

FILED
SUPREME COURT
STATE OF WASHINGTON
7/2/2020 4:38 PM
BY SUSAN L. CARLSON
CLERK

No. 98633-9

SUPREME COURT OF THE STATE OF WASHINGTON

UNEMPLOYMENT LAW PROJECT, et al.

Petitioners,

v.

SUZAN LEVINE, COMMISSIONER FOR THE WASHINGTON STATE EMPLOYMENT
SECURITY DEPARTMENT,

Respondent.

REPLY DECLARATION OF JOHN TIRPAK

THE SHERIDAN LAW FIRM, P.S.

John P. Sheridan, WSBA #21473
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Attorneys for Petitioners

I, John Tirpak, declare that the following statement is true and correct:

1. I have read all of the documents provided by opposing counsel in response to the Motion to Accelerate.

2. This second supplemental declaration is necessary to ensure the Court fully understands the gravity of harm caused by ESD's additional harmful actions since my Supplemental Declaration on 6/22/2020. It is imperative that the Court understand why ULP is a party to this petition since the defense disregarded our role its response to the motion to accelerate. Due to the severity of the unemployment insurance crisis in Washington State, Supreme Court intervention is necessary.

3. I understood that ESD was overwhelmed by new applications for benefits after Governor Inslee entered his stay-at-home order after March 17, 2020. ULP has increased its staff and student interns by over 300 percent to handle the calls from distressed workers across the State of Washington. As of today, the calls to the ULP offices in Seattle and Spokane continue at the rate of over 100 calls per day, including weekends. I have lost contact with many claimants because their phone service has been cut off since they did not receive unemployment benefits for weeks or months.

4. Since ESD is not sending appeal notices to the Office of Administrative Hearings, ULP staff is focused on the hundreds of complaint calls and emails that come in each week, rather than hearing representation. Funds that were allocated to provide legal representation are being used to listen to complaints about ESD.

5. The ESD staffing increase is nowhere near proportional to the sharp surge in claimants and their need for help that was known in March. Early in the pandemic, I personally urged Commissioner LeVine to shift staff from overpayment collections to processing new claims.

6. I personally heard ESD Commissioner LeVine make promises regarding hiring more staff to meet the challenges of the increased demands due to the high unemployment rate. However, the public statements did not include actual numbers of people being hired.

7. Before Covid-19, approximately 6,000-7,000 new claimants filed a claim each week, until the peak of the emergency when ESD had received 1.41 million weekly claims. Feek Dec. at ¶¶ 7 and 15. This is a 23,500 percent increase and Ms. Feek indicates that ESD has only hired 573 new staff, which is only a 34 percent increase since March 8. *Id.* at ¶ 24.

8. Ms. Feek says ESD is leveraging an additional 1,300 workers from various agencies, but these workers appear to have been

engaged only after our petition was filed. *Id.* at ¶ 25. ESD did not take this action when it saw weekly intakes almost double. It does not appear that ESD called in outside support or ensured their phones/online systems could handle the influx of inquiries (pursuant to federal regulations on UI programs).

9. From my perspective, ESD only asked for help from outside agencies when there was a monetary issue surrounding fraud and Commissioner LeVine was responsible for the breach. She swiftly pointed the finger at eligible claimants and has exacerbated the problems that more than 71,600 claimants are experiencing with ESD. *Id.* at ¶ 59.

10. Based on the unemployment rate, ESD staffing should have increased at least 500% to meet the challenge. It baffles me that ESD did not look to unemployed claimants as prospective hires to meet the need for more staff.

11. ESD literally has access to every qualified unemployed worker in the State and the workers' most recent employer to verify skills. ESD could have hired from this pool of hard-working Washingtonians in real time to meet the ever-growing demand that has resulted from this pandemic.

12. I am unaware of any efforts made by Commissioner LeVine to secure more funding to increase staffing to meet the demands.

In July, ESD will have to process thousands of new claims by furloughed state employees at a time when many claims that were opened in March and April continue to be mired in the adjudication process.

13. Since March, ULP has received calls and emails from thousands of claimants who are not receiving their payments and ESD is continuing to collect past overpayments instead of reassigning staff to process claims. Responding to these calls and emails has been an incredible drain on precious legal services resources. The drain on staff resources has turned a non-profit legal services office into an ESD complaint department.

14. In the past, when a claimant is alleged to have committed fraud, ESD would conduct an individual investigation that would allow a claimant to respond. If the investigation indicated a finding of fraud, the claimant would receive a fraud determination letter. The claimant would have an opportunity to appeal and present testimony and other evidence at an administrative hearing. ESD is not following standard due process procedures. Currently, ESD is suspending claimants' payments after flagging the claimant's account as "indicia of fraud" immediately without investigation or any other due process.

