Representation of Claimants at Unemployment Compensation Proceedings: Identifying Models and Proposed Solutions

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Emsellem and Halas posit that claimants need representation at unemployment compensation proceedings. Evaluating statistical and survey data, the authors find that representation significantly improves a claimant's chance of receiving unemployment compensation. Improved recovery rates, they argue, benefit not only claimants but also society. The authors analyze the factors inducing employer appeals of compensation awards. They also review the systemic issues that accompany the provision of representation to those unable to afford it or to those unfamiliar with the unemployment compensation process. Finally, the authors present models of expanding claimant representation.

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INTRODUCTION

This Article evaluates the need for claimant representation at unemployment compensation proceedings and the range of legal protections and organizational models which have developed to expand access for all claimants, especially those least able to represent themselves. Part I reviews the favorable impact of representation as reflected by the available data and the empirical research regarding administrative and judicial proceedings including, but not limited, to those within the unemployment program. Part II expands upon the need for claimant representation, focusing on such factors as the impact of job loss on the ability of claimants to represent themselves and the substantive and procedural law demands of an unemployment benefits case. Part III analyzes the factors that may promote employer appeals, including the experience-rating system and the growing industry of third-party representatives. Part IV evaluates the systemic legal issues that affect the claimant’s right to a fair hearing. Part V concludes with a description of model programs which, if promoted nationally, could expand claimant access to representation.

I. EVALUATING THE EMPIRICAL EVIDENCE

In 1994, claimants and employers filed more than one million appeals in unemployment cases.¹ Sixty-seven percent of these cases involved disputes over “misconduct”² and

¹ Specifically, there were 989,003 lower authority appeals and 178,843 higher authority appeals. Unemployment Ins. Serv. U.S. Dep’t of Labor, Appeals Data (Jan. 23, 1995) [hereinafter Appeals Data] (unpublished data, on file with the University of Michigan Journal of Law Reform). Thirty-two percent of all initial determinations were appealed to lower authority hearing tribunals and an additional 16% of cases were appealed to higher authority tribunals. Id.

² All states have enacted provisions disqualifying from unemployment compensation employees who have been discharged for misconduct. See generally 1C Unempl. Ins. Rep. (CCH) ¶ 1970 (providing brief descriptions of state law variations of the misconduct disqualification). Typically, as described in the leading case on the subject, misconduct requires a finding that the claimant’s conduct evinced a “wanton disregard of an employer’s interests.” See Boynton Cab Co. v. Neubeck, 296 N.W. 636, 640 (Wis. 1941).
"voluntary quit" disqualifications, thereby focusing on the fundamental cause of the claimant's separation from work. Of the appeals brought by claimants who challenged an initial denial of benefits, thirty-one percent of these claims were reversed at the first level of appeal. In addition, fourteen percent of unfavorable determinations against claimants were reversed when challenged at the next level, the higher authority appeals tribunal. Employers successfully appealed thirty-four percent of initial determinations to lower authority tribunals, and of the cases appealed to higher authority tribunals, nineteen percent were reversed in the employers' favor. This information, which is regularly collected by the United States Department of Labor, Unemployment Insurance Service (UIS), highlights the substantial volume of cases appealed, the nature of the disputes, and perhaps most importantly, the significant proportion of determinations overturned when challenged on appeal both by claimants and their employers.

This data, however, tells only part of the story. The available information that the UIS collects examines neither the underlying forces influencing the rate of claimant or employer appeals nor the impact of legal advocate representation on the rate of recovery for those parties who pursue their appeal rights. Pursuant to a request by the National Employment Law Project, Ohio appeals board officials generated data that produced noteworthy results regarding representation. For

3. All states disqualify workers from unemployment compensation if they leave work voluntarily. See generally 1C Unempl. Ins. Rep. (CCH) ¶ 1975 (providing brief descriptions of state law variations of the voluntary quit disqualification). The majority of states provides that a worker is disqualified if she quits without "good cause;" many states require that "good cause" be "attributable to the employer." Id.
4. Appeals Data, supra note 1.
5. Id.
6. Id.
7. Id.
8. See Memorandum from David F. Kubli, Chief Administrative Hearing Officer, Ohio Unemployment Compensation Board of Review, to National Employment Law Project (Feb. 7, 1995) (on file with the University of Michigan Journal of Law Reform). The tabulations, which indicate whether a party was represented and the outcome on appeal, were generated by forming certain queries for retrieval from the state's appeal board database. See Memorandum from David F. Kubli, Chief Administrative Hearing Officer, Ohio Unemployment Compensation Board of Review, to Sue McNeil, National Employment Law Project (Feb. 10, 1995) (on file with the University of Michigan Journal of Law Reform). Other states that enter data on outcomes and legal representation into their computer systems can presumably generate similar tabulations. See id.
example, in 1994, Ohio employers were represented on appeal roughly four times as often as claimants. When represented, claimants were successful in forty-five percent of the cases appealed, up from thirty-four percent when claimants were not represented. In contrast, the success rate for employers remained precisely the same, sixty-five percent, whether or not they were represented. These results are generally consistent with the findings of a 1979 survey that the National Commission on Unemployment Compensation conducted. According to the 1979 data, the rate of decisions favorable to claimants on appeal was thirty-one percent overall, compared to a forty-five percent success rate among claimants who were represented on appeal. In the case of employers, the rate of success decreased from sixty-nine to fifty-four percent when employers had representation on appeal.

We recognize that there are limitations in the current data—for example, the undetermined impact on percentages when legal advocates screen meritorious appeals—and that these limitations must be considered in evaluating the impact of representation in unemployment proceedings. Thus, we propose a more detailed treatment of this issue, a treatment

9. See Memorandum from David F. Kubli (Feb. 7, 1995), supra note 8 (reporting that claimants were represented in 10% of all appeals while employers were represented 45% of the time).
10. See id. When represented by an advocate, claimants had a 32% greater chance of success on appeal. Id.
11. Id.
13. Id. (reporting that claimants were represented in seven percent of all cases).
14. Id. (reporting that employers were represented in nine percent of all cases). The Ohio and national survey results are consistent with data that we received from individual programs that provide representation services. Recently published Wisconsin data also supports these findings. For claimant appellants, the likelihood of success rises 36.8% if both sides have representation and to 47.6% if only the appellant has a representative. The overall success rate of represented claimant appellants is 44.2%. Herbert M. Kritzer, The First Thing We Do, Let's Kill All the Lawyers (or at Least Replace Them?): Lawyers and Nonlawyers as Advocates 65–66 (Spring 1995) (unpublished manuscript, on file with the University of Michigan Journal of Law Reform).
15. For a discussion of survey limitations, such as potential success of claims on appeal or high quality of counsel, see Rubin, supra note 12, at 629. For a presentation of various analyses designed to assess the impact of representation and yet to control for such factors as the "winnability" of the case, see William D. Popkin, Effect of Representation on a Claimant's Success Rate—Three Study Designs, 31 ADMIN. L. REV. 449, 452–60 (1979).
that builds on the research regarding the impact of representation in other administrative and judicial proceedings. For example, scholars have developed statistical models to predict the outcome of a case by applying the expertise of knowledgeable participants in the system, and then by measuring this prediction against the actual outcome of a case.\textsuperscript{16} Not surprisingly, in other forms of administrative and judicial proceedings, studies tend to show that representation has a favorable and measurable impact on the outcome of a case.\textsuperscript{17} Therefore, while the data reported here is preliminary, the data is consistent with the available research and the views of most experienced observers of the unemployment compensation system that the representation of claimants indeed plays a significant role in the recovery of unemployment benefits.

II. THE CASE FOR CLAIMANT REPRESENTATION

A number of factors contribute to the need for claimant representation at unemployment compensation proceedings. These factors divide into two main categories: (1) the unique nature of the employment relationship, and (2) the complex nature of the unemployment benefits system.

\begin{itemize}
\item \textsuperscript{16} See, e.g., Popkin, supra note 15, at 457–59.
\item \textsuperscript{17} See COMMUNITY TRAINING & RESOURCE CTR. & CITY-WIDE TASK FORCE ON HOUS. COURT, INC., HOUSING COURT, EVICTIONS AND HOMELESSNESS: THE COSTS AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL at iv (1993) (predicting that if counsel were provided to tenants facing eviction in New York City, the city would save $67 million in annual shelter costs because these people would not be evicted); Anthony J. Fusco, Jr. et al., Chicago's Eviction Court: A Tenants' Court of No Resort, 17 URB. L. ANN. 93, 114 (1979) ("Outcomes were markedly different, however, between tenants represented by an attorney and tenants who did not retain counsel."); William D. Popkin, The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs, 62 CORNELL L. REV. 989, 1024–26 (1977) (discovering that representation of claimants in several different administrative proceedings had a substantial favorable impact on the outcome of the case); Andrew Scherer, Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings, 23 HARV. C.R.-C.L. L. REV. 557, 573 (1988) ("Representation by counsel makes a tremendous, and in many cases determinative, difference.").
\end{itemize}
A. The Unique Nature of the Employment Relationship

The concentration of wealth and power in a few hands, the grave disparity of income between chief executive officer and employee, and the growing inequality in family income create the contextual reality that informs the employment relationship. Furthermore, with the decline in union membership and the lack of protection under the prevailing employment-at-will doctrines, employers enjoy the upper hand in the distribution of rights and responsibilities in the employment relationship. It should come as no surprise, therefore, that this imbalance of power in the employment relationship spills over to the unemployment context, where the employer also exercises considerably more clout than the employee. Employers generally bring more resources and a greater understanding of the unemployment system to the hearing. In contrast, employees face an emotional and relatively greater financial impact. In this context, the importance of representation for claimants cannot be understated. Indeed, policymakers concerned about the just implementation of the unemployment insurance system have long recognized these issues and the National Commission on Unemployment Compensation fully documented them in 1980.

