit request the claimant verifies that they are able to work and available for work, and reports earnings from other employment. *See id*.

29. Once VEC has begun to make a series of weekly benefit payments to a claimant (known as a "continued claim series"), a "presumption" of continued eligibility is created. UIPL 04-01 ¶ 7, available at <a href="https://wdr.doleta.gov/directives/attach/UIPL4-01.cfm">https://wdr.doleta.gov/directives/attach/UIPL4-01.cfm</a> (Exhibit B). Accordingly, "in the absence of facts clearly establishing current ineligibility, the [VEC] presumes the claimant's continued eligibility until it makes a determination otherwise." *Id*.

30. Such a determination – which in Virginia would be issued by a VEC deputy, see VA. CODE ANN. § 60.2-619(A) – must be "timely." UIPL 04-01 ¶ 7 (Exhibit B ¶ 7); see also VA. CODE ANN. 60.2-619(A), (C) (deputy must act "promptly"). Determinations in a continued claims series must be made within approximately 14 days in order to be considered "timely." UIPL 04-01 ¶ 6 (Exhibit B at ¶ 6).

31. As a result, if an issue with respect to a claimant's eligibility arises *after* the

<sup>&</sup>lt;sup>2</sup> The precise calculation of timeliness depends on several factors. *See* UIPL No. 1145 Attachment ¶ IV (Exhibit A ¶ IV). Twenty-one days is the longest period in which a resolution could be considered "timely." *Id.* 

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claimant has begun to receive benefits, VEC may stop benefit payments briefly to allow a VEC deputy to review the issue. But the halt in benefits cannot be indefinite, because timeliness standards apply: a deputy must either issue a determination within approximately 14 days, or VEC must continue to pay the claimed benefits. *Id.* ¶ 7 ("when the date for a timely determination has passed in a continued claim series, the State must either issue a determination of ineligibility for U[nemployment] C[ompensation] (where the facts establish ineligibility) or else pay the UC immediately"). If a deputy issues a timely determination that a claimant is ineligible or disqualified, the claimant has a right to appeal. VA. CODE ANN. § 60.2-619(D).

## B. <u>VEC Performance for Initial Claims</u>

32. DOL tracks the performance of state unemployment agencies with respect to several "Core Measures." Core Measures are those that are considered to be critical indicators of the overall performance of the program. If acceptable levels of performance with respect to those core measures are not met, it signals fundamental impairment in program operations, and triggers corrective action planning. Unemployment Insurance, State Quality Service Plan, Planning and Reporting Guidelines, ETA Handbook 336, 18th Ed. (March 2019) at I-3, available at https://wdr.doleta.gov/directives/attach/ETAHandbook/ET\_Handbook\_No.336\_18th\_Edition\_C hange 4\_acc.pdf (last visited March 31, 2021).

33. One of those "Core Measures" is for "Non-Monetary Determination Time Lapse," which measures the percentage of "non-monetary" determinations made within 21 days. DOL established a performance standard for state unemployment systems that requires at least 80% of nonmonetary determinations be made within 21 days of the date the issue is detected. *Id.*, at Appendix I, p.2. DOL reports performance data on "Non-Monetary Determination Time Lapse" on its website, located at:

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<u>https://oui.doleta.gov/unemploy/performance1.asp</u>. Reports can be generated for a specific state, as well as reports that rank all 50 states plus the District of Columbia, Puerto Rico and the Virgin Islands. The reports must be generated by the user using different web forms, depending on the report desired by the user.

34. The most recent monthly data on Virginia is for the month ending February 28, 2021, according to the "Benefits: Timeliness and Quality Reports" generated at <u>https://oui.doleta.gov/unemploy/performance1.asp.</u> This report indicates that only 1.7% of non-monetary determinations made by VEC for "separation issues" (issues related to the job loss) were made within 21 days and only 2.9% of such non-monetary determinations were made within 70 days; meaning 97.1% of non-monetary determinations involving separation issues take more than 70 days. Exhibit C. For non-monetary determinations made by VEC for "nonseparation issues" (all other issues), 3.3% were made within 21 days and 5.5% were made within 70 days, meaning 94.5% of non-monetary determinations involving nonseparation issues take more than 70 days. Exhibit D.

35. For the month ending January 31, 2021, the data were similar: only 1.7% of non-monetary determinations made by VEC for "separation issues" (issues related to the job loss) were made within 21 days and only 4.8% of such non-monetary determinations were made within 70 days. Exhibit E. For non-monetary determinations made by VEC for "nonseparation issues" (all other issues), 6.6% were made within 21 days and 11.1% were made within 70 days. Exhibit F.

36. DOL also publishes quarterly time lapse data relating to non-monetary determinations for all 50 states plus the District of Columbia, Puerto Rico and the Virgin Islands. <u>https://oui.doleta.gov/unemploy/ranking.asp.</u> Using a web form, a report ranking 53

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jurisdictions (50 states and 3 territories) may be generated by the user for discrete time periods. For the fourth calendar quarter of 2020, Virginia ranks last of all jurisdictions tracked –  $53^{rd}$  of 53 – with only 4.1% of non-monetary determinations issued within 21 days. Exhibit G. Virginia was ranked  $52^{nd}$  (of 53) for the second and third quarters of 2020 with 14.3% and 6.7% of determinations, respectively, issued in a timely manner. Exhibits H, I.

37. News reports indicate that as many as 90,000 people have filed initial claims with VEC and are stuck in a limbo status: they have not received benefit payments, they have not received information about their benefit claims, and they have not even received a deputy determination denying benefits (which they could appeal). *See* Ned Oliver, "Virginia ranks worst in nation for quickly reviewing some unemployment claims," *Virginia Mercury*, Oct. 30, 2020, available at <u>https://www.virginiamercury.com/2020/10/30/virginia-ranks-worst-innation-for-quickly-reviewing-unemployment-claims/</u> (last visited March 31, 2021); Colleen Curran, "'The communication . . . is broken': Almost a year later, out-of-work Virginians are still struggling to get answers or money from unemployment," *Richmond Times-Dispatch*, (Feb. 26, 2021), available at <u>https://richmond.com/news/local/the-communication-is-broken-almost-a-year-later-out-of-work-virginians-are-still-struggling/article\_2b388bd7-cbb6-5197-bb6f-08c734b34ab5.html (last visited March 31, 2021).</u>

38. In part, the delay in deputy determinations results from a conscious choice by VEC to hire additional staff for their "call center," and additional staff to help with initial claims processing, rather than deputies who can issue determinations. In October 2020, Megan Healy, Governor Ralph Northam's Chief Workforce Advisor, was quoted as follows: "And to be honest, we put our money in the call center staff and the processing staff, not adjudication officers." Oliver, *supra*.

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39. Notwithstanding the additional funding for call centers, many claimants spend hour after hour on VEC's website, or on "hold" with VEC's call center, desperately seeking information, and rarely receive anything helpful. *See* Curran, *supra*.

#### 1. Plaintiff Ashley Cox

40. Plaintiff Cox lost her job with DBi Services, LLC on November 6, 2020.

41. On July 14, 2020, Cox was severely burned by contact with a poisonous plant while working for DBi Services clearing the side of highway. DBi Services advised her on July 31 that she was terminated. However, after she applied for unemployment benefits on August 2, DBi Services changed her termination to a paid "leave of absence" under the Family and Medical Leave Act. She returned to work on October 22, after being cleared by her physician.

42. On November 6th, 2020, DBi Services gave her the choice of resigning – in which case DBi Services would pay the medical bills related to the burn she received while working – or being fired. She chose to resign.

43. Cox applied for unemployment benefits with VEC on November 8, 2020.

44. VEC issued a "monetary determination" indicating that Cox was entitled to \$378 per week for 26 weeks.

45. Cox has never received unemployment benefits from VEC.

46. In addition, Cox has not received a determination from VEC stating that she is not entitled to benefits. Accordingly, she has not had an opportunity to contest VEC's failure to pay benefits through the administrative process.

47. Cox has continued to file weekly claims, even though she has not received benefits.

48. Cox made several attempts to contact VEC to determine why she never received

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benefits. She was informed that a VEC deputy would review her case soon, and was then told to stop calling to inquire as to the status of her claim.

49. The absence of unemployment benefits has caused significant hardship for Cox and her family. Her sole source of income is \$648.46 in monthly child support and \$912 in monthly benefits under the Supplemental Nutrition Assistance Program ("SNAP"). She has exhausted her savings, overdrawn her checking account, and is selling personal possessions on eBay in order to remain current on electricity, water, and phone bills.

## 2. Plaintiff Emily Dimond

50. Plaintiff Dimond lost her job with CMG Women's Center on August 19, 2020. Dimond was told by her supervisor that her job was terminated due to poor performance, but she strongly disputes that characterization. She had worked at CMG Women's Center since 2018 as a Certified Medical Assistant.

51. Dimond applied for unemployment benefits with VEC soon after her job was terminated.

52. On or about August 26, 2020, she received a "monetary determination" from VEC indicating that she was entitled to \$327 per week, plus federal supplemental benefits.

53. Dimond never received unemployment benefits from VEC.

54. In addition, Dimond has not received a determination from VEC stating that she is not entitled to benefits. Accordingly, she has not had an opportunity to contest VEC's failure to pay benefits through the administrative process.

55. Dimond has continued to file weekly claims, even though she has not received benefits.

56. Dimond made several attempts to contact VEC to understand why she never

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received benefits. She has been unable to speak with anyone from VEC regarding her benefits.

57. The absence of unemployment benefits has been tremendously hard on Dimond and her partner. Their only income is her partner's monthly disability payment of roughly \$1,700. She is four months behind on mortgage payments, six months behind on her electricity bill, and her driver's license was almost suspended because she could not afford automobile insurance. During this period she had a stroke, has been prescribed anti-depressants, and has been scheduled for heart surgery.

#### 3. Plaintiff Penny Williams

58. Plaintiff Williams lost her job with Blue Ridge Behavioral Healthcare on October 23, 2020. Williams learned of her termination when she returned to work after taking off for two days in accordance with the Family and Medical Leave Act. At that point she could no longer get access to her employer's computer system, and she was given a letter implying that she had voluntarily quit her job. That was not true; she had not quit – she had been terminated. She had worked at Blue Ridge Behavioral Healthcare in Accounts Payable since January 2018.

59. Williams applied for unemployment benefits with VEC on October 26, 2020.

60. Despite her application for benefits, Williams never received benefits from VEC, or a determination that she is not entitled to benefits, or even a monetary determination. Accordingly, she has not had any opportunity to contest VEC's failure to pay benefits through the administrative process.

61. Williams has continued to file weekly claims, even though she has not received benefits.

62. Williams made several attempts to contact VEC to understand why she never received benefits. She was informed that a VEC deputy would review her case soon, and was then

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told to stop calling to inquire as to the status of her claim.

63. The absence of unemployment benefits has been tremendously hard on Williams and her family. Her sole source of income is \$690 per month in child and spousal support, and she is now on Medicaid. She is four months behind on lease payments and subject to eviction. She is four months behind on her electricity bill. She has two broken vehicles that she cannot afford to repair, and because she lives in a rural area, she has to arrange for transportation to go anywhere. She has a health condition, asthma, which requires regular medication, and recently she could not afford to purchase her medication until she borrowed money from a friend. She needs to ration her money between necessities like food and medicine, and never has enough for both.

# C. <u>VEC Performance for Continued Claims</u>

64. In the fall of 2020, news reports indicated that VEC was also terminating benefit payments without explanation to individuals who had begun receiving payments. *See* Amber Hipolit, "Mom waits 16 weeks for unemployment benefits: 'It just feels like a losing war,'" WTVR 6 Richmond, Sept. 29, 2020, <u>https://www.wtvr.com/news/problem-solvers/problem-solvers/problem-solvers-investigations/mom-waits-16-weeks-for-unemployment-benefits-it-just-feels-like-a-losing-war</u> (last visited March 31, 2021). A report in September indicated that nearly 60,000 people were in that limbo status: their benefit payments had stopped, but they had not received a deputy determination denying their benefit claims (which they could have appealed). *Id.* In early December 2020, VEC admitted that there were 80,000 people stuck in the "continued claims" limbo. Exhibit J (letter from William O Walton, Jr., Deputy Commissioner, VEC).

65. Plaintiffs' Counsel brought the issue to the attention of the Virginia Attorney General and VEC in a letter dated November 6, 2020. Exhibit K. Specifically, Plaintiffs'

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counsel advised VEC of the legal requirement to continue benefit payments that have been started unless a deputy determination is issued concluding that the recipient is ineligible. *Id*.

66. In an internal memorandum dated December 9, 2020, VEC acknowledged the legal obligation to continue these benefit payments, and promised to do so:

In order to comply with a precedent decision concerning the requirement to make prompt payments the agency will be taking steps to release separation issues holding up payments to individuals who are in a continued claim status (received at least 1 payment before the separation issue was discovered).

Exhibit L (memorandum to "All VEC Staff" from "Trish Williams, UI Director"). *See also* Exhibit J (resumption of payments "will allow payment of benefits [to be] consistent with 42 U.S.C. 303(a)(1), SSA" [*sic* – should be 42 U.S.C. § 503(a)(1)]).

67. The following month, VEC again acknowledged the legal obligation to continue benefit payments ("[i]n order to comply with a precedent decision") and claimed that it was at least in the process of doing so ("the agency has taken steps"). Exhibit M (memorandum to "All VEC Staff" from Williams).

68. Nevertheless, in response to a records request pursuant to the Virginia Freedom of Information Act, VEC conceded that, as of January 13, 2021, there were still 7,453 individuals in this "continued claim" status "who have not yet received resumed payments." Exhibit N. VEC later acknowledged that this number may understate the actual scope of the problem, because some claims may have been lost in their system, and because it was not counting claims in which issues had been identified prior to June 25, 2020.

69. Moreover, in a communication to Plaintiffs' counsel on April 8, 2021, UI Director Trish Williams – the same VEC official who authored the December memorandum acknowledging the legal obligation to continue benefits – described three cases in which VEC continued to violate that obligation even after her December 2020 memorandum was issued.

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At a meeting with Plaintiffs' counsel in February 2021, VEC officials acknowledged the obligation to continue claim payments, and advised Plaintiffs' counsel to submit names of individuals whose claims were stopped without notice to a specific email box. Plaintiffs' counsel submitted three names on February 17 to test the system. VEC responded on April 8. VEC's response shows (1) in all three cases claims were illegally stopped without a deputy determination, (2) benefits were illegally stopped for at least six months in each case, and (3) Ms. Williams's December 2020 memorandum had no apparent effect, because benefits were not restarted until a subsequent deputy determination. Exhibit O.