15. ESD claims it would be unduly burdensome and a waste of taxpayer money to give people the notice of hearing because 71,600

people are stuck in adjudication. Fleek Dec. at ¶ 59. This statement disregards reality. It further violates claimants' right to a timely administrative hearing, because the claimant can start the appeal process as soon as possible, which benefits the claimant and the taxpayers of this state. ESD is not prohibited from trying to resolve the issue in “adjudication” while OAH schedules the hearing date. If ESD is able to resolve the matter in favor of the claimant before the hearing then ESD can cancel the hearing, but if ESD is not able to resolve the matter in favor of the claimant, the claimant has already started the process for a hearing, which minimizes unnecessary delays.

16. ESD says an “impostor fraud claim” is a claim where a criminal uses the stolen identity of a Washington worker—including personal identifying information—to file a claim with the Employment Security Department and then directs the unemployment benefits to an account under the criminal’s control. *See*, Trevino Dec. at ¶ 7. However, the majority of the claimants contacting ULP were either:

- a. Approved for benefits and received an eligibility determination;
- b. Asked to submit supplemental documentation to show they did qualify for benefits and the claimants submitted documentation, but ESD did not timely resolve the matter for many claimants; or

c. Submitted applications for regular benefits, PUA benefits, and/or PEUC benefits because they were advised to do so based on action alert in their e-services SAW account. Mr. Zeitlin paints a picture in his declaration that Ms. White was in the wrong for filing a regular UI claim and a PUA claim. Zeitlin Dec. at ¶ 37. He further blames Ms. White for the confusion regarding work search requirements as a justification for the continued delay in prompt payment. *Id.* at ¶ 41-42. He finally acknowledges that this was not a genuine issue warranting pause of payment because Governor Inslee waived the work search requirement on March 8, 2020. *Id.* at ¶45. Ms. White followed ESD's direction to her peril and now she has an overpayment of \$932.00. *Id.* at ¶43. ULP has heard from many claimants with similar experiences as Ms. White.

d. Most claimants did not report having their identity stolen and they all asserted they worked in Washington and believed they were eligible for unemployment benefits.

17. Since June 11, more claimants are contacting ULP saying their bank accounts have been frozen and money on their ESD EBT card is being revoked, but they have not received any notice of the right to appeal. Others are waiting many weeks for their notice of hearing after submitting their request for an appeal.

18. From ULP's standpoint, ESD did not regularly or timely communicate with the claimants about why and how their specific claims were identified as fraudulent. In the past, before a fraud determination was made, the claimant was questioned by ESD regarding the issue being investigated. The investigation would be immediately after the issue was discovered. Then a determination notice would be sent to the claimant within a week or two. If the determination alleged fraud, the claimant would have 30 days to file for a hearing with an administrative law judge. The determination notice would give specific reasons for the alleged fraud. For example, the allegation would specify an issue like unreported income during the claim or an alleged false statement regarding availability for work. In the past a claimant would be able to get a hearing set in two or three weeks.

19. Even ULP advocates could not get timely responses from ESD about common questions that ULP is asked. For example, ULP only learned on June 26, 2020, that claimants may be charged an overpayment if they qualify for UI regular benefits after being approved for PUA benefits. Attached hereto as **Exhibit 1** is the June 26, 2020 email from Daniel Zeitlin, re Call Follow Up (If the regular UI weekly benefit is lower than what was paid out of the PUA claim this will result in an overpayment, which per federal guidance cannot be waived.).

20. It is very concerning for ULP that ESD told claimants they could apply for all benefits on April 20. Attached hereto as **Exhibit 2** is April 20 ESD Covid-19 Action Alert (It is important to remember that you can apply for these benefits at any point, and weekly claims can be submitted anytime, Sunday to Saturday, to be paid for the previous week).

21. Claimants, like Ms. White, followed ESD's instructions to the best of their ability and are now charged with an overpayment. Zeitlin Dec. at ¶ 43, The declaration by D. Zeitlin attempts to place blame for the claimants' problems on themselves, rather than acknowledging the fact that any issues related to these claims could have been resolved in a matter of weeks, not months by ESD. I am sure that if Mr. Zeitlin's paychecks were deposited to his account three months late, he would raise concerns about the integrity of the state's payroll system.

22. ESD has not kept the promises that were made in March, April, May, or June regarding processing claims. In March, the promise of new hiring was not kept. In April, the announcement of Operation 100% was a publicity event that has proved to be far less than 100%. In May, there was a promise that payments would be delayed only a few days to check ID. This has not been the case. Thousands are still waiting as of today—even after providing their ID multiple times. The promise to clear

cases by the end of June has not been kept as thousands waiting since March are still waiting.

23. ESD was forewarned that any extra burden on its claims processing system—never mind an unprecedented quintupling+ of claims—would be unmanageable. In January 2017, when the new IT system (known as UTAB—Uniform Taxes and Benefits) was launched by ESD, it was a period of low unemployment. Nevertheless, the system immediately crashed, claims processing ground to a crawl, the phone lines became essentially non-functional— as they are now—and ULP was inundated with calls for help from desperate claimants.