Employers simply do not stand in the same shoes as claimants with respect to the need for representation. Witnesses for employers very often include a worker's supervisor, the head


of the employer's personnel department, or both. Compared to employees, these individuals may have more education, more familiarity with the unemployment hearing process, and more access to company documents. Employers also can require the attendance of other employees as witnesses. Unrepresented claimants, on the other hand, probably no longer have access to company documents, probably do not know how to get them, and usually find that corroborating witnesses still in the employ of the company are reluctant to testify. They may not know how to assemble facts in a case or to prepare subpoenas and cross-examination—elements necessary to an effective presentation of their claim.22

Added to these disadvantages is the impact on the claimant of losing his employment. It is increasingly recognized that the loss of one's job has an enormous emotional force on the discharged worker.23 Such recognition reflects the central role that employment plays in the lives of men and women, affecting both economic survival as well as psychological well-being. The distinct stages of the grieving process ensuing from the loss of a job24 and the occurrence of an unemployment hearing within a few months of discharge, often leaves an unemployed claimant emotionally ill-equipped to enter a hearing alone.25 If the initial claims taker has denied the claimant unemployment benefits, the claimant may feel that the agency has already taken a position against her and may thus assume that the hearing is a futile exercise, not unlike the process of disputing the merits of the case with the employer.

The fact that the unemployment hearing may very well be the first time that an unemployed worker has confronted her boss face-to-face since separation from the job compounds these

22. See, e.g., Kritzer, supra note 14, at 69–70 (discussing the impact of unfamiliarity of the unemployment hearing).

23. See, e.g., Foley v. Polaroid Corp., 508 N.E.2d 72, 85 (1987) (Liacos, J., concurring and dissenting) ("It is difficult to overstate the importance of the employment relationship as a focus of [personal] security and standing in our society.").

24. Thomas Keefe, The Stresses of Unemployment, 29 SOC. WORK 264, 265 (1984) ("Clinical observations of recently unemployed persons seeking help from social service agencies found grief reactions, anger, guilt, feelings of loss, and a sense of losing a part of the self. These responses are not unlike feelings of bereavement.").

25. A survey of studies of the impact of unemployment reveals that job loss contributes to increased risk of depression, anxiety, and poor mental health. See Robert D. Caplan et al., Job Seeking, Reemployment, and Mental Health: A Randomized Field Experiment in Coping with Job Loss, 74 J. APPLIED PSYCHOL. 759, 767–68 (1989) (testing preventive intervention on the ability to obtain reemployment and cope with setbacks for victims of job loss).
problems. The claimant may feel intimidated by this confrontation or angry over a perceived wrongful termination; these feelings can interfere with the claimant's ability to provide compelling and sufficient evidence to support an award of benefits. In addition, the individual circumstances of many claimants create special barriers to their ability to represent themselves pro se. For example, even with the assistance of an interpreter, a party who does not speak the language of the decision maker suffers an extreme disadvantage when the case rests, as it often does, on credibility determinations. Interpreters who are either untrained in the law or in simultaneous interpretation skills, or who are not bicultural may not be accurately presenting the claimant's words. Language barriers prove even more significant for claimants in states where interpreter services are not provided at hearings. Claimants who are illiterate or have other communication barriers that interfere with their ability to persuade a fact-finder face similar problems.

Finally, the stakes of winning and losing are simply far greater for the unemployed worker than for her employer. Generally, an employer will face only the possibility of a slightly higher experience rating. An unemployed worker, on


28. Experience rating is the basis used to determine an employer's financial obligation to unemployment insurance. Experience rating essentially imposes higher tax rates on employers who generate more cost to the system. Advisory Council on Unemployment Compensation, Unemployment Insurance in the United States: Benefits, Financing, Coverage 3, 73 (1995) [hereinafter 1995 ACUC Report]. Within the rating system, there is significant variation and complexity in the state laws that specifically delineate the taxes. Id. at 73–84. Admittedly, self-insured employers face more serious financial consequences than employers who rely on the unemployment insurance programs run by the government, because self-insured employers must pay the entire claim. Ironically, we have found that as non-profit
the other hand, may face the loss of her family's only source of income. A recent survey of individuals in New York who had exhausted their Federal Emergency Unemployment Compensation (EUC) benefits\textsuperscript{29} revealed that ninety percent had encountered difficulties in meeting expenses, twenty-six percent were receiving public assistance one year later, and thirty-five percent were still unemployed because of a tough job market.\textsuperscript{30} With new proposed federal restrictions on welfare, food stamps, job training programs, and other government assistance programs, the receipt of unemployment benefits will become increasingly important, and more often will become the sole means of a family's economic survival.\textsuperscript{31}

**B. The Complex Nature of the Unemployment Benefits System**

Cases involving employment separation issues are legally complex and very contentious. An administrative hearing challenging the grant or denial of unemployment benefits can be as complicated as any other matter for which an individual seeks legal representation. The proceedings have the same

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employers exercise the option to self-insure, and because they generally employ workers at lower salaries, they are often the most aggressive opponents in unemployment compensation hearings.


\textsuperscript{30} DIVISION OF RESEARCH AND STATISTICS, NEW YORK DEPT OF LABOR, A STUDY OF EMERGENCY UNEMPLOYMENT COMPENSATION (EUC) EXHAUSTEES: FINDINGS ON THEIR POST-BENEFIT ECONOMIC AND BEHAVIORAL PATTERNS ONE YEAR LATER 4-5 (1994).

\textsuperscript{31} See U.S. GEN. ACCOUNTING OFFICE, GAO/HRD-93-107, UNEMPLOYMENT INSURANCE: PROGRAM'S ABILITY TO MEET OBJECTIVES JEOPARDIZED, REPORT TO THE CHAIRMAN, SENATE COMMITTEE ON FINANCE, U.S. SENATE 42 (Sept. 1993) [hereinafter GAO REPORT] (finding that unemployment benefits have become "more important in keeping an unemployed worker's family above the poverty line"); see also Heidi I. Hartmann & Roberta Spalter-Roth, Institute for Women's Policy Research, The Real Employment Opportunities of Women Participating in AFDC: What the Market Can Provide, Paper Presented at Women and Welfare Reform Conference 3 (Oct. 23, 1993) (manuscript available at Brooklyn Law School Library) (positing that approximately 40% of AFDC recipients "package" income by combining welfare and work either concurrently or sequentially). As a result of the instability of jobs and low earnings in the secondary labor market, when heads of households are determined ineligible for unemployment compensation after periods of work, they are forced to rely on welfare. If time-limited welfare is enacted, however, they perhaps will not even be eligible for this source of aid.
elements of a trial and require the traditional lawyering skills needed in an adversarial context. Thus, the hearing requires prehearing factual investigation and legal research of the statutory elements; subpoenas of witnesses and documents; the orderly and logical presentation of a client's story; the examination and cross-examination of witnesses including expert witnesses; the preparation and submission into evidence of relevant documents; and the presentation of legal precedents. Critically, the hearing may be the only opportunity to create the record that will be reviewed on appeal.

The trial-like setting requires that claimants be represented not only in contested two-party hearings, but also in one-party hearings in which the claimant challenges the agency's interpretation of law. Cases that involve the statutory concepts of "suitability of work" or "availability for work" similarly provide challenges to the unrepresented claimant. These concepts are becoming increasingly complex with added federal requirements imposed through "worker profiling" and with states' increased efforts to reduce recipient eligibility through the imposition of tougher monetary and qualification criteria.

32. See Kritzer, supra note 14, at 53, 130; see also Terry Fromson, Enforcing the "Fair Hearing" Requirement, in BRIEFING BOOK: U.S. DEPARTMENT OF LABOR OVERSIGHT AND REFORM OF THE UNEMPLOYMENT COMPENSATION PROGRAM 2 (Employment Task Force, National Employment Law Project, Inc. ed., 1994) (stating that claimants without representation may be denied the opportunity to testify fully or to cross-examine adverse witnesses).

33. See, e.g., Morris, supra note 21, at 665-66.

34. See also ADVISORY COUNCIL ON UNEMPLOYMENT COMPENSATION, DEFINING FEDERAL AND STATE ROLES IN UNEMPLOYMENT INSURANCE 113-62 (1996) [hereinafter 1996 ACUC REPORT] (examining these issues on appeal); SAUL J. BLAUSTEIN ET AL., UNEMPLOYMENT INSURANCE IN THE UNITED STATES: THE FIRST HALF CENTURY 169, 232 (1993) (defining concept of "suitable work").

35. Congress required "worker profiling" with the Unemployment Compensation Amendments of 1993, Pub. L. No. 103-152, 107 Stat. 1517 (codified at 42 U.S.C. § 503(j) (1994)). Worker profiling entails states referring suitable claimants to reemployment services and requiring claimants to participate in these services as a condition of eligibility for unemployment compensation unless there is justifiable cause for nonparticipation. Id. § 503(a)(10). As worker profiling is a relatively new statutory requirement and the Department of Labor has not yet promulgated interpretive regulations, claimants who are denied unemployment compensation under this provision will need the assistance of a representative to challenge whether the participation requirements were justified and whether there was good cause for failure to participate.