## 1. Plaintiff Amber Dimmerling

70. Plaintiff Dimmerling was laid off from her 35-hour-per-week job at a restaurant in Tysons Corner in March 2020. Although the restaurant remained open, as the pandemic hit Virginia, the restaurant went to using a skeleton crew. She was told that there wasn't any work for her.

71. Dimmerling applied for unemployment benefits with VEC in March 2020. Initially she received benefit payments, and in some weeks the payments included additional federal benefits.

72. At about the same time that Dimmerling was laid off, her daughter's school shut down to in-person instruction. She is a single parent, and her daughter has special needs. Before her layoff, she had only worked when her daughter was physically in school.

73. Dimmerling could no longer afford housing after her layoff, so she was forced to move (with her daughter) to her mother's home in Fredericksburg.

74. After she moved, her former employer contacted her occasionally to ask her to cover a shift at the restaurant. On one occasion her employer asked if she could come back to

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work on a very limited schedule. Those were not workable options. Working on a limited basis at the restaurant in Tyson's Corner would have required travel from Fredericksburg and paying for a sitter for her daughter.

75. Dimmerling's benefits stopped in September 2020. She has not received any benefits since. In addition, Dimmerling has not received any statement from VEC describing why her benefit payments stopped. Accordingly, she has not had an opportunity to challenge VEC's failure to continue her benefits through the administrative process.

76. At about the same time, Dimmerling received a monetary determination from VEC stating that she was eligible for Pandemic Unemployment Assistance, which is one form of supplemental federal assistance. She was asked to supply earnings information to VEC, and she did.

77. Dimmerling continued to file weekly claims, even though she has not received benefits since September 2020.

78. Dimmerling made many attempts to contact VEC since September 2020, but she has never been able to get an explanation as to why her benefits stopped.

79. In early January 2021, Dimmerling received a letter from the VEC that stated: "There is an issue(s) associated with your claim that may affect your eligibility for unemployment insurance... [T]he VEC will not prevent you from claiming and receiving UI benefits while the issue on your claim is evaluated."

80. Despite the letter, Dimmerling has not received benefits from VEC since September 2020.

81. The loss of benefits, without notice and without a chance to challenge the decision, have been tremendously hard on Dimmerling and her daughter. She lost her home, had

to leave the area and move in with family. The circumstances have been overwhelming.

## 2. Plaintiff Lenita Gibson

82. Plaintiff Lenita Gibson lost her job at BAE shipyard in February 2020.

83. Gibson was told that she was being laid off because business was slow. She has worked in shipyards for roughly 20 years.

84. Gibson applied for unemployment benefits with VEC soon after her job was terminated.

85. After applying for benefits, Gibson received a written notice from VEC stating that she was eligible for \$76 per week in unemployment benefits, plus federal supplemental benefits. The notice stated she could receive benefits for a total of 24 weeks.

86. Gibson received weekly benefit payments from VEC for approximately three weeks. After that point her benefits stopped, and she has not received any benefit payments since. In addition, she has not received any statement from VEC describing why her benefit payments stopped. Accordingly, she has not had an opportunity to challenge VEC's failure to continue her benefits through the administrative process.

87. At one point Gibson received a letter from VEC asking for information regarding her job separation. She filled out the form and took it back to the post office and mailed it soon after she received it.

88. Gibson has continued to file weekly claims, even though she has not received benefits.

89. Having never received notice or explanation as to why her benefits stopped, Gibson made many attempts to contact VEC. She could not get through on the phone. When she called and was able to get connected into the phone system (which happened only sometimes), she would

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have to stay on "hold" for a long time, and then would get dropped by the call system without reaching anyone. She also tried to go to the Norfolk VEC office to speak with someone, but the office was closed. She finally was able to speak with a VEC representative on or around late September 2020. The representative did not give her much information, other than to confirm that they received the job separation form that she had mailed back. The representative also told her that she would not get any more benefit payments until her case was reviewed by a VEC deputy.

90. Gibson received a form letter from VEC dated December 10, 2020, which stated that VEC was wrong to cut off her benefits, and that payments would resume while she waited for her case to be reviewed by a deputy. Nevertheless, Gibson has not received benefits.

91. The loss of benefits has been tremendously hard on Gibson. She managed to find a job at a seasonal swimming pool, from late July through late September 2020, but no other employment. Her landlord decided not to renew her lease in late 2020, and she became homeless for roughly four months in late 2020 and early 2021. (She currently has housing, but only as a result of temporary assistance through rent relief programs.) She has relied on food stamps and food banks to have something to eat, and she has no income other than food stamps.

## V. CLASS ACTION ALLEGATIONS

92. This case is brought as a class action pursuant to Federal Rule of Civil Procedure 23(a) and (b)(2), on behalf of the following classes:

(1) "Delay Class." All individuals who have: (a) filed an initial claim for unemployment benefits<sup>3</sup> with VEC after February 1, 2020; (b) filed at least one

<sup>&</sup>lt;sup>3</sup> "Unemployment benefits" includes regular unemployment compensation payable under the Virginia Unemployment Compensation Act, VA. CODE ANN. § 60.2-100 *et seq.*, as well as all extended benefits and any additional and special forms of benefits – including federal benefits – payable through the state unemployment compensation system, such as Pandemic Unemployment Assistance (which provides unemployment-type benefits to self-employed, independent contractors, and gig economy workers), Pandemic Unemployment Compensation (which aimed to provide \$600 weekly supplements to unemployment insurance payments for payable benefit weeks

additional weekly claim for benefits, for which there are payable benefits; (c) neither received benefit payments, nor an appealable decision from a VEC deputy denying their benefit claim, for more than 21 days after their claim has been filed.

Plaintiffs Cox, Dimond and Williams are members of the Delay Class.

(2) "Continued Claims Class." All individuals who: (a) have received one or more unemployment benefit payments from VEC since February 1, 2020; (b) have filed at least one additional weekly claim for benefits, for which there are payable benefits; and (c) subsequently stopped receiving benefits for a period greater than 14 days without receiving either: (i) an appealable decision from a VEC deputy denying their claims, or (ii) all benefit payments he or she would be entitled to receive if shown to be eligible and qualified.

Plaintiffs Dimmerling and Gibson are members of the Continued Claims Class.

93. *Numerosity*: The proposed classes are sufficiently numerous as to render joinder impractical. Upon information and belief, the Delay Class includes thousands – perhaps tens of thousands – of individuals. Based on reports from VEC, the Continued Claims Class recently included approximately 7,500 individuals – and probably more. Each Class's members are geographically disbursed throughout the Commonwealth of Virginia. These individuals are known through Defendant's records, and can be provided mail notice of this action with addresses taken from Defendant's records.

94. *Commonality*: Common questions of law and fact affect all members of each class,

including, by example only and without limitation:

(a) for the Delay Class, whether VEC's failure to determine the validity of unemployment benefit claims within 21 days of detecting a non-monetary issue,

before July 31, 2020), Lost Wages Assistance (which aimed to provide \$300 weekly supplements, for several weeks in the fall of 2020, to payable benefit weeks where the claimant was eligible for \$100 or more in underlying state benefits), Pandemic Emergency Unemployment Compensation (which provides additional weeks of benefits, once someone's regular unemployment or Pandemic Unemployment Assistance benefits are exhausted), and Extended Benefits (which aimed to provide additional weeks of benefits once someone's PEUC benefits were exhausted, for much of 2020).

violates (i) the Due Process Clause of the Fourteenth Amendment to the United States Constitution; (ii) the Virginia Unemployment Compensation Act, VA. CODE ANN. § 60.2-619, and/or (iii) the Social Security Act, 42 U.S.C. § 503(a)(1).

(b) for the Continued Claims Class, whether VEC practice of halting benefit payments without providing an appealable decision within 14 days, violates (i) the Due Process Clause of the Fourteenth Amendment to the United States Constitution;
(ii) the Virginia Unemployment Compensation Act, VA. CODE ANN. § 60.2-619, and/or (iii) the Social Security Act, 42 U.S.C. § 503(a)(1).

95. *Typicality:* The claims of Plaintiffs Cox, Dimond and Williams are typical of the claims of the Delay Class in that they have (a) submitted initial claims for unemployment benefits between August and November 2020; (b) filed at least one additional weekly claim for benefits, for which there are payable benefits; (c) neither received benefit payments, nor an appealable decision from a VEC deputy denying their benefit claim, for more than 21 days after their claim has been filed. Indeed, they have not received *any* response to their initial claims from VEC whatsoever, notwithstanding significant efforts on their parts to seek information, and they are in a limbo status in which they have neither benefits nor an appealable denial of benefits.

96. The claims of Plaintiffs Dimmerling and Gibson are typical of the claims of the Continued Claims Class in that they (a) have received one or more unemployment benefit payments from VEC since February 1, 2020; (b) have filed at least one additional weekly claim for benefits, for which there are payable benefits; and (c) subsequently stopped receiving benefits for a period greater than 14 days without receiving either: (i) an appealable decision from a VEC deputy denying their claims, or (ii) all benefit payments he or she would be entitled to receive if shown to be eligible and qualified.

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97. *Adequacy:* The named plaintiffs will fairly and adequate protect the interests of the proposed classes. Plaintiffs' claims are identical to the claims of the class members, they have no relevant conflicts of interest with other members of the proposed classes, and they have retained competent counsel experienced in class actions, unemployment compensation and constitutional law.

98. This action may be maintained under Federal Rule of Civil Procedure 23(b)(1) because prosecuting separate actions by different class members against VEC would create the risk of incompatible standards of conduct for VEC with respect to members of each class.

99. This action may also be maintained under Federal Rule of Civil Procedure 23(b)(2) because VEC has acted (or, more appropriately here, failed to act) in ways that apply generally to members of each class, so that final injunctive relief and corresponding declaratory relief is appropriate with respect to each class as a whole.

100. Management of this action as a class action will not present any likely difficulties.

101. In the interests of justice and judicial efficiency, it would be desirable to concentrate the litigation of all class members' claims in a single forum.

102. In view of the complexities of the issues and the expenses of litigation, the separate claims of individual class members are insufficient in amount to support separate actions.

## VI. CLAIMS FOR RELIEF

# COUNT I Denial of Due Process – 42 U.S.C. § 1983

103. Plaintiffs allege and incorporate by reference each allegation contained in this Complaint as if set forth herein.

104. Plaintiffs Cox, Dimond, and Williams, and members of the Delay Class assert a claim pursuant to 42 U.S.C. § 1983 for violations of their procedural due process rights under the

Fourteenth Amendment to the U.S. Constitution.

105. Plaintiffs Cox, Dimond, and Williams, and the members of the Delay Class have a legitimate expectation of entitlement to, and, thus, a protected property interest in, having their initial claims for unemployment benefits promptly examined and determined by a VEC deputy – resulting either in prompt payment of unemployment benefits, or a prompt, appealable determination that they are not entitled to benefits, pursuant to VA. CODE ANN. § 60.2-619.

106. VEC's failure to promptly examine claims caused the deprivation of applicants' entitlement to have their claims promptly examined. Section 1983 liability for constitutional deprivations by state actors includes the failure to act when there is a clear duty to do so.

107. VEC has no procedures to ensure claimants can get their initial claims for unemployment benefits promptly examined by a VEC deputy as required by VA. CODE ANN. § 60.2-619. By causing the vast majority of claimants to wait months before their claims are examined by a deputy, VEC has effectively extinguished claimants' property interest in having their claims promptly examined by a deputy. Consequently, plaintiffs Cox, Dimond, and Williams, and the members of the Delay Class, are stuck in a procedural limbo, where they are not receiving prompt decisions on their claims and have no way to challenge VEC's failure to promptly determine their eligibility and qualification for those benefits.

108. Plaintiffs Dimmerling and Gibson and members of the Continued Claims Class assert a claim pursuant to 42 U.S.C. § 1983 for violations of Plaintiffs' procedural due process rights under the Fourteenth Amendment to the U.S. Constitution.

109. Plaintiffs Dimmerling and Gibson and the members of the Continued Claims Class have a protected property interest in their continued receipt of unemployment benefits.

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110. Under the Social Security Act, 42 U.S.C. § 503(a)(1), and its implementing regulations, there is a "presumption" that Plaintiffs Dimmerling and Gibson and members of the Continued Claims Class are eligible to receive continued benefits unless they receive an appealable determination that they are no longer entitled to benefits. UIPL 04-01 ¶ 7 (Exhibit B ¶ 7). Neither Plaintiffs Dimmerling and Gibson – nor, by definition, the members of the Continued Claims Class – has received an appealable determination that they are no longer entitled to benefits.

111. VEC's decisions to stop benefit payments to Plaintiffs Dimmerling and Gibson and the members of the Continued Claims Class plainly constitute affirmative "state actions." And even if the events were to be characterized as "inaction" – failure to issue a timely determination of ineligibility, rather than affirmatively acting to stop benefit payments – that, too, constitutes "state action" for the purposes of Section 1983.

112. The procedures employed by VEC are transparently inadequate because they ceased payments without issuing timely, appealable determinations. Accordingly, Plaintiffs Dimmerling and Gibson, and the members of the Continued Claims Class, are denied benefits they are entitled to receive, and are stuck in a procedural limbo where they cannot challenge VEC's failures. This is not a close question of whether a certain decision-making procedure adequately protects the Plaintiffs' rights; this is a situation in which, for their purposes, there is no procedure at all.

# COUNT II Failure to Provide Prompt Payments – 42 U.S.C. § 503(a)(1)

113. Plaintiffs allege and incorporate by reference each allegation contained in this Complaint as if set forth herein.

114. Title III of the Social Security Act of 1935, 42 U.S.C. §§ 501-504, and 20 C.F.R. § 640.3(a) require that state unemployment compensation laws provide for such methods of

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administration as will reasonably ensure the full payment of unemployment benefits to eligible claimants when due and with the greatest promptness that is administratively feasible.

115. Plaintiffs Cox, Dimond, and Williams, and the Delay Class members they represent, have all filed claims for unemployment benefits with VEC, and have neither received benefits, nor an appealable determination that they are not eligible and/or qualified for benefits. They exist in a limbo status in which they are entirely powerless to claim the benefits to which they are entitled – wholly at odds with the statutory mandate to make prompt payment of benefits. Accordingly, in its actions and failures to act with respect to Plaintiffs Cox, Dimond, and Williams and members of the Delay Class, VEC has violated, and continues to violate, the "when due" provision of the Social Security Act, 42 U.S.C. § 503(a)(1), and 20 C.F.R. § 640.3(a), actionable pursuant to 42 U.S.C. § 1983.