24. ULP appealed to the governor and to state legislators to address the problem. ("State unemployment computer system still not working," KIRO7.com, January 5, 2017.) ESD itself, in its Final Report on the UTAB launch, referred it as "troubled." (Employment Security Department, Unemployment Tax and Benefits Project Quality Assurance Closeout Report, March 21, 2017.) Over the next year or so, the system partially improved and claimants' waits on hold fell from hours-long to ordinarily several dozen minutes, but it was clear that the system would be completely unprepared for a sharp increase in claims volume. The report noted that UTAB "is not compatible with ESD's installed infrastructure. ... This may increase risks to the long-term maintenance activities and

will likely require increased support from the vendor... The state's enterprise security infrastructure is complex and will likely require ongoing technical and operations support... WaTech was not prepared to support ESD's SAW/SEAP implementation....The level of difficulty associated with interface coordination and management was underestimated and started too late in the implementation process." *Id.*

25. The UTAB system was installed as a commercial off-the-shelf software package from the company Fast Enterprises at a cost of \$44 million. (Paul Roberts and Patrick Malone, "Missed Red Flags," *Seattle Times*, June 19, 2020). Unfortunately, Fast Enterprises, which promised Washington and other states that its system would reduce state expenses for administering unemployment benefits, has a track record of aggressively charging innocent claimants with overpayments and fraud. In Michigan, for example, from 2013 to 2015 the Fast Enterprises IT system accused 20,000+ claimants of fraud with a 93% error rate, leaving many in financial ruin from which they have still not recovered. ("States' Automated Systems are Trapping Citizens in Bureaucratic Nightmares with Their Lives on the Line," TIME.COM, May 28, 2020.) In 2020, Washington is similarly punishing claimants over unfounded suspicion of fraud via its installed Fast Enterprises' software.

26. In Washington, ESD leadership created an immense amount of confusion that only they had the power to create. Everyday workers of Washington have been harmed as a result. The public trust is lost and the workers need intervention on their behalf against ESD's accusatory response system that treats valid claimants as fraudulent impostors.

27. On or about April 30, the Employment Security Commissioner released a Covid-19 Action Alert that I received by email entitled, "We'll work night and day until everyone receives their benefits." Attached hereto as **Exhibit 3** is the April 30, 2020 ESD Covid-19 Action Alert. But, all of ESD's actions disregarded the promise to issue prompt payment. For example:

a. ESD does not give claimants notice prior to adverse action, and claimants contacted ULP to ask for assistance;

b. ESD abruptly suspended claimants' payments for more than two days after requesting identification verification. Attached hereto as **Exhibit 4**, the May 18, 2020 ESD Covid-19 Action Alert (Holding payments for 1-2 days to validate all claims as authentic).

c. ESD is forcing claimants with the "indicia of fraud" to submit the same exact identification documents multiple times,

unnecessarily delaying prompt payment and keeping people in a never ending “adjudication” or “pending status.”

d. Once a person's identification is verified they are still susceptible to being reflagged and having their payments suspended again for an indefinite period of time to reverify identity. Zeitlin Dec. at ¶¶ 22-27.

e. ESD claims that unemployment benefits are not based on financial need. Defendants Response to Plaintiff’s Motion to Accelerate at 26. But in fact, the majority of people contacting ULP are not able to meet their immediate basic financial necessities and are distressed because their unemployment benefits are their only source of potential income.

f. Under WAC 192.100.070, ESD could have used conditional payments to decrease the length of time a claimant stopped receiving benefits while ESD conducted its fraud investigation. Conditional payment means that when a potential eligibility issue is detected, continued claim recipients receive payment "conditioned" on the eligibility issue being resolved in their favor. Claimants are notified of the issue and are given the opportunity to be heard (reasonable mailing time plus five days). *O'Brien, et al. vs. ESD*, Laying the groundwork for the consent agreement ESD signed based on *O'Brien*, the court found that "continued claim recipients" ... have a

property interest in UI benefits and cannot be deprived of those benefits without adequate notice and the opportunity to be heard on the eligibility issue. *Id.* Attached hereto as **Exhibit 5**, is a screen capture of "Summary of consent agreements resulting from lawsuits filed against Employment Security.", available at www.esd.wa.gov/newsroom/consent-agreements.

28. The administrative hearing is a claimant's only chance to create a legal record regarding their unemployment benefits. On or about June 29, 2020, ULP contacted the Office of Administrative Hearings (OAH) with a claimant to see if OAH had received her request for a hearing. During this call, ULP learned from OAH staff that it is taking seven weeks for ESD to send requests for hearings, and it takes two weeks for OAH to process. Under current direction, ESD is forcing claimants to stay in a "pending" or "adjudication" status for over one month and then must wait for a hearing for over two months. Lorraine Lee, Chief Judge of OAH, has stated in the *Seattle Times* that she has not been informed by ESD regarding the number of hearing requests that will be sent to OAH from ESD. (*Seattle Times* June 19, 2020) This will not give OAH the opportunity to hire new judges to meet the demand.