36. See GAO REPORT, supra note 31, at 30-35 (finding that states faced with declining trust funds respond by tightening eligibility and disqualifications, which results in decreasing unemployment insurance recipient rates); see also Baldwin & McHugh, supra note 20, at 2, 19 (identifying changes in federal law that contributed to the 1980s decline in unemployment insurance recipient rates, because these
The federal enforcement agency that regulates compliance with federal law, the UIS, takes the position, however, that claimants receive fair hearings whether or not they have representation because the proceedings are informal, and the hearing officers provide assistance to unrepresented parties.37 There are at least four problems with this position. First, although the hearings may seem informal, the proceedings carry the trappings of a full-blown trial. Although the rules of evidence do not apply formally, hearsay objections are generally necessary to preserve issues for judicial review.38 Moreover, many courts prevent the parties from introducing evidence, new arguments, or defenses on appeal if these issues were not raised during the hearing.39

37. For example, in 1989, the American Bar Association sought UIS approval for a pilot program providing claimants and employers access to adequate representation in unemployment compensation hearings. American Bar Association Endorses Proposal for Reform of Unemployment Compensation System, Daily Lab. Rep. (BNA) No. 154, at A-5, A-5 (Aug. 11, 1989). Mary Ann Wyrsch, then and currently the director of the UIS, asserted that legal representation does not have a significant impact on a claimant’s or an employer’s ability to win a case and stated that the claims and appeals process is “supposed to be clear and accessible to both parties,” leaving it up to hearing officers to ensure this. Id. at A-6.

38. Cf. Richardson v. Perales, 402 U.S. 389, 395, 402 (1971) (finding that, despite the claimant’s objection that the evidence was hearsay, a written report by a licensed physician who examined the claimant constituted substantial evidence supporting the decision to deny social security benefits to the claimant, because the claimant failed to exercise his right to subpoena the reporting physician and thus provide himself with the opportunity to cross-examine); Goodridge v. Director of Div. of Employment Sec., 377 N.E.2d 927, 929 & n.2 (Mass. 1978) (declining to decide whether, as a general rule, uncorroborated hearsay constitutes substantial evidence in state agency proceedings, but holding that in this case, it did not adequately support the finding). But see Commonwealth Unemployment Compensation Bd. of Review v. Ceja, 427 A.2d 631, 644 (Pa. 1981) (affirming award of benefits to claimant where the referee improperly advised an uncounseled claimant of her rights, gave her no meaningful opportunity to challenge hearsay documents, and did not require the employer to establish the reliability of hearsay that was not reliable on its face).

39. E.g., Albert v. Municipal Court, 446 N.E.2d 1385, 1387 (Mass. 1983) (holding that the appellant was not entitled to raise arguments on appeal that he could have, but did not, raise before the administrative agency); Heitzman v. Unemployment Compensation Bd. of Review, 638 A.2d 461, 463 n.5 (Pa. Commw. Ct.), appeal denied, 648 A.2d 791 (1994) (finding that the claimant waived the issue of whether his employer’s work policy was unreasonable because he raised it for the first time on appeal); Dehus v. Unemployment Compensation Bd. of Review, 545 A.2d 434, 436–37 (Pa. Commw. Ct. 1988) (finding that the claimant waived his right to raise constitutional issue on appeal because he failed to raise it at the “earliest possible opportunity” during administrative proceedings). But see Yanish v. Industrial Comm’n, 558 P.2d 1007, 1009 (Colo. Ct. App. 1976) (holding that the claimant’s failure to raise a procedural objection to a referee did not constitute waiver where the Industrial
Second, UIS timeliness standards influence the behavior of hearing officers and their supervisors. At least sixty percent of all first-level benefit appeals must be decided within thirty days of the date of appeal. The combination of a large number of appeals, shrinking personnel, and a definitive time standard exerts pressure on hearing officers to process cases quickly. This combination of factors may act as a disincentive for hearing officers to take more time to sort out the facts in an unrepresented worker's appeal.

Third, hearing officers are not always in a position to provide much assistance to claimants, nor have courts consistently held that they must do so. The Indiana Supreme Court Commission, in reviewing the referee's decision, has broad authority to take additional evidence); Stone v. Department of Employment Sec. Bd. of Review, 572 N.E.2d 412, 416 (Ill. App. Ct. 1991), aff'd, 602 N.E.2d 808 (1992) (holding that the claimant properly preserved an objection even though he raised it for the first time on appeal); Frey v. Review Bd. of the Ind. Employment Sec. Div., 446 N.E.2d 1341, 1346 (Ind. Ct. App. 1983) (holding that the claimant preserved her right to raise the issue of partial benefits, a matter of law, in her appeal of the referee's finding of fact); Classic Personnel v. Unemployment Compensation Bd. of Review, 617 A.2d 66, 69 (Pa. Commw. Ct. 1992) (finding no waiver where the Bureau of Unemployment Compensation ruled on preliminary matters without ruling on other issues of which the Bureau was aware and which affected the claimant's rights); Bender v. Unemployment Compensation Bd. of Review, 446 A.2d 1004, 1004-05 (Pa. Commw. Ct. 1982) (holding that the claimant did not waive his right to counsel where the referee failed to inform him of his rights and where the claimant first raised the issue during judicial review); Shoreline Community College v. Employment Sec. Dep't, 842 P.2d 938, 943 (Wash. 1992) (stating that an issue is not waived, even if raised for first time in a supplemental brief filed after acceptance of review, if consideration of the issue is necessary to reach a proper decision).

40. 20 C.F.R. § 650.4(b) (1995).
41. See, e.g., Response of Southern Minn. Regional Legal Servs., Inc., St. Paul, Minn., to NELP Survey of Unemployment Compensation Administration 3 (on file with the University of Michigan Journal of Law Reform) (stating that hearing officers "seldom" assist adequately unrepresented claimants and that assistance "varies with [the] Unemployment Insurance Judge").
42. The Pennsylvania courts have recognized that although the review examiner must ensure that relevant evidence is presented by the parties, this duty does not mean that the review examiner must also assist the unrepresented claimant in presenting her claim. See, e.g., Vann v. Unemployment Compensation Bd. of Review, 494 A.2d 1081, 1085 (Pa. 1985) (holding that the lower court erred in requiring the referee to explain that, where the employer has the burden of proof, the claimant is not required to testify). The Vann court reasoned that "[t]o require the referee to advise the claimant as to the strength of his case at any point in the hearing because he is not represented by counsel 'casts the referee in the role of surrogate counsel and advocate for the claimant.'" Id. The court went on to state that such an advisement is contrary to reason and goes far beyond the requirement that the referee be impartial in giving assistance to unrepresented parties. It is . . . preferable to simply recognize, as the Commonwealth Court has previously done, that "any
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addressed the problems which pro se claimants experience in *Berzins v. Review Board of Indiana Employment Security Division.* In weighing the impact of the duty imposed upon a review examiner to insure a full presentation of the case, the *Berzins* court acknowledged that this duty may be impaired by caseload demands. The court noted the inherent difficulty for a review examiner who conducts several hearings every day to "immediately grasp the factual nuances particular to each and every claim and to develop fully the facts relevant thereto. Indeed, our case precedent reveals the frailty of that hope." In particular, cases involving complicated or humiliating factual issues may simply make it difficult for a review examiner to assist a pro se claimant. Such difficulty arises, for example, in cases where the claimant leaves work because of sexual harassment. Here, as in many contentious separations, a claimant layperson choosing to represent himself in a legal proceeding must, to some reasonable extent, assume the risk that his lack of expertise and legal training will prove his undoing.”

*Id.* at 1085–86 (citation omitted). Similarly, in Brennan v. Unemployment Compensation Bd. of Review, [487 A.2d 73](Pa. Commw. Ct. 1985), the court stated:

The referee is not required to become, and should not assume the role of, a claimant's advocate. The referee need not advise an uncounseled claimant on specific evidentiary questions or points of law; nor need the referee show any greater deference to an uncounseled claimant than that afforded a claimant with an attorney.

*Id.* at 77 (citations omitted); see also [Hudson v. Unemployment Compensation Bd. of Review, 522 A.2d 189, 190 (Pa. Commw. Ct. 1987)](citation omitted) (stating that the referee is not required to advise a claimant against assisting the employer in meeting its burden of proof by corroborating the employer's otherwise incompetent evidence). 43. 439 N.E.2d 1121 (Ind. 1982).

44. *Id.* at 1124.

45. *Id.* Illinois and Massachusetts courts have found an explicit duty on the part of review examiners. See [Meneweather v. Board of Review of the Dept' of Employment Sec., 621 N.E.2d 22, 25 (Ill. App. Ct. 1992)](citation omitted) (holding that an unrepresented claimant was denied a full and fair evidentiary hearing where the hearing referee failed to fully develop the record); [McDonald v. Director of the Div. of Employment Sec., 487 N.E.2d 186, 188 n.4 (Mass. 1986)](citation omitted) ("[A]n unrepresented unemployment compensation claimant is entitled to reasonable assistance from the review examiner in presenting relevant evidence."). Yet, in our experience, the claimants in these decisions usually win reversals only after they retain counsel to press their claims of inadequate assistance from the review examiner.