116. Under the Social Security Act, 42 U.S.C. § 503(a)(1), a "presumption" of continued eligibility is created after a state agency such as VEC has begun to make a series of weekly benefit payments to a claimant. UIPL 04-01 ¶ 7 (Exhibit B ¶ 7). Accordingly, "in the absence of facts clearly establishing current ineligibility, the State agency presumes the claimant's continued eligibility until it makes a determination otherwise." *Id.* 

117. Such a determination – which in Virginia would be issued by a VEC deputy, see VA. CODE ANN. § 60.2-619(A) – must be "timely." UIPL 04-01 ¶ 7 (Exhibit B ¶ 7); see also VA. CODE ANN. 60.2-619(A), (C) (deputy must act "promptly"). And as to continued claims, determinations must be made within 14 days in order to be considered "timely." UIPL 04-01 ¶ 7 (Exhibit B ¶ 5).

118. As a result, if a question with respect to a claimant's eligibility arises *after* the claimant has begun to receive benefits, a VEC deputy must either issue a determination that the

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claimant is ineligible within 14 days, or VEC must pay the claimed benefits while that question waits for deputy evaluation. *Id.* ¶ 7 ("when the date for a timely determination has passed in a continued claim series, the State must either issue a determination of ineligibility for U[nemployment]C[ompensation] (where the facts establish ineligibility) or else pay the UC immediately"). If a deputy issues a timely determination that a claimant is ineligible, the claimant has a right to appeal. VA. CODE ANN. § 60.2-619(D).

119. Plaintiffs Dimmerling and Gibson, and the members of the Continued Claims Class, (a) have received one or more unemployment benefit payments from VEC; (b) have filed at least one additional weekly claim for benefits, for which there are payable benefits; and (c) subsequently stopped receiving benefits for a period greater than 14 days without receiving either: (i) an appealable decision from a VEC deputy denying their claims, or (ii) all benefit payments he or she would be entitled to receive if shown to be eligible and qualified.

120. VEC's actions in halting (and failing to promptly restart) benefit payments to Plaintiffs Dimmerling and Gibson and the members of the Continued Claims Class violate the Social Security Act, 42 U.S.C. § 503(a)(1), and its implementing regulations.

# COUNT III Failures to Meet Statutory Obligations – Virginia Code § 60.2-619

121. Plaintiffs allege and incorporate by reference each allegation contained in this Complaint as if set forth herein.

122. Plaintiffs Cox, Dimond, and Williams, and the members of the Delay Class have, under Virginia law, a statutory right to have their initial claims for unemployment benefits promptly examined and determined by a VEC deputy. That examination should result either in prompt payment of unemployment benefits, or a prompt, appealable determination that the applicants are not entitled to benefits, pursuant to VA. CODE ANN. § 60.2-619.

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123. Plaintiffs Cox, Dimond, and Williams, and the Delay Class members they represent, have all filed claims for unemployment benefits with VEC, and have not had their claims promptly examined by a VEC deputy, in violation of VA. CODE ANN. § 60.2-619.

124. VEC lacks procedures to ensure claimants can get their initial claims for unemployment benefits promptly examined by a VEC deputy as required by VA. CODE ANN. § 60.2-619. By causing the vast majority of claimants to wait months before their claims are examined by a deputy, if at all, VEC has effectively extinguished claimants' statutory rights. Consequently, Plaintiffs Cox, Dimond, and Williams, and the members of the Delay Class, are stuck in a procedural limbo, where they are not receiving prompt decisions on their claims and, in turn, have no way to challenge VEC's failure to promptly determine their eligibility and qualification for those benefits.

125. The Virginia Unemployment Compensation Act, VA. CODE ANN. § 60.2-619 establishes a "presumption" of continued eligibility after VEC has begun to make a series of weekly benefit payments to a claimant, and requires VEC to continue benefits payments, while a question waits for deputy evaluation, unless a deputy makes a timely determination that benefits are not appropriate.

126. As a result, if a question with respect to a claimant's eligibility arises after the claimant has begun to receive benefits, a VEC deputy must either issue a timely determination that the claimant is ineligible, or VEC must pay the claimed benefits. If a deputy issues a timely determination that a claimant is ineligible, the claimant has a right to appeal. VA. CODE ANN. § 60.2-619(D).

127. Plaintiffs Dimmerling and Gibson, and the members of the Continued Claims Class, (a) have received one or more unemployment benefit payments from VEC; (b) have filed at

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least one additional weekly claim for benefits, for which there are payable benefits; and (c) subsequently stopped receiving benefits for a period greater than 14 days without receiving either: (i) an appealable decision from a VEC deputy denying their claims, or (ii) all benefit payments he or she would be entitled to receive if shown to be eligible and qualified.

128. VEC's actions in halting (and failing to promptly restart) benefit payments to Plaintiffs Dimmerling and Gibson and the members of the Continued Claims Class violates the Virginia Unemployment Compensation Act, VA. CODE ANN. § 60.2-619.

## VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Cox, Dimond, and Williams, on behalf of themselves and the class they represent, and Plaintiffs Dimmerling and Gibson, on behalf of themselves and the class they represent, demand judgment on behalf of themselves and the putative class members for declaratory and injunctive relief as pled, including the adjudication and payment of unemployment benefits, a prohibition against further violations of law and for such declaratory and injunctive relief as may be appropriate; for attorneys' fees and costs; and for such other relief the Court does determine just and appropriate.

## The Plaintiffs demand a trial by jury.

Respectfully submitted, Ashley Cox, Emily Dimond, Penny Williams, Melissa Dimmerling and Lenita Gibson, on behalf of themselves and all others similarly situated.

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# Exhibit A

UIPL 1145 Attachment

Attachment to UIPL No. 1145

## PROCEDURES FOR IMPLEMENTING THE JAVA DECISION REQUIREMENTS

Manpower Administration Unemployment Insurance Service

#### Procedures for Implementing the Java Decision's Requirements

#### I. Introduction

The material contained in this statement discusses the procedural implications of the <u>Java</u> decision by the U.S. Supreme Court. The Court's opinion in this case was primarily an explanation of the reasons for its decision rather than an explanation of the procedures to be followed in applying the decision and its opinion. The reasoning of the Court in support of its decision is, however, broader in scope than the factual situation in the specific case it was considering. Other cases now pending in the Federal Courts may reach the Supreme Court and elicit from it more specific guidance as to the procedures required in the adjudication of unemployment benefit cases.

Pending such further guidance by the Supreme Court, procedures implementing the <u>Java</u> decision must nonetheless be adopted even though it is recognized that changes may later be necessary and that experience may show that certain of the procedural choices are more and others less effective in meeting the requirements stated by the Court and attaining the statutory objectives which the Court described.

Unemployment Insurance Program Letter No. 1126 states the Manpower Administration's view that to meet the interpretation of section 303(a)(1) of the Social Security Act, given by the Court in its Java opinion, "a State's law and procedure must provide for:

- 1. Paying benefits promptly, after a determination has been made in the claimant's favor, regardless of the pendency of the appeal period or of any appeal that has been taken from the determination; and
- Providing reasonable notice to both the claimant and employer of the time and place of the predetermination factfinding hearing."

#### Promptness of Determination and Payment

In considering procedural steps to implement the requirements stated by the Court, the fullest weight must be given to the emphasis the Court repeatedly placed on the Congressional objective of achieving the promptest payment of benefits that is administratively possible.

"The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee. Probably no program could be devised to make insurance payments available precisely on the nearest payday following the termination, but to the extent that this was

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administratively feasible this must be regarded as what Congress was trying to accomplish. The circumstances surrounding the enactment of the statute confirm this."

(After citing the 1935 recommendations of the Committee on Economic Security and its staff's estimates of possible amounts and duration of unemployment benefits, the Court continued.) "Other evidence in the legislative history of the Act and the commentary upon it supports the conclusion that 'when due' was intended to mean at the earliest stage of unemployment that such payments were administratively feasible after giving both the worker and the employer an opportunity to be heard. The purpose of the Act was to give prompt if only partial replacement of wages to the unemployed, to enable workers to tide themselves over, until they get back to their old work or find other employment, without having to resort to relief."

"Our reading of the statute imposes no hardship on either the State or the employer and gives effect to the congressional objective of getting money into the pocket of the unemployed worker at the earliest point that is administratively feasible. That is what the Unemployment Insurance program was all about."

The Court's stress on speeding benefit payments to unemployed workers suggests that this factor appropriately is the key criterion to be used in choosing among alternative procedures for implementing the requirements stated in the decision. This objective of prompt payment seems clearly, in the Court's view, to suffuse the entire unemployment insurance program. The Court said: "We conclude that the word 'due' in § 303(a)(1), when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both patties have notice and are permitted to present their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment."

#### Requirement of Benefit Payment During Pendency of Appeals

Although the Court's decision dealt specifically only with the initial determination of a worker's eligibility made at the time of the worker's initiation of a claim series, the reasoning of the Court would lead to the conclusion that when redeterminations or appeal decisions allow benefits such benefits must be paid promptly without delay or suspension because of the pendency of an appeal or an appeal period. It would follow also that determinations and decisions that disqualify workers for benefits for lesser periods than the State statute would permit or for the maximum disqualification period do not justify withholding benefits for weeks following the benefit denial.period specified in the disqualifying determination or decision. If the individual is able to work and available for work and otherwise meets requirements for entitlement for such weeks, he should be paid benefits for such weeks.

The Court did not pass on the effect of a subsequent redetermination or appeal decision reversing the initial determination awarding benefits or modifying it adversely to the claimant. Nor did it deal with the adequacy of a subsequent determination, based on a later and different issue, to deny benefits to the claimant. In the case of an appeal decision that reverses or modifies adversely a determination that allowed benefits, it seems clear that such a decision stops the payment of benefits. The Court recognized that appeal decisions involve de novo considerations and, of course, the parties to an appeal are given an opportunity for a fair hearing. As to redeterminations relating to the same issue and determinations relating to new and later issues, even though it is recognized that both categories are in issue before the Federal courts, it seems reasonable to assume that the same predetermination process that is sufficient to establish that benefits are "due" is'sufficient to establish that they are not "due." The procedural discussion in this document proceeds on this assumption.  $\frac{1}{2}$ 

# Requirement of Notice and Opportunity to be Heard

Most of the procedural discussion contained in this document deals with the predetermination hearing to which the Court referred in its conclusion (i.e., "a hearing of which both parties have notice and are permitted to present their respective positions"). These particular procedures are not required for conformity with the Court's interpretation of section 303(a)(1). They are recommended as reasonable approaches which meet the requirements of the statute with due regard to the promptness of benefit

https://wdr.doleta.gov/directives/attach/UIPL/uipl\_pre1975/uipl\_1145a.cfm

#### UIPL 1145 Attachment

payments that the Court has stressed. But they are not the only such approaches. The Court left to the States the choice of procedures to be used in predetermination factfinding proceedings, so long as the procedures provide to the parties reasonable notice and opportunity to be heard and result in the prompt payment of benefits.

The words "hearing" and "be heard" as used by the Court in the <u>Java</u> opinion are susceptible of more than one interpretation. That the Court did not use "hearing" to require a "due process" hearing, "fair" hearing or an "evidentiary" hearing would seem clearly to follow from its careful avoidance of the holding in <u>Goldberg v. Kelly</u> (397 U.S. 254), which the <u>Java</u> appellees had urged the Court to follow. In <u>Goldberg v. Kelly</u> the Court's majority had said that although "statutory 'fair hearing" was not required (p. 266), welfare payments to a recipient who had initially been held eligible could not be suspended without a pretermination evidentiary hearing (p. 264). Instead, in <u>Java</u> the Court said specifically that.:

"Although the eligibility interview is informal and does not contemplate taking evidence in the traditional judicial sense, it has adversary characteristics and the minimum obligation of an employer is to inform the interviewer and the claimant of any disqualifying factors. So informed, the interviewer can direct the initial inquiry to identifying a frivolous or dilatory contention by either party."

Thus, although a State agency may choose, and in some cases most appropriately, to provide a conventional type of hearing such as an "evidentiary," "due process" or "fair" hearing before making a determination of an unemployment benefit issue case, <u>2</u> it cannot be said that this is the Court's requirement.

The following points as to the character of the predetermination factfinding proceeding emerge from the Court's opinion.

1. The Court equated "interview" and "hearing" (It (the preliminary interview) ... is an occasion when the claims of both the employer and the employee can be heard ...) (402 U.S. 121, at p. 134)

2. The Court's recitation of the details of the California determination procedure early in its decision (402 U.S. 121, at pp. 126-127) notes carefully that, when the claim is filed, "the employer is asked to furnish, within 10 days, 'any facts then known which may affect the claimant's eligibility for benefits'." Subsequently the Court noted, if the employer challenged eligibility, the interviewer is required "to seek from any source the facts required to make a prompt and proper determination of eligibility." "This," said the Court, "clearly contemplates inquiry to the latest employer, among others." The Court then describes the claimant as appearing for his interview and being asked to answer questions, explain inconsistencies and offer his version of the facts. "The interviewer is instructed to make telephone contact with other parties, including the latest employer, at the time of the interview, if possible ... Interested persons, including the employer, are allowed to confirm, contradict, explain, or present any relevant evidence."

3. The Court pointed out that a proceeding conducted "informally" which does not "contemplate taking evidence in the traditional judicial sense," meets the traditional "hearing" requirement. (402 U.S. 121, at p.134)

4. The purpose of the proceeding is to inquire into the claim and to obtain information that supports or opposes the claim.

5. The employer's contribution to the proceeding is to furnish <u>information</u>. His "minimum obligation ... is to inform the interviewer and the claimant of any disqualifying factors." The employer who "has notice of the time and place of the preliminary interview" has a "responsibility to present sufficient data to make clear his objections to the claim for benefits and put the interviewer in position to broaden the inquiry if necessary." The employer "who fails to present any evidence ... has in effect defaulted ..." (402 U.S. 121, at 134)

#### UIPL 1145 Attachment

6. The inquiry is to be controlled by the interviewer. The information elicited from the employer and the claimant becomes the basis for any necessary further inquiry to develop additional information that is required to make a determination. (402.U.S., 121, at p. 134)

Taking these enumerated aspects of the Court's use of the word "hearing" into accounts at least two views can reasonably be taken of the Court's meaning and intent that are different from the conventional type of hearing.

For purposes of convenience one of these may be labeled the "separate interview" approach and the other the "investigatory proceeding" approach. (As will presently appear, these are labels and not precise descriptions.)

## Separate Interview

This approach says in effect, that the Court's reference to furnishing an employer an opportunity to be heard means giving the employer a reasonable opportunity to present his information and factual contentions about the claim in an effective manner. To provide such an opportunity: (1) the employer must be asked to supply a written statement of potentially disqualifying information and he may be called on the telephone to give more details when further statements from the claimant at the interview or before indicate that such a telephone inquiry is appropriate or necessary and; (2) in addition, the employer must be advised in any case involving a determination issue that he may also, if he wishes, appear in person or through a representative at the local office and supply such further information with respect to the claim as he may have to present. To meet this latter requirement States may request employers at the time they respond to the request for separation information to indicate whether they wish to appear at the local office to present information on the claim. Employers who reply affirmatively indicating a desire to appear would be notified of the date and place of the claimant interview and advised that they should call the local office to arrange for their own appearance and interview in sufficient time so that the information they then present may be used in the interview with the claimant. When the employer appears, a claims examiner will interview him concerning the claim and obtain from him such additional information as he has to offer.