29. ESD has used the fraud issue as an excuse for its failure to timely process claims and hearing requests since March.

30. Claimant's declarations go back to March and April before the fraud. ESD's leadership dropped the ball at every step of the way. The only people being held responsible for the Commissioner's breach are eligible claimants in desperate need of unemployment benefit insurance compensation to meet their basic living necessities until they can safely return to work.

31. ULP is advocating on behalf of denied claimants because ESD must issue notices of appeal rights before suspending or pausing claimants' benefits for weeks or months at a time. ESD's "pause" or "hold" on payments adversely impacts claimants and they could be better served by ensuring ESD meets the increased demand for benefits in a timely manner that is consistent with the laws. This may not be an official denial but it literally prevents people from receiving their weekly unemployment income.

32. The workers with the most problems have been low-income earners. The current system favors educated English-speaking claimants with high speed internet over low-income people of color who must call the 800 number. Like the long lines at polling stations in Georgia, Florida, or Ohio, ESD has a two-tiered system for receiving benefits. Just like voter suppression, current ESD practices discriminate against the vulnerable low-income communities of color and

immigrant/refugee communities who have been impacted most by the
COVID-19 virus.

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct to the best of my
knowledge.

DATED this 2nd day of July, 2020 in Seattle, Washington.

/s/John Tirpak
John Tirpak

CERTIFICATE OF SERVICE

I, Tony Dondero, certify under penalty of perjury under the laws of the State of Washington and the United States that, on July 2, 2020, I served the document to which this Certificate is attached to the party listed below in the manner shown.

ROBERT FERGUSON
Attorney General

Eric D. Peterson,
Senior Assistant Attorney General;
Leah E. Harris,
Assistant Attorney General

- By United States Mail
- By Legal Messenger
- By Facsimile
- By Overnight Fed Ex Delivery
- By Electronic Mail

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EricD.Peterson@atg.wa.gov
Leah.Harris@atg.wa.gov

Dated this 2nd day of July 2020.

s/ Tony Dondero
Tony Dondero,
Legal Assistant

EXHIBIT 1



Andra Kranzler <andra@ulproject.org>

Fwd: Call Follow Up

1 message

Anne Paxton <apaxton@ulproject.org>
To: Andra Kranzler <andra@ulproject.org>

Tue, Jun 30, 2020 at 2:06 PM

Begin forwarded message:

From: "Zeitlin, Daniel (ESD)" <DZeitlin@ESD.WA.GOV>
Subject: Call Follow Up
Date: June 26, 2020 at 12:27:12 PM PDT
To: "Alexis.Rodich@seiu775.org" <Alexis.Rodich@seiu775.org>, "Stefan@8.unitehere.org" <Stefan@8.unitehere.org>, "Foutch, Madeleine" <madeleine.foutch@seiu775.org>, "Neil@wabuildingtrades.org" <Neil@wabuildingtrades.org>, "rachel@workingwa.org" <rachel@workingwa.org>, Sybill Hyppolite <Shyppolite@wslc.org>, "rmcaloon@wslc.org" <rmcaloon@wslc.org>, "rmcaloon@wslc.org" <rmcaloon@wslc.org>, "jswanson@iuoe302.org" <jswanson@iuoe302.org>, Pamela Crone <pamcrone@gmail.com>, "Mark@wabuildingtrades.org" <Mark@wabuildingtrades.org>, "suryansara@seattleu.edu" <suryansara@seattleu.edu>, "sage@workingwa.org" <sage@workingwa.org>, "suryansara@seattleu.edu" <suryansara@seattleu.edu>, Pamela Crone <pamcrone@gmail.com>, Anne Paxton <apaxton@ulproject.org>, "sgrad@ufcw21.org" <sgrad@ufcw21.org>, "Tina.Sigurdson@seiu775.org" <Tina.Sigurdson@seiu775.org>, "Kendo, Joe" <jkendo@wslc.org>
Cc: "Adams, Joy (ESD)" <JAdams@ESD.WA.GOV>, "Michael, Scott E (ESD)" <SEMichael@ESD.WA.GOV>

All:

Thank you for the good conversation today. Per our discussion, below are responses to the questions we had pending from last week.

We are hearing about calls from people claiming to be with ESD asking for identity verification. Can you confirm that this would not happen at ESD's behest, or could it happen?

This may have occurred with some new hires. We have since instructed them to not make calls. ESD staff will not call claimants asking them to verify their identification.

Many claimants have been denied regular benefits and have appealed. While those appeals are pending, if they have applied for PUA what is the status of that application? Does their PUA application go on hold while the appeal is pending or does it proceed on a separate track?

In situations where a claimant is affected by an indefinite denial on their regular UI claim, and they meet the requirements to be eligible for PUA benefits, they may be paid benefits under a PUA claim while an appeal in connection with the indefinite denial is pending. The PUA claim would not be put on hold.