46. The following transcript comes from a hearing in which the claimant did not have representation and lost her claim on the grounds that her departure over sexual harassment did not constitute good cause:

Q. I see. Let me, let me ask you this. Is he that kind of, is kind of an outgoing man?
needs the assistance of a representative to draw out the relevant facts and to make persuasive legal arguments to meet the statutory elements of her claim.

Concomitantly, reductions in administrative financing of state unemployment agencies have resulted in shrinking personnel and training budgets.\textsuperscript{47} Taking these constraints into

\begin{quote}
A. Yes.

Q. This Mr. X.? Does he fool a lot with the girls, ah, does he fool with the girls, and so forth?

A. Yes, I do think he fools around.

Q. Pardon?

A. Yes, I do think he fools around.

Q. Ya, I mean, well is this like part of his makeup? And, were you astounded the first time that he ever . . .

A. Yes.

Q. (inaudible) you about two, two months ago?

A. I was shocked.

Q. And did you ever hear him talk to other girls, and, in a downgraded manner, or about sex or anything like that?

A. He'd tell them to look at that bum, or look at this bum.

Q. Oh,

A. You know, comparing girls' bums in the office.

Q. I see. So, you ah, would you say that you were, that you were kind of familiar with that type of conversation that he used to (inaudible)

A. Yes.

Q. You were familiar with it. That was part of the man's makeup. I see. I see. Do you think he meant any harm?

Brief for Plaintiff-Appellant at 26–27, Caldwell (No. SJC-2561). With the assistance of counsel, the case was later reversed on appeal, and the state high court upheld the reversal on other grounds. Caldwell v. A-1 Sales, Inc., 434 N.E.2d 174, 176 (Mass. 1982).

\textsuperscript{47.} See U.S. GEN. ACCOUNTING OFFICE, GAO/HRD-89-72BR, UNEMPLOYMENT INSURANCE: ADMINISTRATIVE FUNDING IS A GROWING PROBLEM FOR STATE PROGRAMS, BRIEFING REPORT TO CONGRESSIONAL REQUESTERS 21 (May 1989) (finding that, because federal funding was less than states' costs, states have increasingly converted funds for personnel service to nonpersonnel service costs). Some state officials stated that lack of funds has resulted in inadequate training, warning of service disruption, and claims processing errors if unemployment rose suddenly. \textit{Id.} at 33.
consideration, it is unfair to require the hearing officer to take on the role of a quasi-representative—a role that is often impossible to balance with the concurrent obligation of impartiality.

Finally, in rejecting recommendations to increase the opportunity for representation at hearings, the UIS has also based its decision on the fact that the agency regularly reviews the quality of hearings and that the agency is in the process of redesigning quality appraisal methodology. We have significant concerns, however, that the revised quality measurement of first-level hearings, as currently proposed, will not protect claimants adequately. For example, even if quality appraisals could assure fair hearings in the absence of claimant representation, no quality controls exist for higher-level appeals under the system. Furthermore, higher-level appeals are most commonly based on arguments that the hearing officer's decision is unsupported by substantial evidence or the law. Evaluating the merits of these appeals requires expertise in both administrative and unemployment law. By failing to exercise its oversight role in second-level hearings, the quality of second-level review is left totally to a state's discretion. Even in first-level hearings, the sporadic post-hearing quality review cannot substitute for representation.


III. FACTORS PROMOTING EMPLOYER APPEALS

To evaluate properly the need for claimant representation during unemployment compensation proceedings, it is necessary to examine the forces underlying employer appeals. These forces include the experience-rating system and third-party employer representatives.

A. The Experience-Rating System

The experience-rating system imposes higher tax rates on those employers who generate the most costs to the system. This approach—unique to the United States—is very different from the flat tax system that other industrialized nations have adopted. Experience rating dates back to the creation of the unemployment insurance program in 1935. Original proponents argued that experience rating would advance the following goals: (1) encouraging stable employment, because unnecessary layoffs would decrease as an employer's tax rate increased; (2) distributing costs to those employers most responsible for unemployment; and (3) encouraging employers to participate actively in policing the system by stimulating them to contest unwarranted claims for benefits.

Our primary focus is on this third goal of experience rating and the extent to which the experience-rating system promotes unnecessary appeals by employers. A prominent critic of the experience-rating system has stated that the system "has primarily resulted in increasingly significant and sophisticated employer involvement in the litigation of unemployment claims." The business community argues


51. BLAUSTEIN ET AL., supra note 34, at 147.

52. 1995 ACUC REPORT, supra note 28, at 73. With respect to the first two goals, research shows that the experience-rating system may have had some measurable impact, although these findings continue to be debated. Id. at 85–86.

53. Morris, supra note 21, at 665. Morris, a member of the 1980 National Commission on Unemployment Compensation, claims that
that, while there may be some cases in which claims are challenged solely to avoid the tax, most employers only challenge non-meritorious cases.\textsuperscript{54} Other observers have questioned whether an employer derives any true financial benefits from challenging claims based on the experience-rating system, because a substantial body of state law now distributes the costs of favorable claims in certain categories of cases across the system rather than charging an individual employer.\textsuperscript{55}

The common perception, however, is that the tax system creates a substantial economic incentive for employers to challenge claims regardless of the case's objective merits. One leading consultant, for example, has advised the business community that "fighting—and winning—questionable claims is in your best financial interest."\textsuperscript{56} Empirical research, economic advantages motivate employers to retain professional counsel, augment in-house staff, or hire outside specialists familiar with the routine of a hearing procedure, the complexities of the law, and the State officials appointed to decide claimant qualification. Employers deduct from their taxes the expenses for such services; thus, all taxpayers help finance employer litigation of [unemployment insurance].

\textit{Id.}

\textsuperscript{54} Eric Millage, Corporate Counsel for Employers Unity, a nationwide firm that represents employers in unemployment compensation cases, testified at a hearing in front of the Advisory Council on Unemployment Compensation:

I think that to have a blanket policy out there and say that there is no employer that has ever challenged it just because they want to save money, that probably does happen. I'll tell you this much. I have personally supervised about 60,000 claims come through... And any time that we go to a hearing, the number one feedback that I get from my employer community is, you know, Eric, we wouldn't mind letting this guy have unemployment insurance benefits if he deserved it but he doesn't deserve it. And they're very convinced in their heart of hearts that he or she shouldn't deserve it and that's why they're fighting it.


\textsuperscript{55} For example, states often provide that the cost of payments to workers who quit their last job are often shared among all unemployment insurance taxpayers. See 1995 ACUC REPORT, supra note 28, at 78. In addition to such "noncharged benefits," there is the phenomenon of "ineffectively charged benefits," which occurs when an individual employer has reached the state's maximum tax rate and the rate is still too low to cover former employees' benefits. \textit{Id.} at 80. Additional claims fail to trigger a higher tax rate. \textit{Id.}

\textsuperscript{56} J.D. Thorne, \textit{It's Not Your Fault}, SMALL BUS. REP., Nov. 1992, at 46, 47; see also Dawn Kopecki & Roger Thompson, \textit{Jobless Benefits Cost Firms More}, NATION'S BUS., Aug. 1994, at 56, 56–57 (warning that "failure to contest claims made by employees who have quit or were fired can send an employer's unemployment insurance
though still preliminary, tends to support this perception. For example, in Puerto Rico, which had a flat tax until 1992, employer appeals were seven times lower than the national average. Similarly, in the State of Washington, which has had a history of using both the flat tax and the experience-rating system, employer appeals were significantly lower during the tenure of the flat tax system. A 1985 study conducted by the Department of Labor's Office of Inspector General compared employers who had reached the maximum tax rate in their state with employers operating under the variable tax rates while still subject to the impact of experience rating. The study found that the employers who had reached the maximum rate were less likely to file a benefit appeal. Thus, although the Advisory Council on Unemployment Compensation (ACUC) has stated that "[i]t is difficult to determine the extent to which employers appeal even those [unemployment insurance] claims that are legitimate," it recognizes that the experience-rating system provides an incentive to employers to contest claims and that both lower- and higher-level "employer appeals have grown more rapidly than claimant appeals."

B. Third-Party Employer Representatives

Another significant development in the unemployment compensation system—a development that has evaded public scrutiny—is the expanding industry of third-party employer representatives who specialize in workers' compensation and unemployment compensation. These representatives—Gibbens Company, Employers Unity, Gates McDonald & Company, Frick Company, Harrington and Company, ADP Corporation,
and others—provide a variety of “cost control” functions to employers of all sizes, including direct representation at unemployment compensation proceedings.\textsuperscript{62} It is a highly competitive industry and it has been growing at a significant pace as employers increasingly contract out their human resources and payroll functions.\textsuperscript{63}

For example, Employers Unity, one of the largest of these companies, serves over 2000 clients in every state and Puerto Rico.\textsuperscript{64} In Colorado, where the company is based, more than half of all businesses with fifty or more employees contract with Employers Unity, translating into ten percent of all unemployment claims in the state.\textsuperscript{65} In the early 1980s, Employers Unity’s sales of services more than doubled every year, until 1985, when growth slowed to a rate of thirty to forty percent.\textsuperscript{66} Most of the company’s clients are large employers with more than twenty-five employees, and twenty to thirty percent operate in more than one state.\textsuperscript{67} On average, the company conducts 190 hearings per week.\textsuperscript{68}

The potential impact on the unemployment compensation appeals system resulting from this flood of third-party representatives cannot be underestimated. Indeed, this development could be a greater influence on the rate of employer
appeals than the experience-rating system. Equally disturbing is the fact that there has been no effort at the national level to collect even the most basic information relating to the growth and practices of this influential industry.