As is apparent, this view of the Court's use of the word "hearing" rests on a conclusion that the Court did not refer to a proceeding in which both parties must be given an opportunity to appear at the same time and place to present their information in each other's presence. Instead, the Court used the term broadly to encompass a factfinding process which would assure that each party was permitted to present his version of the facts in writing and by personal appearance, be apprised of the substance of the other's position and then be given a further opportunity to respond when a response would be material to the determination.

## Investigatory Proceeding

This approach takes a different view of the Court's use of the word "hearing": The "hearing" is to be a proceeding that is held at a specific time and place, at which the parties are given an opportunity to appear, in each other's presence, and to present their information on the issue to the examiner directly and in person. Consistent with this view, the notice of the time and place of the proceeding serves the purpose of advising the parties when and where they should be present if they are to attend.

The proceeding differs from the conventional hearing in some significant respects. The Court indicated that the proceeding is conducted in the form of an interview to obtain information, clarify or verify questionable statements, and seek explanations of inconsistent facts. It is conducted by an examiner whose responsibility it is to obtain all of the facts required for a prompt and proper determination of the claimant's right to benefits, and who may not act merely as an umpire or judge of conflicting contentions of opposing parties: Accordingly, he asks the questions of the parties and not they of each other (or, through their representatives, of themselves). It is informal and does not follow traditional modes of taking evidence. Information obtained outside the proceeding (written statements by the employer, telephone

#### UIPL 1145 Attachment

calls, etc.) may be given full consideration. In these circumstances, oaths, a verbatim record, subpoenas and cross-examination are not required and are not recommended.

States should also be mindful of our continued recommendation, expressed in UIPL 1126 that all State laws should authorize the State agency to transfer cases involving difficult issues of fact or law and multiple claimants to the appeal tribunal or the board of review for determination, following a full and fair hearing. (See UIPL No. 1136 for suggested legislative language for such authorizing statutory provisions.)

#### II. Current Claims Taking and Interviewing Procedures Affected by the Java Decision

In many States methods have been devised for identifying claims which require special handling for factfinding and nonmonetary determination, while permitting routine non-issue cases to be processed rapidly and economically.

Typically, this has involved brief questioning of claimants at the initial claims contact to obtain the reason for separation. When an issue has been raised by the claimant's statement, arrangements have been made for a subsequent factfinding interview at which the issue is inquired into. This has afforded time to make the monetary determination and obtain employer information. It has also limited extensive interviewing to cases where claimants continue to file claims. The postponement of the interview has eliminated interview and determination time for claimants who return to work or are monetarily ineligible.

Typically, the separating employer has been notified of the claim filed and the claimant's stated reason for separation. Employers have been asked to respond if they have any reason for questioning eligibility. The intent has been to have this response on hand when the previously scheduled time for the claimant's appearance arrives, thus permitting an interviewer  $\frac{3}{2}$  to conduct a factfinding interview based upon the employer's statement, as well as the claimant's. This kind of procedure has afforded the claimant an opportunity to rebut information furnished by the employer prior to the final determination. Interviewers have been expected to seek additional information needed for a proper determination if the employer statement is inadequate or he fails to respond.

The essential elements of this process will continue to be necessary under the following procedures. In addition, it will be necessary to afford an interested employer notice and opportunity to be heard in issue cases.

#### III. Factfinding Proceeding Required in Issue Cases Only

Essentially, opportunity for an interested employer to be heard is required only when there is an issue as to benefit entitlement. Questions involving chargeability only would not be governed by the requirements of the Court's decision. When the claimant has indicated that he was separated for lack of work, and the employer does not dispute this statement, no change in existing procedure is required. When the information given by a claimant upon filing his claim, taken together with the separation information furnished by the employer, can result only in ineligibility or disqualification, there is no necessity to afford the employer an opportunity to appear. When issues do not involve any employer who is an interested party, the predetermination factfinding proceeding presumably would differ little from present factfinding interviews.

#### **Interested Parties**

State law will determine who are interested parties in addition to the claimant. Only employers who are interested parties must be afforded an opportunity to appear in predetermination proceedings. In most States, when an initial claim is filed, only the separating employer is an interested party. In some States, however, all base-period employers as well (as the separating employer) are interested parties. Whether (and which) employers are interested parties in connection with issues arising during a claim series also depends upon provisions of State law.

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#### IV. Promptness of the Determination Process

Determinations on issues arising in connection with new claims may be considered on time within the meaning of the Court's requirement for promptness if accomplished no later than the second week after the week in which the claim is effective.

The proposed time limit provides for completion of the determination process on normal claims (nonretroactive) by the end of the week in which the claimant would be certifying to his first compensable week regardless of the type of "week" used by the State.

These are examples of how this time limit for promptness would work out with a claim filed on August 12 (Thursday) in three different types of State "week":

Type of State "week"	Effective Date of Claim	Time Limit for Determination
1. Calendar week (claims predated to preceding Sunday)	August 8 (Sunday)	August 27 (last working day of the second week after week which the claim was effective)
2. Calendar week (claim post- dated to following Sunday)	August 15 (Sunday)	September 3 (last working day of second week after week for which the claim was effective
3. Flexible week (claim effective on date of filing)	August 12 (Thursday)	September 1 (last working day of second (flexible) week after week for which the claim was effective)

Prompt mailing of notices is critical to prompt completion of the process. Mailing times involved will often make it difficult or perhaps impossible to achieve the promptness contemplated when notices to employers are prepared and mailed centrally. For this reason the procedures proposed here envision mailing of such notices from local offices. An employer's failure to respond on time to notices should not be permitted to delay proceedings.

#### V. Scheduling and Notification Process

An opportunity to appear requires that the parties be informed of the time, place and nature of the proceeding so that the parties can know and protect their rights.

A. Notification of Parties (See subsection B as to mass separations.)

The procedures for providing notice to claimants and employers include new elements designed to inform the parties of their opportunity to appear.

#### 1. Notice to Employer

a. Notice of Claim Filed and Request for Separation Information

Informing employers of their right to appear should be tied in with the current practices, in most State agencies, of mailing notices of claims filed.  $\frac{4}{2}$ 

The notice of claim filed should contain the following information:

(1) The claimant's stated reason for separation;

(2) That the employer must post his return of the notice within <u>5 calendar days</u> of its mailing by the agency with any information he has concerning the

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circumstances of separation or any reason he has to question the claimant's eligibility;  $\frac{5}{2}$ 

(3) The consequence under State law of his failure to respond to the notice;

(4) That the claim will be determined on the basis of available information in the absence of a reply from him;

(5) That in cases where issues  $\frac{6}{2}$  are raised by the information obtained from him or the claimant he may attend a predetermination factfinding proceeding;

(6) That he is not required to attend such a proceeding and, if he chooses to rely on written information rather than appear in person, it will be given full consideration in the making of the determination;

(7) That he should reply as to whether or not he wishes to attend such a proceeding in the cases and that if he replies that he wishes to attend, he will be notified of the time and place; and

(8) That benefits will be paid immediately if allowed, even though an appeal is taken.

#### b. Notice to Employer of Proceeding

There are at least two methods for notifying the employer of the actual place and time of the proceeding. One method is to schedule the proceeding automatically after discovery of an issue, and to provide information concerning the time and place of the proceeding in the notice mailed to the employer. The proceeding would most likely be set for the time that the claimant is scheduled to report to the local office. <sup>7</sup> This method would have the advantage of providing earlier advice to the employer, thus giving him a better opportunity to decide whether he can, or wishes to, attend the proceeding. A major disadvantage would be that such a procedure would require an advance allocation of space and claims examiners' time for such proceeding before it is known whether the employer will appear.

The second method, which appears to be preferable, is to schedule the proceeding after an employer has indicated on his response to the notice of claim filed that he intends to appear. Better estimates can then be made of the time required for a particular proceeding and the time required, in the aggregate, for <u>all</u> proceedings scheduled on a particular day. It also makes possible more flexibility in scheduling predetermination proceedings for cases in which the employer elected not to appear. The disadvantage of this procedure is that it requires two contacts with employers who indicate a desire to appear -- the notice of claim filed and the notice of time and place of the proceeding.

When an employer has signified his intention to appear at the proceeding, a notice of the time and place should be mailed to him at least <u>three calendar days</u> before the scheduled date of the proceeding. <sup>§</sup> If, for example, the proceeding is to be held on Tuesday, the notice should be mailed no later than the preceding Friday. The next three calendar days, the days of notice, would be Saturday, Sunday, and Monday. (Note that the mailing date has not been counted and the date of the proceeding is the day following the specified number of calendar days of notice.)

When circumstances require that such notification be given by telephone (as is likely to be the case in separate interview proceedings), an appropriate record should be made of

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the exact information given the employer, the name of the person to whom the information was given, and the date and hour of the telephone call.

#### c. Content of Notice to Employer of Proceeding

If the employer who has requested an opportunity to appear is to be given an effective opportunity, he must be given certain basic information concerning the proceeding.

This should include, at least:

(1) The time, place and purpose of the proceeding; and

(2) His right of representation and that any person designated to appear at the proceeding to present information on the employer's behalf should either have direct knowledge of the circumstances surrounding the issue or be able to present the written statement of a person who has such knowledge and/or the employer's pertinent, written records.

2. Notice to Claimant of Proceeding

Claimant must be informed of the predetermination proceeding but the method employed for notification will vary according to whether advance notice is required and whether other interested parties are involved in the determination.

When no other interested parties are involved, in most instances it will be possible to hold the proceeding immediately and no written notice will be required. The claimant should be informed of the purpose and nature of the proceeding.

If the proceeding is scheduled for a later date, the notice to the claimant should be in writing. This may be given by entry on the claimant's reporting booklet or on a separate notification form. The following information should be provided in the notice:  $\frac{9}{2}$ 

- a. The time, place and purpose of the proceeding;
- b. Advice that the employer might attend;  $\frac{10}{10}$
- c. The need for particular evidence (doctor's statement, etc.) and the claimant's right to bring witnesses;
- d. His right of representation; and
- e. That he notify the local office if he cannot attend the proceeding at the scheduled time and the reasons so that the office may reschedule the proceeding or take whatever other action is appropriate.
- 3. Time and Place of Proceeding

The time and place of the proceeding must neither burden the claimant nor delay payment of benefits to which the claimant may be found entitled. It is recommended that the proceeding be scheduled for the day and hour on which the claimant is scheduled to report at the local office.  $\frac{11}{11}$  By so scheduling the proceeding, the local office procedures for equalizing workloads by spreading claimant reporting periods throughout the days of the week would better be maintained.

4. Requests for Postponement or Continuance

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Since requests for postponement or continuance of a proceeding may, if granted, delay the payment of benefits that may be due, they should not be granted except in compelling circumstances. Such a request by an employer, however, can often be satisfied by asking him to appear separately from the claimant or inviting him to submit his information in writing or by telephone.

Since the claimant is the initiating party who seeks prompt payment of benefits and is moreover required as a condition of getting benefits to report when requested by the agency, his presence at the proceeding is generally assured. On the infrequent occasions when he requests a postponement it should be granted where information from him is necessary to make the determination and it would be difficult to obtain from him in writing.

#### B. Notice Requirements in Mass Separations

In the case of mass lay-offs where employers furnish lists of laid-off workers to the agency there is no need for notice to the employer and opportunity to be heard in person because lack of work is the cause of separation.

In mass cases involving issues, such as labor disputes, special procedures may be necessary, and as recommended in UIPL Nos. 1126 and 1136, consideration should be given to referral of the claims to the appeal tribunal or board of review for the initial determination.

#### VI. Requirements for Notice When Issues Arise After the Initial Determination

In general, the preceding section applies also to issues that arise during a claim series or to an additional claim. Insofar as such issues involve special consideration, however, they are discussed in this section.

The <u>Java</u> case did not involve an issue arising after the initial determination. The reasoning of the Court, however, requires that interested employers be given notice and opportunity to be heard with respect to such issues.

#### A. Issues Arising During a Clam Series

When an issue arises during a claim series and the claimant is the only interested party, no substantive changes from existing procedures are required. A typical situation would involve a claimant who, during his regular interview, reports an illness during the week being claimed that might warrant denial of benefits for the week. All necessary actions can be taken on the spot, and the claimant may be informed of the issues and of his right to hearing. Factfinding can then take place, and a determination can be made.

When an issue arising during the claim series involves any interested party in addition to the claimant, notice and an opportunity to be heard must be given to such other party. The determination of the issues may not be made until such notice and opportunity has been provided. Such determinations will be considered on time within the meaning of the Court's requirement for promptness if issued no later than the end of the week following the week in which the issue arises.

#### B. Additional Claims

C. An additional claim begins a new claim series and involves a new reason for unemployment. Unlike a claim that may begin a benefit year, however, such a claim does not require a monetary determination.

It follows that payment of benefits cannot commence until a determination of entitlement is made after notice to the pprties and opportunity to be heard. When an issue arises in connection with an additional claim, and notice must be afforded to parties other than the claimant a proceeding must

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be scheduled for a date after the filing of the claim. As in the case of new claims, employers should be given notice of the claim and five calendar days in which to respond and to state whether they wish to appear in person. Employers who wish to attend should be afforded at least three calendar days' advance notice of time and place of the proceeding. If the employer elects to appear, a determination issued in the second week after the additional claim is effective will be considered on time within the meaning of the Court's requirement for promptness. In other cases it should be possible to issue the determination by the end of the week after the additional claim is effective.

#### VII. Conduct of the Predetermination Proceedings

#### A. Investigatory Proceedings

Although the appearance of an employer or his representative adds a new element, it need not materially change the content of the factfinding interview from that conducted by interviewers prior to the <u>Java</u> decision. While each State must determine how its proceedings will be conducted, it is our recommendation that: the proceeding should not be recorded, the parties should not be required to testify under oath, and the subpoena procedure should not be used. Each party, however, may have witnesses appear in his behalf, and where necessary the party or the witness may avail himself of the services of an interpreter whom either he or the agency may provide.

The interviewer should tactfully but firmly control the proceedings. Each party should be given an opportunity to present his view of the facts, and should be given rebuttal opportunity. The interviewer may and should ask questions to elicit from the parties and their witnesses information he deems relevant to the issues in the case at hand. He should have the parties' questions and answers directed to him rather than permit questions, discussion or argument between the parties.