However, if the appeal results in an overturned or modified decision which then allows benefits under the regular unemployment claim, any weeks eligible for payment of benefits under the unemployment

claim would no longer be eligible under PUA. Weeks originally claimed under PUA would need to be transferred to the regular UI claim if determined payable after the appeal determination.

If the regular UI weekly benefit amount is lower than what was paid out of the PUA claim, this will result in an overpayment which per federal guidance cannot be waived. Such situations would likely involve claimants receiving a minimum weekly PUA benefit (\$235), which is higher than the minimum weekly UI benefit (\$188; \$201 effective 7/1).

For those who had their own individual standby request approved and expired while everyone was on standby by rule, have they lost their twelve weeks? These applicants would not have known to save their individual standby period?

No, they have not lost their 12 weeks. When/if work search requirements are reinstated (we continue to seek extensions) workers will again be able to request standby. We will have to determine and provide in rule the number of weeks for which standby can be granted from workers and/or employers.

Dan Zeitlin
Director
Policy, Data, Performance and Integrity (PDPI) Division
Washington State Employment Security Department
Phone: 360-890-3467
Email: dzeitlin@esd.wa.gov

EXHIBIT 2

ALERTS (3) ▼

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The Washington State Employment Security Department processed a record number of applications for unemployment benefits but had challenges with the volume

4/20/2020

OLYMPIA - With the launch of new benefits Saturday night, the Employment Security Department received more applications (including expanded, extended and traditional benefits) in a single day than the biggest week on record, which was 182,000 applications in the week ending 3/28. For comparison, the 182,000 applications in a week was already seven times the peak week for the 2008/2009 recession.

"The amazing news is that hundreds of thousands of our fellow Washingtonians have already applied and have or will receive much-needed relief right away. That said, we appreciate everyone's patience and understanding as we manage this enormous volume," said Employment Security Department Commissioner Suzi LeVine. "Last week, I warned everyone this would be a clunky process and some of that has come true. We know many people have been unable to access the system and submit their applications. We know how frustrating this is and are adapting in real time to this massive influx of new claimants as best we can. Most importantly, we want to reassure everyone that those who are eligible will get their money and that they will be paid retroactive to their date of eligibility. This is a source of funding that won't run out."

As is expected in a major technology roll-out, several issues have been identified and the team started resolving those concerns starting Saturday night. They continue to look for opportunities to improve performance and have seen application numbers rising since mid-morning on Sunday, demonstrating that those efforts are working.

Top issues we are seeing and challenges we are facing:

- High volume in weekly claims: In addition to the incredible influx of new applications, Sunday is also the day on which many people file their weekly benefit claims. This increased the number of site users, which exacerbated the performance issues for many customers.
- While many are coming prepared and we have seen 257,144 downloads of our instruction guides and checklists, many people are still making common mistakes when filling out the application. These avoidable errors could lead to people having to resolve it with a call center agent or go through adjudication. This will slow down their ability to receive benefits. It is important to read the website and download and use the checklists and guidance documents before applying.

A few tips to help:

- It is important to remember that you can apply for these benefits at any point, and weekly claims can be submitted anytime, Sunday to Saturday, to be paid for the previous week.

- Again, the unemployment benefits programs will not run out of money and you will be paid retroactively to the date you are eligible.
- You do not need to do anything to receive the additional \$600 per week enhancement.
- To reach us by phone:
 - Have questions (after you've checked the website first): 833-572-8400
 - Filing your weekly claim over the phone: 800-318-6022
 - Claims inquiries that can't be answered online: 800-318-6022
- Visit the new help page on the website for additional tips for success: esd.wa.gov/unemployment/help (https://esd.wa.gov/unemployment/help?utm_medium=email&utm_source=govdelivery).

-30-

Media inquiries: media@esd.wa.gov (<mailto:media@esd.wa.gov>)



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(<https://www.yeswecan.org/>)

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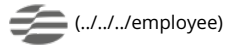


EXHIBIT 3

ALERTS (3) ▼

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Employment Security Commissioner: "We'll work night and day until everyone receives their benefits"

4/30/2020

OLYMPIA – Employment Security Department Commissioner Suzi LeVine released this statement today about Washingtonians awaiting unemployment benefits:

"While the team at the Employment Security Department has helped hundreds of thousands of people get unemployment benefits since the beginning of the COVID-19 crisis, we know that there are still many who are awaiting their payments. It is beyond frustrating for these individuals and we will continue to work night and day until everyone receives their benefits.

"Unfortunately, resolving these issues takes both people and time. Claims may be pending for a number of reasons, the most common of which is a discrepancy between the information the employee entered when applying for unemployment, and the information reported to us by their employer. In order to make sure the customer is eligible for benefits, and to ensure due process for both the employee and employer, these cases need to be adjudicated.

"Under normal circumstances, cases are adjudicated within 21 days. That means additional information is requested and reviewed by a trained adjudicator and a decision is made in about three weeks. However, right now is anything but normal. We've had more claims in the past 7 weeks than we had in the prior 3.5 years combined! The work of an adjudicator requires specialized training and additional skill development in order to make sure these cases are fairly and accurately processed, and it takes time to staff up this team. In the meantime, we know that people continue to wait for an answer.