IV. SYSTEMIC LEGAL ISSUES

A discussion of representation in unemployment compensation proceedings must necessarily address four systemic legal issues: claimants’ due process rights; notification of the right to representation at hearings; attorney’s fees; and lay representation. This Part speaks to each issue in turn.

A. Due Process and the “Fair Hearing” Clause

Unemployment compensation hearings operate under basic principles of due process pursuant to the Fourteenth Amendment of the United States Constitution and to the “fair hearing” clause of the Social Security Act, which requires that each state shall afford an “[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied.” As the cornerstone of due process is notice and an opportunity for a fair hearing, the Social Security Act thus requires that the protections of due process be incorporated into the hearing process of unemployed claimants.

Despite the recognition of unemployment benefits as a property right subject to the requirements of due process and the significant difference that representation makes to claimants in securing that right, no court has held that an unemployment claimant has the right to state-appointed counsel. A California court squarely addressed this issue in Staley v. California Unemployment Insurance Appeals Board, in which the claimant sought to set aside an adverse unemployment administrative decision on the ground that she was denied due process because she had not been provided with

state-appointed counsel. The court refused to apply the holding of *Gideon v. Wainwright* to the claimant's deprivation of unemployment benefits and found no constitutional right to counsel in actions for the withdrawal of public assistance. The *Staley* case, however, was decided before an important evolution in the United States Supreme Court's due process theory, that is, the case of *Mathews v. Eldridge*.

In *Mathews v. Eldridge*, the Supreme Court articulated the standard to be applied to protect an individual's due process rights when faced with the potential deprivation of a property interest. The *Mathews* test requires balancing three factors: (1) the property interest in the benefits involved, or "the private interest;" (2) the risk of erroneous deprivation through the procedures used, including the probable value of additional or substitute procedures; and (3) the governmental and administrative interest, including fiscal burdens, or "the public interest." As other commentators have argued, the three-part balancing test set forth in *Mathews* is an appropriate standard for determining whether an individual is constitutionally entitled to representation of counsel in an administrative proceeding. The application of *Mathews* to the issue of state-appointed representation in unemployment proceedings requires a re-examination of the holding in *Staley* for several reasons.

First, the Court has suggested that unemployment compensation claimants are entitled to due process, stating that "[r]elavent constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation." Accordingly, numerous courts have imposed constitutional standards on unemployment

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72. *Id.* at 295.

73. 372 U.S. 335, 344 (1963) (establishing that indigent criminal defendants have the right to state-appointed counsel).

74. *Staley*, 86 Cal. Rptr. at 295.


76. *Id.* at 335.

77. *E.g.*, Scherer, *supra* note 17, at 563–79 (arguing that when the *Mathews* test is applied to eviction proceedings, the constitutional right to due process of law encompasses the right to representation of counsel for poor people facing the loss of their homes).

78. Goldberg v. Kelly, 397 U.S. 254, 262 (1970). The Supreme Court has also prohibited laws or procedures which inhibit a claimant's ability to receive unemployment insurance benefits. *See*, *e.g.*, Sherbert v. Verner, 374 U.S. 398, 404–05 (1963) (finding that a claimant who, for religious reasons, refused to work on Saturdays was unconstitutionally denied unemployment benefits, because such a denial of benefits violated her First Amendment right to the free exercise of religion).
As one federal district court found: "[T]he payment of unemployment benefits . . . permits retention of the basic human dignity that past accomplishment alone merits, avoiding, in Macaulay's stark phrase, sinking, after many vicissitudes of fortune, into 'abject and hopeless poverty.'"

Certainly claimants' interests in unemployment benefits can no longer be distinguished from the "brutal need" of welfare beneficiaries for their own benefits. The claimant's interest in receiving unemployment benefits during periods of involuntary unemployment is considerable, as the funds are essential to help pay necessary expenditures such as food, shelter, and medical care.

The second prong of the Mathews test, the risk of erroneous deprivation, requires one to look at the data which show that claimants enjoy significantly improved outcomes when they are represented. This data demonstrates substantial risk of error in cases where claimants are not represented. This prong also necessitates an analysis of the administrative procedures used in unemployment benefits cases, as these procedures have become increasingly complex and therefore intimidating to uninitiated claimants. If one side is unrepresented, as in the case of many unemployment benefits hearings, the "pure" adversarial nature of the proceeding is tainted by an imbalance of knowledge in the particulars of unemployment compensation law and procedure. Thus, one cannot overstate the risk of deprivation looming before the claimant appealing a case.

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81. See Goldberg, 397 U.S. at 261 (quoting Kelly v. Wyman, 294 F. Supp. 893, 899, 900 (S.D.N.Y. 1968)).

82. One Supreme Court Justice opined that California, which sought to delay payment of unemployment benefits pending an employer appeal, was disingenuous in its attempt to distinguish Goldberg on the ground that unemployment compensation unlike welfare is not based on need, because "history makes clear that the thrust of the scheme for unemployment benefits was to take care of the need of displaced workers, pending a search for other employment." California Dep't of Human Resources Dev. v. Java, 402 U.S. 121, 135 (1971) (Douglas, J., concurring).

83. See supra text accompanying notes 10, 13.

84. Specifically, the 31% reversal rate for claimant appeals at the first-level hearing stage attests to the need for a substantial check on the system's denial of unemployment benefits. See supra text accompanying note 5.
without representation—especially for low-wage earners who, as a group, disproportionately exhaust their unemployment benefits.\textsuperscript{85}

Finally, an analysis of the \textit{Mathews} test's third prong, the so-called "public interest" prong, demonstrates that the public interest is served when a claimant receives benefits. In \textit{California Department of Human Resources Development v. Java},\textsuperscript{86} the United States Supreme Court found that unemployment compensation, by preventing a decline in the income of the unemployed, serves to aid industries which produce goods and services, by maintaining the purchasing power of unemployed consumers.\textsuperscript{87} Increased claimant representation, which leads to more successful claimant challenges, could also result in significant governmental savings, given that large numbers of claimants who are denied benefits often end up in poverty relying on public assistance,\textsuperscript{88} which typically does not provide the same work-search assistance or training opportunities available to those on unemployment assistance.

The third prong of the \textit{Mathews} balancing test also considers the extent to which the public interest is served by providing an efficient administration of justice.\textsuperscript{89} In essence, the question is whether the costs of improving access to representation outweigh the benefits to the claimant and to the unemployment compensation system.

The UIS has long argued that the costs of improving access to claimant representation are prohibitive, claiming that

\begin{itemize}
  \item \textsuperscript{86} 402 U.S. 121 (1971).
  \item \textsuperscript{87} \textit{Id.} at 131.
  \item \textsuperscript{88} \textit{See} \textit{Division of Research and Statistics, supra} note 30, at 4 (reporting that 26\% of Emergency Unemployment Compensation exhaustees were receiving public assistance one year after exhausting their benefits). Indeed, many states have funded projects called Disability Advocacy Projects (DAP) to provide representation in federally funded Supplemental Security Income (SSI) cases specifically to avoid reliance on state funded public assistance programs including General Assistance. \textit{See} Jane Hardin, \textit{Disability Advocacy Projects: Programs That Assist Low-Income Clients and Ease State Government Fiscal Problems}, 26 \textit{Clearinghouse Rev.} 776, 782-84 (1992).
  \item \textsuperscript{89} \textit{See} Scherer, \textit{supra} note 17, at 576 ("In evaluating the governmental interest in the appointment of counsel for indigent defendants in eviction proceedings \ldots\} one must consider the government's interest in the administration of justice, the just and equitable distribution of finite financial resources, and its interest in the health, safety and welfare of its citizens.").
\end{itemize}
representation leads to increased administrative burdens such as longer proceedings and more delays. The only available evidence of this claim is found in an analysis of one state's program, the Illinois Legal Services Program, which funded attorney representation for claimants and small employers. An evaluation of the Illinois program showed that hearing time increased when one or both of the parties were represented and that a greater percentage of such cases were granted continuances. To the extent, however, that a large percentage of employers are probably already represented at hearings, the Illinois program evaluation did not measure the net increase in costs, if any, resulting from the addition of a claimant representative in the proceedings.

Conspicuously absent from the UIS position against representation is an evaluation of the benefits of claimant representation, which are many. Most importantly, representation ensures fairer hearings, an issue that takes on special significance given that employers are disproportionately represented on appeal. In addition, the unemployment compensation system cuts costs whenever claimants decide not to appeal a case based on an advocate's advice that the case is without merit. Finally, hearing officers are less burdened when not required to usher the proceedings for pro se claimants.