In some instances a party may wish to record the proceeding. While the agency cannot prohibit such recordings, the practice should be discouraged, as it may disrupt the conduct of the proceeding. Both parties must be informed in such cases that the agency record will be the only official record to be used in making the determination or in any subsequent appeals.

#### 1. Preparation of Factfinding Report

State practice in the preparation of factfinding reports may be used at a predetermination factfinding proceeding. The common practice of taking notes which can be used in preparing factfinding reports will suffice. Since the factfinding report, essentially, is a report of the interviewer, it is not necessary that the individual parties sign the report. However, some State agencies may wish to have parties sign certain statements which appear to be vital to the proceedings, and this may be done.

#### 2. Separate Appearances of Claimant and Employer

The investigatory type of predetermination proceeding is intended to afford the employer an opportunity to appear at the factfinding interview at the same time as the claimant. Provision for employer appearance should not be made for any place other than the local office where the claimant is filing and the proceeding is scheduled. If an employer requests an opportunity to make his appearance elsewhere, he should be asked to submit his information in writing instead, since only the claim-filing office has records and knowledge of the case.

If an employer wishes to appear at the claim-filing office before the scheduled time for the proceeding, he should be permitted to do so if at all possible, but he should be informed that the claimants appearance will not be rescheduled to conform to his. (This in, effect changes the proceeding to the separate interview type explained in VII.B below.)

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In responding to a request by an employer for separate appearance, he should also be informed again that information may be submitted in writing and it will be given full consideration in the making of the determination.

#### 3. <u>Representation of Parties</u>

Each party has the right to be represented by a person of his choice, but this right has been seldom exercised at the determination level. In view of the Java decision, representation at the factfinding proceeding may increase. The handling of the representative adds a new dimension to the interviewer's task. The interviewer should ascertain at the outset the status of the representative and he should inform him that his participation will be limited to the presentation of information necessary to decide the issues, and as to which he has direct knowledge or is able to present the written statement of a person who has such knowledge and/or the employer's pertinent written records.

#### B. Separate Interview

This type of proceeding consists essentially of providing for a personal interview on the determination issues with an employer who has requested it in addition to the predetermination factfinding interview with the claimant. Accordingly, the considerations that make recordings, oaths, and subpoenas inappropriate in the investigatory proceedings apply with equal or greater force in the separate-interview proceeding. No change from pre-Java practices would appear necessary in the claimant-interview portion of the proceeding.

The employer-interview part of the proceeding would differ from any other factfinding interview conducted by the interviewer only in the need for the interviewer to take into account the fact that the interview takes place as the result of the employer's request and that it usually supplements written information already provided by the employer. Presumably, the employer in such an interview has additional information and the interviewer should permit him to present that additional information before any questions designed to get other information are directed to the employer. The employer may wish to raise questions that he believes should be put to the claimant. These should be accepted when they are pertinent to claimant's benefit eligibility and the employer should be assured that they will be taken up in the claimant interview.

Subparagraphs A. 1 and 3 Would appear to be generally applicable also to separate interviews.

#### C. Referral of Cases to the Appeals Authority

Certain types of cases are not suited to the predetermination proceeding contemplated for the great majority of determination issues. These are cases involving difficult questions of fact or law and multiple claimants. It is recommended that State agencies use their authority to transfer such cases to appeal tribunals or boards of review for determination. If a State agency now lacks legislative authority for transferring such cases to an appeals body, it should seek such authority. <sup>12</sup> As in other types of predetermination proceedings, promptness is crucial.

#### D. Notice of Determination

Present State practices with respect to the preparation and distribution of Notices of Determination are not affected by the changes in procedures required to insure that both claimant and employer(s) are given reasonable notice and opportunity to be heard. Any needed adaptations would present no problem so long as they do not interfere with the prompt completion of the determination process. In any event, the claimant is entitled to a written Notice of Determination as provided in section 6013, Standard for Claim Determinations-Separation Information, Part V of the ES Manual.

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## VIII. <u>Payment of Benefits During Investigation, Determination, Redetermination and Appeals (Including Higher Authority)</u><sup>13</sup>

- A. Under the <u>Java</u> decision benefits allowed in an initial determination may not be withheld by reason of the pendency of the appeal period or of an appeal.
- B. In addition, the reasoning of the Court in the Java decision supports the payment of benefits as indicated below. <sup>14</sup>
  - 1. Redeterminations

Since practices vary so widely among the States, the following covers only the most common kinds of redeterminations: (a) When a claimant was initially found ineligible and another interested party is involved, notice and opportunity to be heard in a predetermination proceeding must be offered both parties before a redetermination can be made. No benefits may be paid until the redetermination is completed and then benefits are to be paid immediately or denied, according to the redetermination. (b) When a claimant was initially found eligible, notice and opportunity to be heard must be afforded to the claimant and any other interested party before a redetermination can be made that could modify or reverse that initial determination. In the meantime benefits may not be withheld. Benefits will be paid or denied upon the issuance of. the redetermination and in accordance therewith.

2. Appeals

Except as it may be precluded by a "double affirmance" provision in the State law, an appeal decision should be given immediate effect when it is issued and benefits should be paid or denied in accordance with it regardless of the issue involved or previous determinations and decisions and regardless of the fact that a further appeal may be taken.

3. Payment of Benefits for Weeks Not in Dispute

In the case of an appeal, it has been the practice to pay benefits only for weeks "not in dispute." For example, in a voluntary--quit case where State law provides a variable 1-to-6 week disqualification, and a 3-week disqualification has been assessed, benefits would be withheld for 6 weeks, because the appeal decision could result in increasing the disqualification. The reasoning of the Court in the Java case leads to the conclusion that benefits after the 3 week disqualification initially imposed are due and are to be paid if the claimant is eligible for such later weeks.

4. Suspension of Benefit Payments During a Claim Series

In the Case of any week claimed during a claim series as to which a question arises, such as a question of work refusal, a determination must be made as to whether benefits are payable. Before such a determination, benefits will not be withheld. When the determination has been made following appropriate predetermination procedures, benefits must then be paid or denied in accordance with that determination. When the question relates to eligibility or possible fraud for past weeks only, benefits claimed for current weeks may not be suspended while an investigation is conducted. They may be denied in appropriate cases, however, for weeks claimed after a determination or redetermination has been made of the issue(s) with respect to such prior weeks, following notice to the interested parties and opportunity to be heard. In order to minimize overpayments this process should be completed as quickly as possible.

#### IX. Interstate Claims, Federal Claims and Monetary Determination Issues

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#### A. Interstate Claims

Although the procedural concepts outlined in this document have been stated in terms of intrastate claims, they apply as well to interstate claims. The interested employer in a determination issue arising in an interstate claim must be given an opportunity not only to submit information concerning the claim in written form but also, if he wishes, to appear either in person or by representative and submit any additional information he has to offer that bears upon the issue. Since it is not necessary that an employer who wishes to make such an appearance be interviewed in the claimant's presence, his opportunity to appear and be interviewed on the claim may be provided to him in the office of the liable State where the determination will be made rather than in the agent-State local office where the claimant is to be interviewed. Obviously, such an interview on an interstate claim with an employer who is located in the liable State and wishes to make an appearance would need to be held at a time when any information he may present can be taken into account in making the determination. If the interested employer is located in the agent State, the latter will have the responsibility to notify the employer of the opportunity to appear at the local office, and if he elects to make an appearance, to schedule it at an appropriate time.

#### B. <u>Application of Java Decision to Federal Unemployment Insurance, Training Allowances and</u> <u>Related Payments</u>

The requirements for paying benefits promptly after a determination has been made in the claimant's favor, regardless of the pendency of the appeal period or of any appeal that has been taken from the determination, are applicable to Federal claims. The requirement of notice to an interested employer and opoprtunity to be heard will, however, have no effect on those programs which do not involve employers as interested parties.

Following are specifics on application of the requirement for notice and opportunity to be heard relating to the various kinds of Federal claims.

#### UCFE: (Unemployment Compensation for Federal Employees)

When a private employer is an interested party to a UCFE claim, the procedures for notice and opportunity to be heard with respect to State UI claims are applicable.

When a Federal agency is an interested party to a UCFE claim, the <u>Java</u> decision does not change present methods of processing so long as findings of the Federal agency, in writing, which are final and conclusive, are applicable in determining the claim.

#### UCX: (Unemployment Compensation for Ex-Servicemen)

When a private employer is an interested party to a UCX claim the procedures for notice and opportunity to be heard with respect to State UI claims are applicable.

When a Federal agency which employed the claimant as a civilian employee is an interested party, the procedures applicable to UCFE claims apply. For the purpose of the Java procedure, a branch of the Armed Forces for which a UCX claimant served on active military duty is never considered to be an interested party with respect to reasons for separation or for not reenlisting or for not continuing on active duty, since the State agency does not apply the eligibility or disqualification provisions of the State unemployment insurance law to any of these. Thus in such cases the notice-and-opportunity-to-be-heard requirement of the Java decision is not applicable.

#### TRA: (Trade Readjustment Allowances)

The procedures for implementing the Java decision for State UI claims, with respect to notice and opportunity to be heard, are applicable to TRA claims with respect to employers who are interested

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parties to an issue.

#### Training Allowances, Disaster Unemployment Assistance and Other Similar Federal Payments

The procedures implementing the <u>Java</u> decision, with respect to notice and opportunity to be heard, have no effect on factfinding procedures for determination of issues arising under the Manpower Development and Training Act (MDTA), the Work Incentive Program (WIN), or the Disaster Unemployment Assistance provisions of the Disaster Relief Act of 1970. There is no employer or other interested party involved in such cases. Established procedures for the factfinding claimant interview and notice of determination satisfy the requirements for predetermination proceedings.

#### C. Monetary Determinations

It should not be assumed that, because the facts in the Java case presented a nonmonetary determination issue, the Court's requirements do not also apply to monetary determinations and redeterminations. The principles are equally applicable when monetary determinations or redetermirations involve issues of fact although the manner in which they must be applied necessarily is affected by the nature of the issues and the processes required to resolve them. Some monetary "issues," for example, are simply questions of computation or other operational matters that relate entirely to the processing of data already contained in the agency's records. To settle such questions the State agency need not seek information from either the employer or the claimant and there is, no occasion for appearance by either at an interview.

Some monetary issues, however, present questions which cannot be resolved from a review of the agency's records. For example, a claimant may question the correctness of an employer's wage report underlying the agency record on which the claimant's monetary determination was based. Yet another claimant may contend that his monetary determination has not taken into account wages he earned during his base period that an employer omitted from his report because, in his view, there was no employment relationship. Common agency practice in such cases is to make a field investigation including a visit to the employer's place of business, a review of his records and an interview with the employer or the appropriate members of his staff who have the necessary pertinent information. The facts thus obtained, together with the information submitted by the claimant, are then used in resolving the issue and as the basis for the necessary monetary redetermination. When this is the case, the process used has itself provided an appearance by the employer in the factfinding proceeding in addition to his written submittal. There would ordinarily appear to be no need to provide the employer in such cases with yet a further opportunity to appear in the factfinding proceeding that precedes the monetary determination or redetermination in question. The common agency practice of reinterviewing the claimant after the results of the field investigation are available assures claimant of his opportunity to appear and be heard before the determination is made.

1. See also UIPL No. 1136, July 19, 1971 "Draft language to Implement the Java Decision," Explanatory Statement, Attachment No. 1, p. 2.

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- 2. This would be most appropriate, for example, in cases involving difficult issues of fact or law and multiple claimants. See UIPL No. 1126 and UIPL No. 1136.
- 3. Anyone, whatever his title, who interviews parties and others to obtain the facts necessary for making a determination.
- 4. A State agency which requires employers to submit separation notices to the agency automatically upon the separation of a worker will also need to use notices of claim filed or other appropriate notice to the employer of his right to appear and be heard.
- 5. If the fifth day is a Saturday, Sunday, or holiday, then the period runs to the next day which is not a Saturday, Sunday, or holiday. The five-day requirement is suggested to State agencies as appropriate to meet the promptness limit provided in section IV. States may wish to vary the requirement for areas where mail delivery problems require it.
- 6. An explanation to employers of what is an "issue" in the case of a benefit claim appropriately is included in an employer handbook or other general informational material that is given to all registered employers. If such an explanation has not been supplied to all employers, it should accompany the notice of claim filed.
- 7. Not applicable if the State uses separate interview type of proceeding.
- 8. Where experience demonstrates that more time is needed to provide reasonable notice, this period may be modified.
- 9. The detail that needs to be included in the individualized portions of such notices to claimants can be reduced by attaching an adequate printed explanation to each notice or by including appropriate explanatory detail in claimant handbooks or pamphlets.
- 10. Not applicable if the State uses separate interview type of proceeding.
- 11. Not applicable if the State uses separate interview type of proceeding.
- 12. Appropriate legislative language for this purpose was transmitted to State agencies with UIPL No. 1136, July 19, 1971.
- 13. Some increase in overpayments will result from the new requirements for immediate payment of benefits. If State law requires recovery, claimants should, of course, be informed that benefits being paid under such circumstances may (according to requirements of State law) be subject to recovery or future offset as the case may be. This information may be included in general informational material furnished to all claimants. In any event, it should not be presented in such a manner as to discourage claimants from accepting the benefits due them.
- 14. For additional discussion see Explanatory Statement, Attachment No. 1 to UIPL No. 1136, July 19, 1971.

# Exhibit B

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Payment of Compensation and Timeliness of Determinations during a Continued Claims Series

U.S. DEPARTMENT OF LABOR Employment and Training Administration Washington, D. C. 20210	CLASSIFICATION UI CORRESPONDENCE SYMBOL TEUL ISSUE DATE October 27, 2000
RESCISSIONS	EXPIRATION DATE
None	Continuing

#### DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 04-01

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

- FROM : GRACE A. KILBANE Administrator Office of Workforce Security
- SUBJECT : Payment of Compensation and Timeliness of Determinations during a Continued Claims Series
  - 1. **Purpose.** To remind States of the Department of Labor's (Department's) interpretation of the "payment when due" requirement of Section 303(a)(1) of the Social Security Act (SSA), as applied during a continued claim series, and to provide clarification concerning this interpretation.
  - 2. References. Section 303(a)(1), SSA; California Department of Human Resources Development v. Java, 402 U.S. 121 (1971); Fusari v. Steinberg, 419 U.S. 379 (1975); Pennington v. Didrickson, 22 F.3d 1376 (7<sup>th</sup> Cir. 1994); 20 CFR Parts 602 and 640; <u>Unemployment Insurance Program Letter (UIPL) No. 1145</u> (Procedures for Implementation of the Java Decision); <u>UIPL No. 34-85</u> (Voluntary Waiver of Benefit Rights by a Claimant Pending the Outcome of an Employer Initiated Appeal); ETA Handbook No. 365 (Unemployment Insurance Quality Appraisal (no longer in effect)); <u>ET Handbook No. 301</u> (UI Performs: Benefit Timeliness and Quality (BTQ): Nonmonetary Determinations Quality Review); <u>ET Handbook No. 401</u> (Unemployment Insurance Reports).
  - 3. Background. While conducting training for States on the new process for reviewing the quality of nonmonetary determinations, the Department became aware that, during a continued claim series, some States may not properly administer the requirements of Section 303(a)(1), SSA, concerning payment of unemployment compensation (UC) "when due." The Department has three specific concerns.