"It is our agency's number one priority to get benefits to those people who are eligible for some form of unemployment assistance and who are still waiting. These are the four things we're doing right now to address this issue:

1. Getting people who are eligible to be paid to take action. Tens of thousands of people have not filed their weekly claim, or do not know they are should apply for expanded unemployment benefits under the federal CARES Act. Targeted emails will remind them to take these important steps.
2. Reaching out to those in adjudication for various reasons and updating them on the work we are doing to resolve their situation.
3. Bulk-clearing certain issues when we can. For example, people who noted that they are a student as well as an employee, typically must show that they have enough hours in their week outside of school available to work. With most schools cancelled, this is an issue we have been able bulk-clear from many applicants, speeding up the process for many of those folks to be paid.
4. Bringing on more customer service staff to both help people across the state process their claims and get through on the phones and free up our adjudicators to do the specialized work of resolving claims issues. We've more than tripled our claims staff and we continue



to hire, so please go to esd.wa.gov/esdjobs (<https://esd.wa.gov/esdjobs>) to see current postings.

"We know people are struggling all across the state and many are in desperate situations. These are our friends, neighbors and families. I am so sorry that we haven't been able to provide everyone with relief when they need it and we will continue to work hard to eliminate this backlog and get money to all those who are eligible as quickly as possible."

Commissioner LeVine also shared a video about this topic on Wednesday (https://www.youtube.com/watch?utm_medium=email&utm_source=govdelivery&v=TCqIFSB-h4A).

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Contact:

media@esd.wa.gov (<mailto:media@esd.wa.gov>)



(<https://seeker.worksourcewa.com/home.aspx>) (<https://securemedia.newjobs.com/..../GCDE/id/mgs/9976/docs/Priority-of-Service-Overview.pdf>)

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State government

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- Find a rule or a law (<http://leg.wa.gov/LawsAndAgencyRules/Pages/default.aspx>)

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EXHIBIT 4

ALERTS (3) ▼

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Update on imposter fraud from Commissioner Suzi LeVine

5/18/2020

OLYMPIA - Since the beginning of May, the Employment Security Department (ESD) has been experiencing a dramatic rise in incidents of "imposter fraud," where an individual using stolen personal information fraudulently applies for unemployment benefits. ESD Commissioner, Suzi LeVine, released this statement on Monday as an update to [information she shared last week](https://esd.wa.gov/newsroom/statement-imposter-fraud?utm_medium=email&utm_source=govdelivery) (https://esd.wa.gov/newsroom/statement-imposter-fraud?utm_medium=email&utm_source=govdelivery):

"This is happening because bad actors have acquired people's personal information through other data breaches outside of the agency. Criminals then use this information to fraudulently apply for unemployment benefits in someone else's name. There has been no data breach from ESD's system.

"While this is an immediate and pressing concern for our department, it is not just happening here in Washington. Imposter fraud is a sweeping issue affecting unemployment systems in states across the country. We are working with law enforcement, other states, financial institutions and the U.S. Department of Labor to detect and prevent fraud.

"Because our top priority is to ensure Washingtonians are paid as quickly as possible while we simultaneously protect against fraudulent activity, we have taken a number of steps in our own system to address this increase in fraudulent activity. Steps include:

- Holding payments for 1-2 days to validate all claims as authentic.
- Hiring more fraud investigators and staff to answer questions on the fraud hotline.
- Making changes to our system that will require some customers to verify or provide certain information. These changes impact both new and existing customers, and in some cases could delay payment while we collect or verify this additional information. We apologize for any confusion or delay this is causing and are working quickly to address any issues for legitimate claims.


"We are digging into the scope and scale of the problem and remain committed to transparency and security.

"We will share additional information and actions customers can take soon. You can read more about imposter fraud and report it at [esd.wa.gov/fraud](http://www.esd.wa.gov/fraud?utm_medium=email&utm_source=govdelivery) (http://www.esd.wa.gov/fraud?utm_medium=email&utm_source=govdelivery)."

-30-

Contact: media@esd.wa.gov
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**NEWSROOM****QUICK LINKS**

Summaries of consent agreements resulting from lawsuits against Employment Security

Duncan vs. Turner | Nava settlement | O'Brien, et al, vs. ESD | Othello Community Hospital | Pregnancy/disability

Duncan vs. Turner

In 1987, the legislature passed a law giving claimants the option of filing for an alternate base year. Before this law was passed, if a claimant didn't have 680 hours worked in their base period (first four of the last five completed quarters), they had to wait a quarter until the base period changed and a subsequent quarter became part of their base period. The new law allowed claimants to be paid benefits as soon as their employer's wage details were keyed. The law didn't require the department to make any efforts to speed keying of wage details to validate claims. Claimants had to wait until the wages were processed normally.