In short, it is necessary to scrutinize closely both the costs and benefits of improving claimants' access to representation before determining that the public interest is not so served. As stated above, the potential benefits of increased representation, such as direct savings to the unemployment compensation system and government-funded public assistance programs, are

90. See, e.g., Letter from Mary Ann Wyrsch, Director, Unemployment Insurance Service, to Richard W. McHugh, Associate General Counsel, International Union, United Auto Workers 2 (Oct. 25, 1989) (on file with the University of Michigan Journal of Law Reform) ("[T]he introduction of additional individuals into the appellate process would inevitably result in the process being delayed."); cf. U.S. Dep't of Labor, Response to Briefing Book: U.S. Department of Labor Oversight and Reform of the Unemployment Compensation Program (Employment Task Force, National Employment Law Project, Inc., ed., 1994) (Sept. 20, 1994) (on file with the University of Michigan Journal of Law Reform) ("[The Department of Labor] has always taken the position that the [unemployment insurance] appellate process should be nontechnical and informal so that representation of the parties would not be necessary.").


92. ILLINOIS LEGAL SERVICES PROGRAM REPORT, supra note 91, at 3.
often overlooked. As Justice Learned Hand stated, "'If we are to keep our democracy there must be one commandment: thou shall not ration justice.'" A balancing of the costs and benefits should therefore err on the side of claimant access to representation in the unemployment compensation system, ensuring access for low-wage workers and others unable to afford representation or to represent themselves adequately.

B. Notice of the Right to Representation at Hearings and the Availability of Low-Cost Representation

Whether or not due process requires unemployment agencies to provide state-appointed representation, recent state court decisions suggest that the due process clause extends to notification of the right to representation. Where so held, a procedure reasonably calculated to provide this information to

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94. Some states grant a claimant a new hearing if he is not provided with notice of her right to counsel. See, e.g., Sandlin v. Review Bd. of the Ind. Employment Sec. Div., 406 N.E.2d 328, 332 (Ind. Ct. App. 1980) (holding that the claimant had a due process right to a procedure reasonably calculated to inform him of his right to counsel); Katz v. Unemployment Compensation Bd. of Review, 430 A.2d 354, 354-55 (Pa. Commw. Ct. 1981) (holding that fairness and state regulation required that claimants be notified of the right to counsel, even though this holding contradicted another Pennsylvania court's interpretation of a fair hearing). Other states only grant a new hearing if the claimant is prejudiced by a hearing officer's failure to not inform her of her right to counsel. See, e.g., Berzins v. Review Bd. of the Ind. Employment Sec. Div., 439 N.E.2d 1121, 1123, 1127 (Ind. 1992) (stating that although due process requires procedures "reasonably calculated to provide notice to employers and claimants of the right to be represented at evidentiary hearings," the failure to so notify does not ipso facto require reversal where the claimant has had the benefit of a full and fair hearing); Sotak v. Review Bd. of the Ind. Employment Sec. Div., 422 N.E.2d 445, 447-48 (Ind. Ct. App. 1981) (holding that although failure to provide written notice of right to representation is not reversible error per se, reversal and remand were required here, where the referee failed to discharge the affirmative duty to examine claimant's witnesses and cross-examine opposing witnesses to ensure the protection of the claimant's interests).

Still other states have declined to find a constitutional right to be notified of the right to counsel and have based the right to notification on a state statute. See, e.g., Simmons v. Traughber, 791 S.W.2d 21, 24 (Tenn. 1990) (holding that failure to advise the claimant adequately of the possible availability of free or low-cost legal representation violated her statutory right to a fair hearing, entitling the claimant to a new hearing).
claimants must include written notification before the hearing of the right to appear with a representative.\textsuperscript{95}

In \textit{Simmons v. Traughber},\textsuperscript{96} the Tennessee Supreme Court addressed the fact that for indigent claimants the right to representation is meaningless because it is unaffordable. The \textit{Simmons} court held that a notice to the parties of an unemployment compensation hearing that stated, "You may be represented by counsel or other authorized representative at your own expense" did not adequately inform the plaintiff of her statutory right to be represented at the hearing.\textsuperscript{97} The court reasoned that "[t]he tone of the notice was negative and misleading. For many unemployed claimants, a notice that they can be represented by counsel at their own expense will terminate their interest in obtaining an attorney and seeking benefits under the statute."\textsuperscript{98} The court found that the claimant was prejudiced by lack of counsel and recognized that "the adversarial nature of the hearing makes counsel especially important in employment security cases."\textsuperscript{99}

As a result of the \textit{Simmons} ruling, hearing notices for unemployment compensation hearings in Tennessee now offer the following information:

\begin{quote}
You may be represented by an attorney or any other authorized representative of your choosing. If you cannot afford an attorney, free or low cost assistance may be available through your local legal services organization or bar association.\textsuperscript{100}
\end{quote}

\textsuperscript{95} See, e.g., Morgan v. Unemployment Ins. Appeals Bd., 6 Cal. Rptr. 2d 34, 37–38 (Cal. Ct. App. 1992) (finding no violation of due process because the claimant was provided with a document informing him of his right to have a representative present and of the availability of free legal representation in the community).

\textsuperscript{96} 791 S.W.2d 21 (Tenn. 1990).

\textsuperscript{97} Id. at 24. \textit{But see} Staley v. California Unemployment Ins. Appeals Bd., 86 Cal. Rptr. 294, 296 (Cal. Ct. App. 1970) (finding that the California unemployment agency had no responsibility to advise a claimant that free counsel was available to represent her in an administrative hearing).

\textsuperscript{98} \textit{Simmons}, 791 S.W.2d at 24.

\textsuperscript{99} Id. at 25.

\textsuperscript{100} Hearings Notice of the Department of Employment Security Appeals Tribunal, Nashville, Tennessee 1 (on file with the \textit{University of Michigan Journal of Law Reform}). Advocates at Legal Services of South Central Tennessee, Inc., remain concerned that this information, buried in other text, still fails to constitute meaningful notice of the availability of free services. Memorandum from David Kozlowski, Staff Attorney, Legal Services of South Central Tennessee, to Monica Halas, Senior Attorney, Greater Boston Legal Services (Mar. 14, 1995) (on file with the \textit{University of Michigan Journal of Law Reform}).
Ohio recently tested the *Simmons* notice. The State of Ohio Unemployment Compensation Board of Review convened a committee comprised of representatives from the Board, service companies, private bar, legal aid, and labor unions to study the representation needs of claimants and employers in unemployment compensation hearings before the Board.\(^{101}\) To determine whether claimants and small employers—which they defined as employers with fewer than 500 employees—were in need of representation, the committee conducted a survey of individuals who appeared unrepresented. The survey was conducted over the course of a year in two separate locations; results were tabulated after one hundred questionnaires were compiled.\(^{102}\) The tabulated results showed that fifty-two percent of all parties stated that they appeared at the hearing unrepresented because they believed that representation was not necessary. Forty-nine percent of those surveyed post-hearing, however, felt that they had needed representation, and eighty-nine percent of those represented stated that representation helped.\(^{103}\)

### C. Attorney’s Fees in Unemployment Compensation Cases

Many commentators have argued that access to representation could be increased significantly by enlarging attorney’s fees in unemployment compensation cases.\(^{104}\) Most state unemployment statutes currently provide for some limited form of “fee generating” mechanism at the administrative and judicial

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102. *Id.* at 1–2.

103. *Id.* at app. C. The conclusions are somewhat limited because the surveys did not record whether or not the represented/unrepresented party had won, which party started the appeal, or which had the burden of proof. The survey did, however, record the huge disparity in representation for claimants and employers. In 6% of the hearings claimants only were represented, whereas in 43% of the hearings employers only were represented; both parties were represented in 9% of the hearings. *Id.* at 8. Thus, employers were represented in 50% of the hearings, whereas claimants secured representation in only 15% of the hearings. *See id.*

review levels. Here, we will briefly analyze the current law regarding attorney's fees and the proposals for reform, with a view toward their impact on the unemployment compensation appeals system generally and claimant representation in particular.

State laws uniformly allow both claimant and employer representatives to charge attorney's fees in cases on administrative appeal. The states vary in the amount allowed, with most leaving the determination of an appropriate fee to the appeals tribunal. Some place strict caps in terms of a dollar amount per case, a percentage of the maximum benefits at issue, or both. A minority of states also provides for attorney's fees and costs upon judicial review of an administrative appeal. The state's administrative security fund usually absorbs the fees and costs of cases in which the claimant is successful in his appeal to the court. Finally, several states

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106. See id.


allow for assessment of court costs against claimants or employers in cases in which the court determines that the proceedings for judicial review have been instituted without "reasonable grounds" or in "bad faith."\textsuperscript{112}

In contrast to the current approach toward recovery of attorney's fees, state legislators have introduced proposals to create the state equivalent of the Federal Equal Access to Justice Act (EAJA), where the government awards reasonable fees to the "prevailing party" in agency proceedings that are adversarial in nature. For example, in California, a bill allowed for representation fees to be paid to the prevailing party from the unemployment compensation contingent fund based on the "financial ability of the party applying for fees to pay for representation."\textsuperscript{113} The legislation died in committee, however, and has not yet been re-introduced. Interestingly, Nebraska once allowed for recovery of fees in administrative proceedings, funding recovery through the unemployment compensation fund.\textsuperscript{114}