First, some States may fail to pay benefits to claimants for weeks in which no eligibility issue exists when a determination of eligibility for a previous week is pending.

Second, the Department has observed an inconsistency among States in the starting date used to calculate timeliness of determinations during a continued claim series, a date that should be uniformly applied.

Third, the Department has found that, during a continued laim series, some States improperly withhold benefits from laimants when the State does not make a determination of continued eligibility in a timely fashion.

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Payment of Compensation and Timeliness of Determinations during a Continued Claims Series

The Department is issuing this UIPL in order to address these concerns. It clarifies UIPL No. 1145, issued in 1971 but still in effect, with respect to the date to be used for calculating timeliness of determinations during a continued claim series, and clarifies when payment may not be withheld during a continued claim series.

4. Section 303(a)(1), SSA -- "Full Payment .... When Due." Section 303(a)(1), SSA, requires States, as a condition of receiving Federal UC administration grants, to provide in their laws for "[s]uch methods of administration ... as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due." In the 1971 decision, California Department of Human Resources Development v. Java, the Supreme Court interpreted "when due" in Section 303(a)(1), SSA, to mean "at the earliest stage of unemployment that such payments [are] administratively feasible after giving both the worker and the employer an opportunity to be heard." Although the specific holding in Java required the State to pay benefits to claimants initially determined eligible pending an employer appeal, the Court's reasoning was broader, requiring promptness at all stages of the eligibility determination and payment processes. See UIPL No. 1145, Attachment, page 1; Fusari v. Steinberg, 419 U.S. 379, 387-388 n.15 (1975); and Pennington v. Didrickson, 22 F.3d 1376, 1386 (7th Cir. 1994) (quoting Jenkins v. Bowling, 691 F.2d 1225 (7th Cir. 1982)). The Department has issued regulations interpreting the promptness requirement of Section 303(a)(1), SSA, to require payment of UC to eligible claimants, and the making of determinations, "with the greatest promptness that is administratively feasible." 20 CFR 640.3(a). In addition, in the attachment to UIPL No. 1145, the Department interpreted the promptness requirement of Section 303(a)(1), SSA, to require prompt determinations on individual claims. See pages 8 & 14, UIPL No. 1145, Attachment.

As well as promptness, the Department has always interpreted "when due" in Section 303(a)(1), SSA, to require accuracy in order to ensure that payments are not made when they are not due. See 20 CFR 602.11(a) and 602.21(c). Proper application of Section 303(a)(1) requires an appropriate balancing of the dual concerns of promptness and accuracy in the "when due" provision.

5. The Need for Payment Without Delay to Claimants in Weeks for which They Are Eligible During a Continued Claim Series. As stated, a fundamental aspect of payment "when due," for purposes of Section 303(a)(1), SSA, is that UC is due to claimants who are eligible under State law. Eligibility for UC is determined on a week-by-week basis. During a continued claim series, a claimant must certify as to continuing eligibility for each week. If information provided by the claimant or others establishes eligibility, the State agency manifests its determination of eligibility for benefits for a given week arises, the State agency conducts an investigation of the facts and makes a determination of eligibility or ineligibility. While such a determination is pending, the State agency need not issue payment for the week in question until it issues a determination regarding eligibility, provided the determination is timely. Sometimes the question of eligibility affects future weeks. In such circumstances, not issuing payment for these later weeks because of the earlier eligibility issue is acceptable until a *timely* determination is made.

When the question of eligibility does not affect later weeks, however, States must make payment for the later weeks without delay. In other words, States may not withhold payment for later weeks in which no eligibility issue exists consistent with Section 303(a)(1), SSA's requirement to pay benefits "when due." The Department clearly expressed this requirement on page 19 of the Attachment to UIPL No. 1145, stating "[w]hen the question [of eligibility] relates to eligibility or possible fraud for past weeks only, benefits claimed for current weeks *may not be suspended* while an investigation is conducted [emphasis added]." This requirement is still in force.

6. Timely Determinations in a Continued Claim Series. The attachment to UIPL No. 1145 interpreted the "when due" provision in Section 303(a)(1), SSA, and Java, to require prompt resolution of eligibility issues that arise during a continued claim series. That Attachment stated that such determinations would be considered to be issued "on time" within the meaning of the "when due" requirement, as interpreted in Java, if issued "no later than the end of the week following the week in which [an] issue arises [emphasis added]." Thus, the date on which an issue "arises" is the critical date for calculating timeliness.

The term "arises" has historically been subject to different interpretations. Some States have interpreted the "arises" date literally to mean the date a claimant engaged in potentially disqualifying behavior. Other States have applied the interpretation found in ET Handbook No. 365, Quality Appraisal, in effect from 1992-1996, which says that determinations during a continued claim series are timely if "issued within 7 days from the end of the week in which the issue is *detected*" (in the case of intrastate claims) or the

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State "received notification" of the issue (in the case of interstate claims) (emphases added). This approach interpreted the "issue arises" date in UIPL No. 1145 to mean the issue detection date. This interpretation is followed in subsequent handbooks, including ET Handbook No. 401, the UI Reports Handbook, and Handbook 301, the BTQ NonMonetary Determination Quality Review Handbook (see pages V-9 and V-10). Handbook 401 defines the issue detection date as: "the earliest date that the agency, including organizational units . . . , is in possession of information indicating the existence of a nonmonetary issue" (see page V-3-5).

Although UIPL No. 1145, Attachment, used the term "arises," taken in context, that term means, as reflected in later handbooks, the date an issue is detected by the State agency. Interpreting the "issue arises" date in the more literal manner followed by some States (meaning the date of the potentially disqualifying event) would necessarily preclude timely determinations in many cases. For example, if a claimant refused a job in week one and has until Thursday or Friday of the following week to submit a claim certification for week one, it may be impossible for the agency to gather facts and issue a decision by Friday of week two. Requiring a determination to be made in that manner is not reasonable, nor is it necessary under Section 303(a)(1), SSA. Consequently, States are to use the issue detection date as the date from which to calculate timeliness for purposes of Federal requirements.

7. Balancing Timeliness and Accuracy: the Presumption of Continued Eligibility. Although Section 303(a)(1), SSA, requires timely determinations regarding eligibility for individual claimants, States may, in some cases, be unable to issue a determination in a timely fashion. UIPL No. 1145 stated that before a determination is made in a continued claim series "benefits *will not be withheld*" (emphasis added) (see UIPL No. 1145, Attachment, page 19). Over the years, the Department has been asked about the meaning of this statement, especially in relation to the requirement of Section 303(a)(1), SSA, that payment not be made when it is not due.

With this UIPL, the Department clarifies this statement in UIPL No. 1145, Attachment, concerning payment during a continued claim series. Prior to the date for timely determinations, a State is not required to pay UC without a determination. However, when the date for a timely determination has passed in a continued claim series, the State must either issue a determination of ineligibility for UC (where the facts establish ineligibility) or else pay UC immediately. Payment would occur under a presumption of continuing eligibility. The presumption means that the State has made an initial determination of eligibility and, based on that initial determination and the absence of facts clearly establishing current ineligibility, the State agency presumes the claimant's continued eligibility until it makes a determination otherwise. The presumption is appropriate in a continued claim series because a determination of initial eligibility exists on which the presumption can be based. The presumption may not be applied on an initial claim.-(1) The presumption appropriately balances the timeliness and accuracy concerns of Section 303(a)(1), SSA.

The presumption of continued eligibility is an expedient for the State to facilitate timely payments and may not be used as a substitute for the State completing its determination procedures. In order to avoid failing to comply with Section 303(a)(1), SSA, by paying benefits when they are not due, a State using the presumption must issue a determination as soon as administratively feasible after payment is made to verify whether the presumption was correct. In arriving at such a determination the State must follow the predetermination procedures set forth in UIPL No. 1145.

The Department is aware that making payments based on a presumption of continuing eligibility may result in overpayments. For that reason, States must make timely determinations whenever possible. A certain number of overpayments resulting from application of the presumption of continuing eligibility, when the agency has been unable to issue a timely determination, are inevitable.

In order to notify individuals of their rights and obligations, a State must inform claimants who receive payments under such a presumption that a pending eligibility issue may affect their entitlement and may result in an overpayment. The State may also advise claimants that they may want to defer cashing the unemployment check until their eligibility has been verified. This may help to deter losses to the State's fund and enable the claimant to immediately repay any overpayment. This procedure is consistent with Departmental guidance in UIPL No. 34-85, concerning the prohibition on voluntary waiver of benefit rights by claimants, because a determination has not yet been made.

8. Action Required. Administrators are to provide this information to appropriate staff.

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Payment of Compensation and Timeliness of Determinations during a Continued Claims Series

9. Inquiries. Inquiries should be directed to the appropriate Regional Office.

10. Attachment. UIPL No. 1145.

1. This does not imply, however, that Section 303(a)(1), SSA, sets no outside time limit on individual determinations of initial claims.

# Exhibit C

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#### NONMONETARY DETERMINATION TIME LAPSE -- SEPARATION REPORT FOR 02/01/2021 THROUGH 02/28/2021

STATE	Total Workload	<=7 Days	14 Days	21 Days	28 Days	35 Days	42 Days	49 Days	56 Days	63 Days	70 Days	> 70 Days
Virginia												
*Waiting week from	m 02/01/2021 to 02/	/28/2021.										
02/28/2021	9,040	0.4%	1.0%	1.7%	2.0%	2.2%	2.4%	2.5%	2.6%	2.7%	2.9%	100.0%

Created: March 29, 2004

#### **Employment and Training Administration**

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Updated: November 1, 2019

# Exhibit D

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STATE	Total Workload	<=7 Days	14 Days	21 Days	28 Days	35 Days	42 Days	49 Days	56 Days	63 Days	70 Days	> 70 Days
Virginia												
*Waiting week fro.	m 02/01/2021 to 02	/28/2021.										
02/28/2021	4,791	1.7%	2.5%	3.3%	3.8%	4.2%	4.5%	4.7%	5.0%	5.2%	5.5%	100.0%

Created: March 29, 2004

Updated: November 1, 2019

#### **Employment and Training Administration**

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# Exhibit E

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3/31/2021

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### **Benefits: Timeliness and Quality Reports**

#### NONMONETARY DETERMINATION TIME LAPSE -- SEPARATION REPORT FOR 01/01/2021 THROUGH 01/31/2021

STATE	Total Workload	<=7 Days	14 Days	21 Days	28 Days	35 Days	42 Days	49 Days	56 Days	63 Days	70 Days	> 70 Days
Virginia												
*Waiting week from	m 01/01/2021 to 01	//31/2021										
01/31/2021	7,046	0.4%	0.8%	1.7%	2.3%	2.7%	3.1%	3.5%	4.1%	4.5%	4.8%	100.0%

Created: March 29, 2004

Updated: November 1, 2019

#### **Employment and Training Administration**

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# Exhibit F

#### Case 3:21-cv-00253 Document 1-7 Filed 04/15/21 Page 2 of 2 PageID# 61

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### **Benefits: Timeliness and Quality Reports**

NONMONETARY DETERMINATION TIME LAPSE -- NONSEPARATION REPORT FOR 01/01/2021 THROUGH 01/31/2021

STATE	Total Workload	<=7 Days	14 Days	21 Days	28 Days	35 Days	42 Days	49 Days	56 Days	63 Days	70 Days	> 70 Days
Virginia												
*Waiting week fro	m 01/01/2021 to 01	/31/2021.										
01/31/2021	2,574	3.0%	5.1%	6.6%	7.7%	8.3%	9.1%	9.5%	10.4%	10.9%	11.1%	100.0%

Created: March 29, 2004

**Employment and Training Administration** 

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Updated: November 1, 2019

# Exhibit G

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3/31/2021

State Rankings of Core Measures, Employment & Training Administration (ETA) - U.S. Department of Labor

## **State Rankings of Core Measures**

State Ranking of Core Measures for the Period: 10/01/2020 to 12/31/2020 Run Date: 3/31/2021

Nonmon Determin 21-da Timelin	ations ay
US	42.6

\* State did not submit any reports for the period. ^ State did not submit all reports for the period and performance has been estimated based on the partial data submitted.

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3/31/2021

State Rankings of Core Measures, Employment & Training Administration (ETA) - U.S. Department of Labor

State Ranking of Core Measures for the Period: 10/01/2020 to 12/31/2020 Run Date: 3/31/2021

\* State did not submit any reports for the period. ^ State did not submit all reports for the period and performance has been estimated based on the partial data submitted.

# Exhibit H

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3/31/2021

State Rankings of Core Measures, Employment & Training Administration (ETA) - U.S. Department of Labor

## **State Rankings of Core Measures**

State Ranking of Core Measures for the Period: 07/01/2020 to 09/30/2020 Run Date: 3/31/2021

Nonmonet Determinat 21-day Timeline	tions
State ND UT ID MS LA NE WY NV NJ DC AL TX MO WA CO ME TN SC AK RI MT NH IL MN NC AR CA VI CT WV WI PA GA NYY SD HI OR CA VA IA SD HI OR CA VA IA SD HI OR CA VA SD HI OR CA VA SD HI OR CA VI SD HI OK SD HI OK SD HI OK SD HI OK SD HI OK SD HI OK SD HI OK SD HI CA SA SA SA SA SA SA SA SA SA SA SA SA SA	% 85.9 77.2 75.4 71.8 69.6 66.5 63.2 63.0 62.7 56.5 55.5 55.0 54.8 53.4 51.4 50.8 49.8 49.7 47.0 46.3 44.6 35.4 51.4 50.8 49.7 47.0 46.3 44.6 36.2 39.8 36.8 36.6 36.2 34.4 32.2 31.6 30.8 25.9 25.5 23.3 23.0 19.8 19.4 19.0 18.2 16.9 15.5 14.4 19.0 18.2 16.9 15.5 14.4 19.0 18.2 16.9 15.5 14.4 19.0 18.2 16.9 15.5 14.4 19.0 19.4 19.0 18.2 16.9 15.5 14.4 19.0 19.4 19.0 18.2 16.9 15.5 14.4 19.0 19.4 19.0 19.4 19.0 19.5 14.4 19.0 19.5 14.4 19.0 19.5 14.4 19.0 19.4 19.4 19.4 19.0 19.5 14.4 19.0 19.4 19.4 19.4 19.5 14.4 19.5 14.4 19.5 14.4 19.5 14.4 19.5 14.4 19.5 14.4 19.5 14.4 19.5 14.4 19.5 14.4 19.5 14.4 19.5 14.5 19.5 19.4 19.6 19.6 19.6 19.6 19.6 19.6 19.6 19.6

State did not submit any reports for the period.
 State did not submit all reports for the period and performance has been estimated based on the partial data submitted.