Mr. Duncan was a roofer who worked in Vancouver. He filed a claim for benefits and was first denied as his employer considered him an exempt corporate officer and didn't report any wages or hours for him. The Unemployment Law Project represented Mr. Duncan in an appeal regarding the denial of wage credits. After winning his appeal on the issue of wage credits, Mr. Duncan received enough wage credits to establish a valid claim using the "regular" base year. The Unemployment Law Project and Evergreen Legal Services then looked for another affected claimant to serve as their test claimant.

In the meantime, the department conducted a pilot project to determine the costs and benefits of tracking wage details and keying wages for claimants with alternate base year claims. The Priority Processing Project showed that the processes used to key tax reports and



wage details were not conducive to setting up alternate base year claims. The methods in use were manual, processing wages of specific claimants was not cost effective, and had minimal impact on the timely processing of these claims.

Following depositions with Evergreen Legal Services, and unable to find another claimant who was harmed, the Unemployment Law Project and Evergreen Legal Services dropped their lawsuit.

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Nava settlement

In March of 1993, Evergreen Legal Services filed a class action lawsuit against the Employment Security Department and the Office of Administrative Hearings. The class was defined as "all limited English speaking individuals, presently or in the future, who apply for or receive unemployment compensation benefits, who file an appeal concerning their benefits and who receive notices concerning administrative hearings and appeals there from that are not in their primary language nor accompanied by a notice in their primary language that adequately describes the significance of the notice and how the recipient may receive assistance in understanding the notice."

A limited English proficient individual is defined as: "Any person whose primary language is not English and who cannot readily speak, read and understand the English language." The primary language is the language other than English which a limited English proficient individual is able to readily speak and understand.

The lawsuit was filed on behalf of claimant Manuela Nava and all limited English proficient claimants who may have had their benefits denied because notices concerning their appeal hearings were not provided to them in their native languages. A final settlement was reached in August of 1994.

In that settlement, the plaintiff agreed to dismiss her action if the department would agree to provide certain specific services to limited English proficient individuals. The department agreed to provide the services based on the dismissal of the lawsuit.

In October of 1993, the department began tracking the language preference in which limited English proficient claimants would like to receive written communications. The Office of Administrative Hearings began collecting similar data from hearings where interpreters were requested. Based on the data, languages were grouped into Tiers I, II, and III. The most common language, which was Spanish, was placed in Tier I. The next most common languages were placed in Tier II, while all other languages were placed in Tier III. This type of survey was to take place once each year, which it has.

The primary focus of the settlement was to provide Unemployment Insurance Division, Office of Administrative Hearings, and Commissioner's Review forms and notices relating to a claimant's appeal right (including petitions for review) in Tier I and II languages. Tier III claimants receive notices of the availability of translation services.



In November of 1994, an amendment to WAC 192-04-090 (<http://apps.leg.wa.gov/WAC/default.aspx?cite=192-04-090>) was approved. It allowed the Office of Administrative Hearings and Commissioner's Review Office to consider limited English proficiency as a good cause factor for the late filing of an appeal or petition for review.

For a period of one year, our department was required to notify all Tier I and II claimants about the expanded services available to them under the settlement agreement. The settlement agreement also required our department to mail the Spanish advisory notice to all claimants who had filed new claims since January 1, 1994, indicating Spanish as their language preference.

Since the settlement was agreed to, the Unemployment Insurance Division has taken the responsibility of expanding the distribution of forms and notices in Spanish as well as other languages, not only with respect to appeals, but also with the filing and claiming of unemployment benefits.

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O'Brien, et al, vs. ESD

Prior to 1984, when a claimant submitted a claim form that did not clearly establish eligibility for benefits, payment was "pending" (or suspended) until the claimant established eligibility.

Claimant O'Brien submitted a claim form for the weeks ending May 7 and 14, 1983. Based on the information on the claim form alone, she was denied benefits for failing to conduct a "systematic and sustained effort to obtain work." Claimant was given no opportunity to provide information prior to the denial of benefits.

A class action suit was filed in Thurston County Superior Court by Evergreen Legal Services on behalf of O'Brien and others.

The court found that "continued claim recipients" (those who have been determined monetarily and non-monetarily eligible and who have received waiting period credit or payment for at least one week) have a property interest in UI benefits and cannot be deprived of those benefits without adequate notice and the opportunity to be heard on the eligibility issue. The court also found that 80 percent of claimants who had their payments pending were later found eligible and that pending payments caused delays of seven to ten days in receiving payment, thus depriving claimants of needed income.

In May of 1984, Superior Court Judge Gerry Alexander issued an order that the department be "restrained and enjoined from":

- Pending benefit payments of "continued claim recipients."
- Failing to provide "adequate notice and opportunity to be heard" to continued claim recipients when the department questions their eligibility for benefits.

As a result of the court order, the department adopted emergency regulations (made permanent in 1987) that:



- Defined adequate notice and opportunity to be heard.
- Defined a continued claim recipient.
- Provided for the "conditional payment" of continued claims recipients.
- Provided that claimants who were paid conditionally and then subsequently denied were at fault and liable for repayment of benefits.