Given the limitations on attorney's fees, the private bar generally has not played an active role in representing claimants in unemployment compensation proceedings.\textsuperscript{115} Requiring claimants to pay fees out of benefit awards would negate the whole purpose of unemployment insurance as income replacement. Yet, some private attorneys have argued that states

\begin{footnotes}
\item[112.] ALASKA STAT. § 23.20.460 (1990) (court costs against the claimant); ARK. CODE ANN. § 11-10-106(b) (Michie 1987) (court costs against the claimant or the employer); CAL. UNEMP. INS. CODE § 1586 (West 1986) ("penalty" assessed against claimant or employer); CONN. GEN. STAT. ANN. § 31-272(b)(1) (West Supp. 1995) (court costs against the appellant); IDAHO CODE § 72-1375(b) (1989) (attorney's fees and/or court costs against the claimant); LA. REV. STAT. ANN. § 23:1692 (West 1985) (court costs against the claimant); OKLA. STAT. tit. 40, § 2-302(1) (1991) (court costs against the claimant); P.R. LAWS ANN. tit. 29, § 706(l) (1995) (court costs against the claimant); V.I. CODE ANN. tit. 24, § 306(h) (1993) (court costs against the claimant).
\item[114.] E.g., Act of Protection of Rights and Benefits, ch. 108, § 15, 1937 Neb. Laws 399 (codified at NEB. REV. STAT. § 48-646 (repealed 1986)). The law provided that "[a]ny individual claiming benefits in any proceeding before the commissioner or an appeal tribunal or his or its representative or a court may be represented by counsel or other duly authorized agent, and such counsel may either charge or receive for such services a reasonable fee to be approved by the commissioner. The commissioner may, in special cases, pay such fee from the Unemployment Compensation Administrative Fund." \textit{Id.}
\item[115.] See Goldhammer, \textit{supra} note 104, at 1140 ("[K]nowing that the client is in need of insurance proceeds, the attorney is justifiably skeptical of promises of payment on a contingent basis, because he has no remedy if the client refuses to pay. The result is a rejection of all such cases.").
\end{footnotes}
should impose and enforce liens on benefits in cases in which the claimant does not make payment in accordance with a fee agreement, as done in social security disability appeals. In the end, absent a substantial shift in the nature of the policy debate, the states probably will resist efforts to encourage fee generating and private bar involvement in the unemployment compensation system. Depending on the experience of those states that have already adopted the concept of sanctions in frivolous appeals, however, there may be opportunities to augment sanctioning and perhaps thereby discourage employer appeals in nonmeritorious cases.

D. Lay Representation

Lay advocacy for unemployment compensation claimants involves the participation of diverse individuals: paralegals and law students under the supervision of attorneys, union representatives, and community representatives. Although a few bar associations have challenged lay advocacy, lay advocates can represent parties at unemployment compensation hearings in most states, either by statute or under judicial decisions finding that such representation does not constitute the unauthorized practice of law.

116. See Goldhammer, supra note 104, at 1140.
118. See, e.g., Hunt v. Maricopa County Employees Merit System Comm'n, 619 P.2d 1036, 1041 (Ariz. 1980) (allowing lay representation of employees in administrative hearings but noting that there is no statutory privilege protecting the confidentiality of communications between an employee and her lay representative); Unauthorized Practice of Law Comm. of the Superior Court v. Employers Unity, Inc., 716 P.2d 460, 464 (Colo. 1986) (holding constitutional a statute that authorized unlicensed practice of law before an unemployment agency); State Bar v. Galloway, 369 N.W.2d 839, 843 (Mich. 1985) (holding that a statute allowing employer representation by counsel or other duly authorized agent in proceedings before the unemployment agency permitted representation by nonattorneys, notwithstanding unauthorized practice-of-law statutes); Henize v. Giles, 490 N.E.2d 585, 588 (Ohio 1986) (holding that interested parties or their nonlawyer representatives who appear at administrative unemployment compensation hearings are not engaged in the unauthorized practice of law). But see Kyle v. Beco Corp., 707 P.2d 378, 382-83 (Idaho 1985) (holding that, if a corporation is represented in the Industrial Commission's proceedings, the representative must be an attorney); Reed v. Labor & Indus. Relations Comm'n, 789 S.W.2d 19, 22 (Mo. 1990) (holding that, if a nonattorney employee files an application for review on behalf of a corporate employer, it constitutes the unauthorized practice of law).
Lay advocacy raises two critical issues: whether this type of advocacy is necessary to ensure adequate representation and whether lay advocacy is effective—i.e., what are claimants' success rates at hearings with lay advocates? Administrative agencies are largely receptive to lay advocates. Yet, whether lay advocacy should be permitted and expanded has been the subject of considerable debate among the private bar.

The issue of nonlawyer effectiveness is just beginning to attract the attention of scholars. As one commentator noted, the difficulty of isolating representation as the critical variable in the outcome of a particular case presents an obstacle to assessing advocacy effectiveness. Nonetheless, the collected data support the conclusion that an advocate familiar not only with the particular substantive area but also with the procedures of a particular agency may provide an even better chance of winning than an attorney who does not customarily handle these claims.

Herbert Kritzer, Professor of Political Science and Law at the University of Wisconsin, has completed recently an extensive study of the effect of nonlawyer representation. Professor Kritzer researched the effectiveness of nonlawyers in four administrative settings in Wisconsin, including unemployment

119. Deborah L. Rhode, The Delivery of Legal Services by Non-Lawyers, 4 GEO. J. LEGAL ETHICS 209, 215 (1990). Rhode notes that the California State Bar Commission on Legal Technicians has listed the area of government benefits among specialties "worthy of study" for proposed licensing. Id. at 227. She further comments that governmental benefits is an area in which additional assistance is sorely needed in low-income populations. Id. at 229 (citing THE SPANGENBERG GROUP, NATIONAL SURVEY OF THE CIVIL LEGAL NEEDS OF THE POOR 32-33 (1989)).

120. See, e.g., Colloquium on Nonlawyer Practice Before Federal Administrative Agencies, 37 ADMIN. L. REV. 357 (1985). Advocates of nonlawyer representation argue that lay advocacy should be expanded because of: (1) the specialized competence of certain nonlawyers; (2) the administrative setting, which presents issues that are less legally complex and which rely on less formal procedural rules; (3) the unavailability of lawyers, particularly where the monetary interest at stake may be small; and (4) greater freedom of choice. Id. at 363–73, 391–96. Opponents of expanding the role of nonlawyers argue that: (1) nonlawyers cannot competently discharge all the responsibilities of a lawyer which, even in an administrative setting, may include due process concerns and challenging regulations; (2) many aspects of the hearings are quasi-judicial and/or adversarial in nature; (3) there also may be an unavailability of competent nonlawyers; and (4) competent nonlawyers may charge high fees as well. Id. at 375–81, 385–89; see also Loyd P. Derby, Comment, The Unauthorized Practice of Law by Laymen and Lay Associations, 54 CAL. L. REV. 1331, 1333 (1966) (mentioning the bar’s organized campaigns to halt lay representation).


122. See Popkin, supra note 17, at 1043.
compensation appeals hearings. He concluded that, in the unemployment context, a combination of factors result in effective advocacy, the two most important of which are advocacy experience and substantive knowledge.

Professor Kritzer found that, overall, the greatest impact on success rates in most unemployment compensation proceedings was representation itself, with no clear difference between lawyer and nonlawyer representation. Lawyer representation constituted a clear advantage when both parties had a lawyer; then, the claimant had a fifty-four percent success rate, compared to merely nineteen percent when only the employer had a lawyer.

This study is important: By determining in which cases lawyer and nonlawyer representation has a greater impact, scarce resources can be targeted more effectively. The study contributes to a growing body of evidence supporting the critical importance of representation in any adversarial administrative proceeding such as the unemployment compensation hearing.

V. MODELS OF REPRESENTATION

This Part reports on the results of a survey that the National Employment Law Project developed to identify the range of programs currently offering services to unemployed workers. We found an impressive mix, ranging from community-based organizations which provide intensive peer counseling to federally funded legal services programs, labor union programs, special state-funded projects, private bar pro bono projects, law school clinical programs, and student-run volunteer organizations, each of which provides direct representation in unemployment compensation proceedings. This Part profiles this diverse pool of projects and evaluates their unique contributions to the goal of improving access to the unemployment benefits system.

124. Id. at 130.
125. Id. at 131.
126. Id.
A. Community-Based Organizations

Organizations with bases in the community constitute invaluable resources for claimants suffering from the shock of job loss. These organizations provide a familiar place of solace where laid-off workers can discuss their problems, get information about rights and benefits, and learn that there are others experiencing the same problems. Around the country, many such organizations play an active role in ensuring that workers pursue their unemployment compensation claims.127

In Pennsylvania, the Mon Valley Unemployed Committee was formed in 1982 in response to the shutdown of the steel mills.128 The staff advises unemployed workers on their rights to unemployment benefits and provides pre-hearing guidance.129 The Philadelphia Unemployment Project provides counsel, including representation in first-level hearings to approximately thirty individuals each year.130 These organizations also influence national policy decisions regarding the unemployment compensation system, job training, and other issues of significant importance to the unemployed.

Community organizations based in immigrant communities also play a critical role. These organizations often function as a liaison to state agencies by providing basic information regarding unemployment benefits, translating forms, and offering interpreter services. The Workers Center of the Chinese Progressive Association exemplifies these services. It emerged in Boston in 1977 from community-based campaigns to save jobs and to secure English-as-a-second-language and job training.131 The Center has produced bilingual pamphlets

129. Id. at 3.
explaining how to obtain unemployment benefits. The advice provided, which includes basic information like directions to the local unemployment office, what to bring to apply for benefits, and how to obtain interpreter services, often makes the difference as to whether or not an individual receives his benefits.