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3/31/2021

State Rankings of Core Measures, Employment & Training Administration (ETA) - U.S. Department of Labor

State Ranking of Core Measures for the Period: 07/01/2020 to 09/30/2020 Run Date: 3/31/2021

State did not submit any reports for the period.
 State did not submit all reports for the period and performance has been estimated based on the partial data submitted.

## Exhibit I

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3/31/2021

State Rankings of Core Measures, Employment & Training Administration (ETA) - U.S. Department of Labor

## **State Rankings of Core Measures**

State Ranking of Core Measures for the Period: 04/01/2020 to 06/30/2020 Run Date: 3/31/2021

Nonmonet Determinat 21-day Timeline	ions
State TN AL WA WA WE ND UT LA NJ NV AK DC MT TX NE MI MS SC MO MN NMA CO WI RI NC IL NH KS OH IN WV SD DE PR HI CT OK VT NY AZ PA FL A CA GA MD RV VI US	% 89.6 82.2 80.9 80.7 78.0 77.5 75.3 72.4 72.0 70.9 70.3 70.0 67.6 67.6 67.6 67.6 67.1 66.7 64.0 62.4 61.1 60.9 60.7 57.1 53.7 48.9 48.6 47.1 45.8 41.9 40.6 39.8 39.6 36.1 35.6 33.8 33.3 30.3 29.3 29.3 29.3 29.3 29.3 29.3 29.3 29

\* State did not submit any reports for the period.

^ State did not submit all reports for the period and performance has been estimated based on the partial data submitted.

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3/31/2021

State Rankings of Core Measures, Employment & Training Administration (ETA) - U.S. Department of Labor

State Ranking of Core Measures for the Period: 04/01/2020 to 06/30/2020 Run Date: 3/31/2021

\* State did not submit any reports for the period. ^ State did not submit all reports for the period and performance has been estimated based on the partial data submitted.

# Exhibit J

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COMMONWEALTH of VIRGINIA

### Virginia Employment Commission

Ellen Marie Hess Commissioner 6606 West Broad Street Richmond, VA 23230 Post Office Box 26441 Richmond, VA 23261-6441

December 10, 2020

Mr. Pat Levy-Lavelle Legal Aid Justice Center 626 East Broad Street Suite 200 Richmond, VA 23219

Dear Mr. Levy-Lavelle:

On behalf of the Virginia Employment Commission (VEC), I am responding to the letter dated November 6, 2020 and subsequent discussion held on November 16, 2020. The agency also acknowledges your communication dated November 20, 2020 that summarized that tele-conference. We appreciate the concerns raised and the spirit of collaboration to address those concerns in a fair and equitable way.

**Continued Claims:** There are approximately 74,000 claims pending adjudication within the state Unemployment Insurance (UI) program. There is a subset of these claims where the individual had been receiving benefits but an issue was identified related to the individual's separation from employment or issues have been established concerning an individual's on going weekly eligibility for benefits (internally referred to as non-separation issues). There are approximately 58,000 individuals who were in a continued claim status with a separation issue to be addressed. There are approximately 22,000 claims with non-separation issues to be addressed.

Separation issues: The agency will not restrict claims that cannot be adjudicated within 21 days of the issue detection date. This action will allow individuals to claim and receive weekly benefits while separation issues are pending. Removing the issue is an administrative action to allow payment of benefits consistent with 42 U.S.C. 303(a)(1), SSA. The VEC will render determinations on these same issues and notify both the claimant and employer consistent with our business practices. All parties will have appeal rights. There will be individuals who will ultimately be overpaid. We will be communicating with those affected individuals by way of a notice sent through the U.S. postal service as well as through a text messaging campaign. Both

(804) 786-3001 E-Mail: vec@vec.virginia.gov VRC/TDD VA Relay 711 Equal Opportunity Employer/Program

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Legal Aid Justice Center Attn: Mr. Pat Levy-Lavelle December 10, 2020 Page Two

messaging campaigns have been crafted to explain the action we are taking and what can be expected going forward. We began this effort on December 7, 2020. As of today, we have addressed 38,821 issues using this approach. We are working with the oldest claims first and will continue to process batches of issues until all identified continued claims have been addressed similarly. We expect to complete this for all affected individuals by December 15, 2020.

Non-Separation Issues: This population will be addressed following the effort on the claims with separation issues. There will be similar communication sent to the affected individuals as detailed for the separation issues. There are a certain number of these issues related to fraudulent activity. These issues will not be included in this initiative.

In our meeting, we discussed changes to our workflow. We have utilized staff from multiple divisions within the agency to assist the UI division. We have supplemented our call center operations with contract staff. Our efforts were focused on reacting to the historic claim volume that was amplified by multiple new benefit programs established by the CARES Act. We have processed over 1,380,000 claims and only have a backlog of 168,000 remaining. We will eliminate this backlog later this month. Please understand that having the claim "processed" after it is submitted allows the agency to establish employer liability and is critical to being able to render a formal decision. The progress in claims processing has allowed us to deploy other strategies in the area of adjudication. We recently started a project where our most experienced staff who process claims, have been trained to write determinations on outstanding issues. We have also placed Hearing Officer/deputy positions in a state of continuous recruitment.

We believe the Commonwealth of Virginia and other states throughout the nation have experienced many of the same challenges. The agency leadership has participated in discussion groups hosted by the National Association of State Workforce Agencies where UI leaders have discussed struggles with workload, staffing and technical infrastructure. These forums bring the states together to discuss the many challenges we are faced with because of the pandemic. States have utilized different approaches in response to the current situation. You specifically mentioned a program operated by the state of Oregon referred to as "Benefits while you wait". I reached out to the UI Director in Oregon. He acknowledged that they were operating this program but that it had been significantly scaled back. Guidance from the U.S. Department of Labor referenced UIPL No. 04-01 clarified the claim characteristics that must exist to follow "payment when due" guidance. We have used this information in our approach to individuals in a continued claim status. Legal Aid Justice Center Attn: Mr. Pat Levy-Lavelle December 10, 2020 Page Three

In addition to the program in Oregon, you suggested the VEC could provide greater transparency and information to the public by utilizing a "data dashboard" as other states have done. Your communication from November 20, 2020 provide bulleted data elements that could be useful. We agree that such a tool would be beneficial but we cannot commit to a timeline as to when we would be able to establish such a platform.

In an effort to help individuals facing eviction for non-payment of rent, it was suggested that the VEC coordinate with the Department of Housing and Community Development (DHCD) to help individuals avail themselves of the Rent and Mortgage Relief Program. It was further suggested that the VEC dedicate space on our web site to provide information concerning types of financial benefits unemployed persons could apply to receive. We would certainly be in favor of highlighting these programs and feel it is consistent with the overall mission of the agency.

In the postscript to the November 20, 2020 communication, Mr. Wegbreit asked that the VEC consider the timing of when overpayment determinations are issued. He asks that the VEC return to its longstanding past practice of not issuing overpayment determinations unless and until underlying decisions on eligibility or qualification have become final. In the past, we know that many claimants did not file appeals of underlying determinations, but did file appeals against the overpayment determinations. An appeal of an overpayment only allows for a review of the actual dollars deemed overpaid. It does not address the underlying issue which caused the overpayment. By issuing the overpayment decision soon after the decision on the underlying issue, we found more people filed appeals against both. This resulted in a review of the underlying issue, which directly affects the overpayment determination. The VEC would be willing to engage in further dialogue concerning this or other issues that may arise.

Sincerely,

William O. Walton, Jr. Deputy Commissioner

cc: Ellen Marie Hess, Commissioner Jeffrey Ryan, Deputy Commissioner Elizabeth Peay, Senior Assistant Attorney General

# Exhibit K

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## E LEGAL AID JUSTICE CENTER

Pat Levy-Lavelle Attorney

Virginia Office of the Attorney General Attn: Attorney General Mark R. Herring Senior Assistant Attorney General Heather Hays Lockerman 202 North Ninth Street Richmond, VA 23219

Virginia Employment Commission Attn: Ellen Marie Hess, Commissioner 6606 West Broad Street Richmond, VA 23230

Sent via first-class mail and email to MHERRING@OAG.STATE.VA.US, HLOCKERMAN@OAG.STATE.VA.US, and ELLENMARIE.HESS@VEC.VIRGINIA.GOV

November 6, 2020

### RE: Violations of Statutory and Constitutional Rights – Delays in VEC Deputy Adjudication and Cessation of Continued Claims

Dear Attorney General Herring, Senior AAG Lockerman, and Commissioner Hess:

We—the Legal Aid Justice Center, in conjunction with other firms, including Legal Aid Works and the Virginia Poverty Law Center—represent multiple claimants amongst the thousands enmeshed in the crisis of backlogged unemployment insurance claims at the Virginia Employment Commission. We also represent a group of Virginians whose unemployment insurance payments the VEC cut off summarily—who now have been waiting months for a deputy to determine if their cessation of benefits was warranted. As you know, these processing delays and errors have left many thousands of Virginia families in uncertainty and financial ruin.

We are preparing a federal class-action complaint on behalf of our clients and the thousands of Virginians who are similarly situated. Given our history of collaboratively resolving legal disputes, we first ask to work with you to come to a solution without the need for litigation.

### The Issues

*Waiting Applicants.* According to a recent article in the Virginia Mercury,<sup>1</sup> 90,000 Virginians have filed applications for benefits with the VEC and are stuck in a waiting status.

<sup>&</sup>lt;sup>1</sup> Ned Oliver, "Virginia ranks worst in nation for quickly reviewing some unemployment claims," Virginia Mercury, Oct. 30, 2020, at <u>https://www.virginiamercury.com/2020/10/30/virginia-ranks-worst-in-nation-for-quickly-reviewing-unemployment-claims/</u>.

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Presumably, the VEC has determined that one or more issues related to their applications needs to be evaluated by a deputy before benefits can be paid (or otherwise be deemed not payable). As you may know, data from the U.S. Department of Labor (USDOL) indicates that Virginia ranks last among all states in the percentage (9.0%) of nonmonetary determinations issued within 21 days of the benefit application filing date.<sup>2</sup> By contrast, USDOL has established a performance measure that 80% of nonmonetary determinations should be made within 21 days of the date of detection of any nonmonetary issue that has the potential to affect the claimant's benefit rights.<sup>3</sup> In practice, many applicants are waiting months for their claims to be processed.

"Continued Claims" Claimants. Equally troubling is the termination of continued claims without process. In short, thousands more Virginians have received benefits for some number of weeks, and then have lost their benefits without notice or hearing. WTVR 6 News in Richmond reported last month that 60,000 Virginians fall into this category of claimants.<sup>4</sup> Typically, if these claimants can get any information at all about the cessation of their benefits from the VEC, they are told only that an issue related to their claims exists, which requires a deputy adjudication to be resolved, and that they cannot receive benefits in the meantime.

### **Legal Violations and Practical Problems**

The VEC's actions—or inactions, as the case may be—violate various statutory and constitutional rights afforded to our clients. As to the "waiting applicants," Virginia Code Section 60.2-619(A)(1) provides that "a representative designated by the Commission as a deputy, shall promptly examine the claim." (emphasis added). Merriam-Webster's Dictionary defines the word "promptly" as "without delay: very quickly or immediately."<sup>5</sup> No reasonable interpretation of "promptly" would condone delays lasting several months in processing a claim. especially given that the Virginia Supreme Court declared that the Virginia Unemployment Compensation Act "should be liberally construed so that those justly entitled to compensation may not be denied, and the [remedial] purpose of the legislation thus effectuated."6 Moreover. this statutory requirement has been deemed "mandatory" by the Virginia Court of Appeals,<sup>7</sup> such that the VEC lacks discretion to withhold from claimants prompt examination of claims. Consequently, claimants have an entitlement to prompt determination of their claims—a property interest protected by the Due Process Clause of the Fourteenth Amendment. By forcing claimants to wait months before their claims are examined by a deputy, the VEC has deprived these applicants of their property interest in having their claims promptly examined, in violation of the Due Process Clause.<sup>8</sup>

<sup>5</sup> https://www.merriam-webster.com/dictionary/promptly

<sup>&</sup>lt;sup>2</sup> This data is available at <u>https://oui.doleta.gov/unemploy/ranking.asp</u>. Virginia's percentage reported here is for the time period starting with the quarter beginning April 1, 2020.

<sup>&</sup>lt;sup>3</sup> This performance standard is found at <u>https://oui.doleta.gov/unemploy/pdf/Core\_Measures.pdf</u>.

<sup>&</sup>lt;sup>4</sup> Melissa Hipolit, "Mom waits 16 weeks for unemployment benefits: 'It just feels like a losing war'," WTVR 6 Richmond, Sept. 29, 2020, at <u>https://www.wtvr.com/news/problem-solvers/problem-solvers-investigations/mom-waits-16-weeks-for-unemployment-benefits-it-just-feels-like-a-losing-war</u>.

<sup>&</sup>lt;sup>6</sup> Ford Motor Co. v. Unemployment Comp. Comm'n, 191 Va. 812, 823-24 (1951).

<sup>&</sup>lt;sup>7</sup> See Virginia Employment Comm'n v. Cole, No. 1268-15-2, 2016 WL 1317584, at \*4 (Va. Ct. App. Apr. 5, 2016).

<sup>&</sup>lt;sup>8</sup> See Logan v. Zimmerman Brush Co., 455 U.S. 422, 434-36 (1982).

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The individuals comprising the "continued claims" class of claimants have a statutory right to payment of benefits "when due." 42 U.S.C. § 503(a)(1). The U.S. Department of Labor has interpreted this provision "to require prompt adjudication of eligibility issues that arise during a continued claim series[,]" cases in which the claimant has applied, begun to receive benefits, and continues filing weekly claims. Unemployment Insurance Program Letter No. 04-01 ("UIPL 04-01"). When timely decisions—defined as decisions issued no later than the end of the week following the week in which the state agency detects a potentially disqualifying issue<sup>9</sup>—cannot be made, federal guidance prohibits the state agency from withholding benefits. This requirement creates a presumption of the claimant's ongoing eligibility for benefits, which may be overcome only after a deputy issues an adverse determination regarding the issue(s) in question:

UIPL No. 1145 stated that before a determination is made in a continued claim series "benefits will not be withheld." ... Prior to the date for timely determinations, a State is not required to pay UC without a determination. However, when the date for a timely determination has passed in a continued claim series, the State must either issue a determination of ineligibility for UC (where the facts establish ineligibility) or else pay UC immediately. Payment would occur under a presumption of continuing eligibility.