Conditional payment means that when a potential eligibility issue is detected, continued claim recipients receive payment "conditioned" on the eligibility issue being resolved in their favor. Claimants are notified of the issue and are given the opportunity to be heard (reasonable mailing time plus five days).

Claimants failing to respond to the notice timely are presumed to be ineligible and are issued "presumptive" denials. Those denials can be redetermined if the claimant later establishes eligibility.

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Othello Community Hospital

Employment Security is now required to review all base year and last employer separations rather than only the last separation to determine eligibility for unemployment benefits.

Leona Lawrence was discharged from Othello Community Hospital in July of 1983 for alleged theft of hospital property. She did not file a claim for benefits after this discharge. She began working for Willapa Harbor Hospital in September of 1983 and quit to follow her spouse in May of 1984. She filed for unemployment and was appropriately denied on the grounds that she left work for domestic responsibilities.

She returned to work and was discharged after three months. She reopened her claim, allowed benefits for a non-disqualifying reason, and had sufficient earnings to purge her denial from Willapa Harbor Hospital.

When she began receiving benefits, Othello Community Hospital, as a reimbursable base year employer, was notified of a charge to their account. They filed an appeal requesting a ruling on separation from their employment. On March 10, 1985, they were denied based on the "last employer rule." The separation from Othello Community Hospital could not be considered in determining her benefit eligibility because the Hospital was not the last employer at the time she initially applied for benefits. On March 13, 1985, the claimant pled guilty and was convicted of third-degree theft (13 months after her separation). The case was taken to the Court of Appeals and in October of 1988 they invalidated the department's "last employer rule." The department's motion for reconsideration was denied.

As a result, claimant eligibility is determined by adjudicating all potentially disqualifying separations from base year employers and the last employer unless the separation is purged. Claimants are required to provide accurate addresses for base and lag period employers. Notification that a claim has been filed is sent to all base year employers who report wages to the department.



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Pregnancy/disability

Claimants Terri Gachen and Debbie Booser were ticket agents for Alaska Airlines and worked with cathode ray tube computers (CRTs). The union/management collective bargaining agreement stated that CRTs posed a risk to unborn children and allowed for a voluntary leave of absence to pregnant workers. Both claimants exercised their rights under this agreement and requested leaves of absence. They applied for unemployment benefits, but were ultimately denied on the grounds that they had not taken all reasonable steps to preserve their employment by asking their employer for alternative work. Subsequently, the Unemployment Law Project filed a class action suit alleging the department unlawfully discriminated against pregnant workers who file unemployment claims.

The Pierce County Superior Court judge awarded benefits to both claimants, ruling that the evidence was clear that the job of the claimants involved working with CRTs, which posed a danger to pregnant workers. The court also noted that the reasons for leaving were known to the employer, and that the employer is in the unique position of knowing what other positions would be available for the employee to perform. The court then concluded that the burden of offering alternative work is on the employer and not on the claimant in cases where claimants have a disability. The Unemployment Law Project and department signed a settlement agreement, approved by the court, in which the department agreed it would, in good faith, propose the following rules:

- Claimants who leave work due to pregnancy will be given a directive outlining the work search and availability requirements they must meet;
- Pregnancy-related disabilities will be treated the same as other medical disabilities;
- A claimant will not be found unavailable for work for failing to request alternative work with the employer if he or she told the employer of the disabling condition and the employer did not offer alternative work prior to the leave of absence; and
- A claimant on leave of absence due to a pregnancy-related disability will not be found unavailable solely because the leave of absence is voluntary.

Under current practice, claimants are required to take reasonable steps to preserve their employment, including requesting alternative work from the employer, unless those efforts would be futile. Claimants on a voluntary leave of absence are considered to be unavailable for work and ineligible for benefits. In normal circumstances, directives are only issued when the department determines a claimant needs to increase his or her job search activities, or those activities need clarification. While pregnancy-related disabilities should be treated the same as other medical disabilities, existing policy does not directly address this.

The department adopted the following rules to resolve the settlement:

- Leaving work because of illness or disability - WAC 192-150-055 (<http://apps.leg.wa.gov/WAC/default.aspx?cite=192-150-055>)



- Leaving work because of disability - WAC 192-150-060 (<http://apps.leg.wa.gov/WAC/default.aspx?cite=192-150-060>)
- Suitable work factors - WAC 192-170-050 (<http://apps.leg.wa.gov/WAC/default.aspx?cite=192-170-050>)
- Requirements of individuals who leave work due to illness or disability - WAC 192-180-012 (<http://apps.leg.wa.gov/WAC/default.aspx?cite=192-180-012>)

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Unemployment Handbook

(<https://esdorchardstorage.blob.core.windows.net:443/esdwa/Default/ESDWAGOV/Unemployment-Handbook-for-Unemployed-Workers.pdf>)

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