UIPL 04-01 at P7.

The U.S. Department of Labor has acknowledged that while the required presumption of continued eligibility may create overpayments in some cases, the presumption is necessary:

The Department is aware that making payments based on a presumption of continuing eligibility may result in overpayments. For that reason, States must make timely determinations whenever possible. A certain number of overpayments resulting from application of the presumption of continuing eligibility, when the agency has been unable to issue a timely determination, are inevitable.

### Id.

Likewise, claimants have a property interest in unemployment insurance benefits, and those benefits in a continued claims posture cannot be terminated without first providing a claimant an "effective process for asserting his claim prior to any administrative action."<sup>10</sup> In other words, once a claimant begins to receive benefits, they cannot be deprived of their benefits unless or until an adverse deputy determination occurs. *Id.* Furthermore, because claimants have a property interest in unemployment benefits, the Due Process Clause of the Fourteenth Amendment entitles claimants to receive clear notice of their deputy fact-finding interview and their rights to participate in the interview.<sup>11</sup>

<sup>&</sup>lt;sup>9</sup> UIPL 04-01 at P6.

<sup>&</sup>lt;sup>10</sup> Klimko v. VEC, 216 Va. 750, 761 (1976).

<sup>11</sup> Id.

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Over 100,000 Virginians comprise both putative classes. While their claims languish at the VEC, many face the risk of eviction, and many cannot pay for their families' basic needs. Thus, the legal deficiencies of the VEC's current protocols have caused and exacerbated real suffering and irreparable harm. We therefore hope you will choose to work with us to tackle these issues.

### Remedies

As to the "continued claims" claimants, the solution is simple: apply the presumption federal guidance requires. Once a person has begun receiving benefits and an issue arises that may impact eligibility or qualification (e.g. job separation, subsequent job offers), the VEC must either 1) adjudicate no later than the end of the week following the week in which the issue is detected, or otherwise 2) continue benefits unless or until there is an adverse deputy determination (following adequate notice to and participation rights for the claimant). The U.S. Department of Labor requires the VEC to apply this presumption of ongoing eligibility irrespective of the possibility that doing so may result in overpayments for some claimants.

As to the waiting applicants, the VEC must work in whatever ways possible to reduce the adjudication backlog. Doing so may require the VEC to increase its adjudication capacity and/or decrease the number of cases needing adjudication using a triage system. The VEC also may need to consider additional ways to reduce hardship on unemployed Virginians.

We are aware that the VEC has posted job vacancies for additional hearing officers: however, that step alone has proven woefully insufficient to deliver needed results.

We have undertaken a review of steps other states have made to reduce adjudication backlogs. These include increasing temporary adjudication capacity through hiring private contractors; deploying National Guard members to claims processing functions; temporarily reassigning administrative adjudicators from other state agencies; temporarily reassigning other agency staff to adjudication functions; having adjudicators specialize in particular types of issues, to allow them to work through cases more efficiently; expediting training for new adjudicators by having them specialize in particular types of issues; setting up teams of experts to resolve the oldest and most complicated claims; and using computer systems to resolve certain types of cases *en masse*. To the extent additional funds are needed for any of these purposes, we suggest that unspent CARES Act funds be utilized.

In addition to working through adjudication backlogs, states have taken steps to respond to hardships caused by adjudication delays. For example, Oregon has created a "Benefits While You Wait" program that identifies people who are likely to be deemed qualified for benefits via either regular unemployment insurance or Pandemic Unemployment Assistance ("PUA"), and begins issuing benefit payments while their cases wait for adjudication.<sup>12</sup>

<sup>&</sup>lt;sup>12</sup> See State of Oregon Employment Department, "Tens of Thousands of Oregonians Awaiting Adjudication Could Receive 'Benefits While You Wait'," July 31, 2020, at https://unemployment.oregon.gov/tens-of-thousands-oforegonians-awaiting-adjudication-could-receive-benefits-while-vou-wait.

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Virginia must do much more to respond to the crisis of backlogged unemployment claims. We are confident that the Commonwealth can.

Assuming that you are interested in discussing this issue with us, we ask that you indicate that interest to us, by email to pat@justice4all.org and steve@vplc.org, no later than Monday, November 23, and that we schedule a discussion (to occur by Zoom or similar video call service) with you to take place no later than December 4. We look forward to discussing these matters with you further.

Thank you in advance for your attention to this urgent and troubling situation.

Sincerely,

Pat 2; h Pat Levy-Lavelle

## Exhibit L

### COMMONWEALTH of VIRGINIA Virginia Employment Commission Communication from UI Division

To: ALL VEC Staff

From: Trish Williams, UI Director

Subject: Removal of Separation Issues/ New Issue Codes

Date: December 9, 2020

### **Removal of Separation Issues**

In order to comply with a precedent decision concerning the requirement to make prompt payments the agency will be taking steps to release separation issues holding up payments to individuals who are in a continued claim status (received at least 1 payment before the separation issue was discovered). The adjudication staff will continue working these issues and rendering written decisions as they have since the pandemic started.

As these issues are resolved the claimant will be mailed a letter (see attached) and a text or robo call will be sent out directing them to access the following link: <u>www.vec.virginia.gov/benefits-update</u> This link will take them to a landing page that will provide them detailed information on this matter.

On 12/07/2020, programming was implemented to start automatically resolving discharge (10) and voluntary quit (20) issues based on establishment date. The oldest issues will be resolved first starting with the establishment date of 06/23/20. The operator id on the VABS 02 screen will be 60000697 with a status of 3. A claimant may have multiple separation issues established on different dates. The plan is to have separation issues established between 06/23/2020 and 11/25/2020 resolved by 12/15/2020.

Separation issues established on or after 11/30/20 will be resolved 21 days from that date unless they have already been adjudicated.

### Non-Separation Issues

Individuals who are in a continued claims status and have a non-separation issue(s) attached to their claim may be addressed in the same manner as separation issues. However, there are certain issues that cannot follow this process. More details to follow.

### New Issue Codes

In an effort to identify fraud a new 82 issue code has been established in VABS. Staff should place this issue code on the VABS claim record if they are either working the claim or have received an inquiry that leads them to suspect fraudulent activity has occurred. Staff should also be sure to place this issue on any claim pending a recheck, pending federal wages (UCFE, UCX), pending out of state wages (Combined Wage Claim), and pending alternate base period wages. The staffer "MUST" place a memo on the claim record explaining why the 82 issue has been established and refer it to the fraud unit, unless it is pending wages.

Due to the increased volume of monetarily ineligible claims being filed and continued rise in fraudulent claims activity I have requested IT to program and establish an 82 issue on all monetarily ineligible claims. It will take a few weeks for this to be programmed. This will enable any PUA claim filed to be stopped (Status=S) pending investigation.

You may also begin to see 46 issue codes established and resolved on the VABS 02 and 22 screens. This is a new issue code for PUA Appeals (and possibly other pandemic programs) which create the dummy determination that will be used as a means of keying these appeals into VABS, much like the dummy codes Appeals uses when setting up an appeal on a Monetary Determination. You will also note on the appeals 30 screen an issue law code of PL116 that signifies the PUA language for the appeal.

# Exhibit M

## COMMONWEALTH of VIRGINIA Virginia Employment Commission Communication from UI Division

To:	ALL VEC Staff
From:	Trish Williams, UI Director
Subject:	Removal of Non-Separation Issues
Date:	January 4, 2021

### **Removal of Non-Separation Issues**

In order to comply with a precedent decision concerning the requirement to make prompt payments the agency has taken steps to release non-separation issues holding up payments to individuals who are in a continued claim status (received at least 1 payment before the non-separation issue was discovered). The adjudication staff will continue working these issues and rendering written decisions as they have since the pandemic started.

A letter has been mailed to the claimant (see attached).

On 12/31/2020, programming was implemented to start resolving job refusal (04), in between school terms (07), and failed drug test (15) issues based on establishment date. The operator id on the VABS 02 screen will be 60000697 with a status of 3. A claimant may have multiple non-separation issues established on different dates. The removal of issues covered the period 06/23/2020 through 12/09/2020.

There could still be other issues on the claim record that have not been removed and are continuing to hold up the processing of a payment to the claimant.

Non-Separation issues established on or after 12/10/20 will be resolved 21 days from that date unless they have already been adjudicated.

# Exhibit N

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**COMMONWEALTH of VIRGINIA** 

### **Virginia Employment Commission**

Ellen Marie Hess Commissioner 6606 West Broad Street Richmond, VA 23230

Post Office Box 26441 Richmond, VA 23261-6441

Mr. Pat Levy-Lavelle, Esquire Legal Aid Justice Center 626 E. Broad Street Suite 200 Richmond, VA 23219

Via Email

Mr. Levy-Lavelle:

January 13, 2021

This office is in receipt of your request for records made in accordance with the Virginia Freedom of Information Act (§ 2.2-3700 et seq.). Attached are the records you have requested relating to the designated items:

1. A copy of the VECNET memo dated December 9, 2020, or as subsequently revised, entitled "Removal of Separation Issues/ New Issue Codes";

Attached is the UI Communication dated 12/09/20. There has been no further communication on this matter.

 Any additional guidance (\*except guidance, if any, authored by legal counsel\*) regarding the implementation of resumed payments to individuals who are in a continued claim status, and were cut off due to one or more separation and/or non-separation issues that is/are awaiting adjudication;

The agency took action to remove certain pending non-separation issues on paid claims 12/31/20. See attached UI Communication dated 01/04/21.

3. The number of individuals who are in a continued claim status but have not received resumed payments as of December 23, 2020 (or otherwise as of the most recent available date, if after December 23, 2020);

The most recent number of continued claims who have not received resumed payments is 7,453.

Page 2 Mr. Pat Levy-Lavelle, Esquire January 13, 2021

4. A list of reasons, collectively, why those individuals haven't been paid yet;

The following issues continue to hold up payments on claims: a. 45 = UI Eligible b. 53 = Alien without Lawful Permanent Residence c. 54 = Other State UI d. 59 = Court Conviction e 60 = Suspected Fraud f 65 = Prior Benefit Year Requalification g 75 = No Liable Employer h. 81=Does Not Validate with Social Security Administration i. 82= Potential Identity Theft j. 89 = Administrative Fraud

5. Information about when all such resumed payments – to individuals in a continued claim status – will be completed.

At this time the agency cannot provide an answer to this question as there is no existing record for this information.

Please contact me at (804) 786-8533 or <u>InformationControl@vec.virginia.gov</u> if you have any questions.

Sincerely, Rachel Bamble

Rachel Bramble Analyst, Information Control

Attachments

# Exhibit O

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From: Chief of Benefits, rr <chief benefits@vec.virginia.gov> Sent: Thursday, April 8, 2021 10:35 AM To: Pat Levy-Lavelk <pat@justice4all.org> Cc: Weaver, Kathy <kathy weaver @vec.vrgjinia.gov> Subject: Re: Request for Assistance for "Continued Claims" Claimants

Good Morning,

I apologize for the late response to your inquiries. Please see attached document with responses to all three claims. Please let me know if you have any questions,

Regards, Trish Williams UF Director Virginia Employment Commission Trish Williams@vec.virginia.gov

On Wed, Feb 17, 2021 at 5:59 PM Pat Levy-Lavelle pat@justice4all.org wrote:

Dear Madam or Sir

I am writing you to request your assistance in resolving the continued claims cutoffs / outstanding benefit payments associated with the following claimants. Please resume payments as soon as possible to these claimants, or otherwise advise with specificity on why that is not possible. (Also, if there is any info needed from any of these claimants to enable the resumption of payments, please advise.)

Crystal Clifton

Last four of SSN

VEC PIN:

Delange Fells



Amanda Clemons

Last four of SSN

Please update on the status as soon as possible.

Thank you kindly for your assistance.

Sincerely, Pat Levy-Lavelle

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#### Amanda Clemons:

Ms. Clemons filed a regular UI claim effective 03/29/20 and started receiving benefits on 04/21/20 when her reported discharge issue was automatically removed. She continued to receive benefits through the week ending 06/13/20. She filed weekly claims for the weeks ending 06/20/20 through 08/01/20, however, those weeks were held up until her separation decision was issued on 12/23/20, which qualified her for benefits. The claimant stopped filing weekly claims. A new hire report was received on 07/09/20 indicating she was hired. Wages were reported for the 3<sup>rd</sup> quarter 2020. The VEC last spoke to the claimant on 08/10/2020. On 12/28/20 the claimant was emailed by our Customer Service Department and advised to reopen her claim. The claimant never reopened her claim and the claim expired on 04/07/21.

### **DeLange Fells:**

Ms. Fells filed a regular UI claim effective 03/29/20 and started receiving benefits on 04/06/20. She reported that she was discharged and that issue was automatically removed on 04/02/20. She continued benefits through the week ending 06/13/20. She filed weekly claims for the weeks ending 06/20/20 through 08/01/20, however, those weeks were held up due to a job refusal issue. The separation decision was rendered on 02/16/21 and the job refusal rendered on 02/19/21 releasing payments for the weeks 06/20/20 through 08/1/20. The claimant exhausted her UI benefits and was notified by text or robocall and letter to file a PEUC claim. The PEUC claim was not filed until 03/16/21 and benefits released on 03/17/21 for the weeks 08/09/20 through the week ending 12/19/20. The claimant was then eligible for PEUC 2021 and filed that claim on 03/23/21. Benefit weeks 01/02/21 through 03/20/21 were processed and paid on 03/24/21. The claimant is now receiving benefits weekly.

### **Crystal Clifton:**

Ms. Clifton filed a regular UI claim effective 03/29/20 and started receiving benefits on 04/06/20. She continued receiving benefits through the week ending 05/09/20. When she claimed the week ending 05/16/20 a job refusal was reported by Ms. Clifton and an issue established on her claim. She had reported she was separated from her employer due to a lack of work. On 06/05/20 a voluntary quit issue was established. The separation and job refusal issues were adjudicated and the claimant denied benefits on 03/18/21. Ms. Clifton was determined overpaid UI benefits paid in the amount of \$4,986.00. The overpayment decision was mailed to the claimant on 03/22/21. The claimant then filed for PUA (Pandemic Unemployment Insurance) on 03/24/21. Benefits were released to Ms. Clifton on 04/07/21 for weeks claimed 05/16/20 through 12/26/20. She should be able to file additional weeks of PUA and be paid for those weeks.