B. Publicly Funded Legal Services Programs

The federally funded Legal Services Corporation (LSC), which provides free legal services in civil proceedings for poor and low-income individuals, provides another resource for claimants seeking representation in unemployment compensation cases. In many communities, the LSC offices offer the only program through which claimants may obtain representation in unemployment compensation cases. Unfortunately, resources and staffing have declined significantly, with further reductions in funding expected in the coming months.

As reported in our survey, the local LSC offices that represent claimants in unemployment compensation proceedings appear at 10 to 200 hearings per year, mostly in first-level appeals but also in second-level and judicial-level appeals. Those offices that conduct unemployment compensation hearings generally report high levels of success on appeal. In

133. Response of Chinese Progressive Ass’n, supra note 131, at 3.
135. See Center for Law & Social Policy, Comparison of Current LSC Act and Regulations with Pending Legal Services Appropriations and Authorization Bills (Jan. 17, 1996) (on file with the University of Michigan Journal of Law Reform) (breaking down the features of four different bills seeking to reorganize or dismantle the LSC).
136. See, e.g., Response of Georgia Legal Servs. Program, Atlanta, Ga., to NELP Survey of Representation at Unemployment Compensation Proceedings 4 (on file with the University of Michigan Journal of Law Reform) (appearing in approximately 110 hearings at all levels, but mostly in first-level hearings); Response of New Orleans Legal Assistance Corp., New Orleans, La., to NELP Survey of Representation at Unemployment Compensation Proceedings 4 (on file with the University of Michigan Journal of Law Reform) (appearing in 155 to 200 proceedings per year at all levels, though primarily in first-level appeals).
137. See, e.g., Response of San Francisco Legal Assistance Found., San Francisco, Cal., to NELP Survey of Representation at Unemployment Compensation Proceedings 4 (on file with the University of Michigan Journal of Law Reform) (reporting that the
addition, several programs with experienced employment law advocates often litigate class action cases in federal and state courts, thus affecting a large number of claimants. As described below, legal services programs also have been actively involved in developing programs through which the private bar may participate in unemployment compensation cases. Unfortunately, as consistently reported in our survey, the demand for legal services representation far exceeds the availability of services.

C. Private Bar Pro Bono Projects

Joint ventures between Legal Services Corporation programs and bar associations have created Volunteer Lawyers Projects (VLPs), organizations which use private attorneys in the pro bono representation of legal services eligible clients in civil matters. VLPs handle a wide variety of legal claims and

Foundation wins almost all its cases); Response of Legal Servs. Org. of Ind., Evansville, Ind., to NELP Survey of Representation at Unemployment Compensation Proceedings 4 (on file with the University of Michigan Journal of Law Reform) (reporting a success rate of 50–85% on the different levels of appeal).

138. See, e.g., White v. Evans, 597 A.2d 419 (Md. 1991) (reversing summary judgment in favor of state where legal and organizations represented claimants in class action challenging state policies regarding reduction, delay, termination of unemployment insurance benefits); Ross v. Giles, 1C Unempl. Ins. Rep. (CCH) ¶ 21,899 (S.D. Ohio 1988) (finding “when due” provision violated where legal aid organizations filed suit on behalf of class who had waited two to three years for decisions in second-level appeals).

139. See, e.g., Response of Legal Servs. of N. Va., Fairfax, Va., to NELP Survey of Representation at Unemployment Compensation Proceedings 3 (on file with the University of Michigan Journal of Law Reform) (describing the organization’s pro bono program for volunteer attorneys and paralegals).

140. See, e.g., Response of Legal Servs. of Greater Miami, Fla., to NELP Survey of Representation at Unemployment Compensation Proceedings 5 (on file with the University of Michigan Journal of Law Reform) (stating organization’s limitation is “not having enough staff to represent all claimants that need” services).

141. See, e.g., Response of Maine Volunteer Lawyers Project, Portland, Me., to NELP Survey of Representation at Unemployment Compensation Proceedings 1 (on file with University of Michigan Journal of Law Reform) (describing the Project’s purpose to utilize private attorneys to assist the low-income population with civil legal problems). In addition to pro bono representation, bar associations may refer indigent clients to reduced fees panels. For example, the Philadelphia Bar Association has a Low Fee Plan Committee which, at the request of Community Legal Services in Philadelphia, has recently added a panel for handling administrative hearings in unemployment compensation cases. The fee for attending the hearing is $200. Letter from Paul J. Kazaras, Director of Legal and Public Services, Philadelphia Bar
often specialize in a particular area of law. The budget for these projects is usually a combination of LSC funding and private bar contributions.

Generally speaking, unless particular state unemployment agencies are cooperative in the timing of administrative appeals, the quick scheduling of hearings does not provide sufficient time for the VLP coordinator to find an attorney. A few VLP programs, however, devote targeted resources to unemployment compensation hearings. For example, the Maine VLP conducted 215 unemployment administrative appeals in 1994 with a success rate of sixty-one percent, compared with an overall success rate of forty percent for all unemployment claimants in Maine. The Massachusetts VLP is embarking on an unemployment advocacy project with the Labor and Employment Law Section of the Massachusetts Bar Association; private attorneys with training provided by Greater Boston Legal Services will provide representation to income-eligible claimants. The VLP will pre-screen the cases for financial eligibility, as well as furnish malpractice insurance. The project developed in response to a growing need for claimant representation within the state.


142. See Memorandum from Steven B. Scudder, Staff Counsel, American Bar Association Center for Pro Bono, Chicago, Ill., to Monica Halas, Senior Attorney, Greater Boston Legal Services 1-2 (Mar. 15, 1995) (listing projects that only provide representation in employment law).

143. See, e.g., Response of Maine Volunteer Lawyers Project, supra note 141, at 2.

144. See, e.g., Letter from Mary M. Connolly, Executive Director, Volunteer Lawyers Project, to Maida B. Shifman, Director of Customer Services, Massachusetts Department of Employment and Training (Nov. 6, 1995) (on file with the University of Michigan Journal of Law Reform) (confirming the need for a postponement policy to be able to refer cases).


146. Memorandum from Diane Z. Cochran, Ellen Messing, and Christopher Perry, Co-Chairs, Ad Hoc Pro Bono Committee, Massachusetts Bar Association (MBA) Section on Labor and Employment Law, to Members of MBA Section on Labor and Employment Law 1 (Mar. 21, 1995) (on file with the University of Michigan Journal of Law Reform) (announcing the program).

147. Id. at 2.

148. A Massachusetts Bar Association pro bono committee found that in Massachusetts in 1993 the percentage of unemployed receiving unemployment benefits had fallen to 37% which, when coupled with the state's elimination of its general relief program, had resulted in increased poverty in the state. Massachusetts Bar Ass'n, Labor and Employment Law Section Pro Bono Proposal 1994: Claimant Representation at Administrative Unemployment Hearings 1 (Draft No. 2 1994) (on file with the University of Michigan Journal of Law Reform).
Representation of indigent unemployed claimants gives private attorneys an excellent opportunity to participate in pro bono activities and to provide a real service without the necessity of an overwhelming commitment of time or other resources.

D. Union-Sponsored Programs

At least a few state labor federations contract with private law firms to provide representation to union members at unemployment compensation hearings. For example, since 1979, the Colorado AFL-CIO has contracted with a private attorney whose office handles ten to fifteen cases a month with a ninety-five percent success rate. The state unemployment office cooperates by sending a copy of the entire file to the attorney and by allowing the attorney to schedule the hearing. The labor federation offers this service to all affiliated members and believes that, in plant organizing drives, this service proves very important to workers. Similarly, a private firm in Raleigh, North Carolina represents local unions and individual union members at all stages of unemployment hearings. In addition, it supervises union members who act as lay advocates at hearings. The firm combines this work with legislative advocacy on employment issues on behalf of the North Carolina AFL-CIO. These arrangements enhance the benefits of union membership and are also a necessary tool in assisting the state federation to track potential policy issues.

E. Student-Run Volunteer Organizations

Among the most impressive projects in the country, and certainly the most cost-efficient, is a volunteer organization of

149. Telephone Interviews with Jonathan Wilderman, Wilderman and Linnett, Denver, Colo., and Ann Sutton, Secretary/Treasurer, Colorado AFL-CIO, Denver, Colo., by Monica Halas, Senior Attorney, Greater Boston Legal Services (Mar. 13, 1995).

150. Response of Patterson, Harkavy & Lawrence, Raleigh, N.C., to NELP Survey of Representation at Unemployment Compensation Proceedings 1 (on file with the University of Michigan Journal of Law Reform).
law students called the Unemployment Action Center (UAC). A labor lawyer helped found the UAC in 1980 at New York University School of Law in order to represent claimants in unemployment compensation proceedings. The only organization of its kind, the UAC enlists 450 student volunteers from four New York metropolitan area law schools.\textsuperscript{151} In 1993, the UAC conducted 475 administrative hearings and 120 appeal board hearings, primarily on behalf of low-income clients, all on an annual budget of less than $30,000.\textsuperscript{152}

The UAC is entirely student-governed and operated.\textsuperscript{153} Students comprise the Board of Directors, as well as recruit and train the volunteers.\textsuperscript{154} Under New York law, law students may represent unemployment insurance claimants without the direct supervision of an attorney; nonetheless, the program also maintains a Board of Advisors composed of local attorneys.\textsuperscript{155} Although students do not receive law school credit or any other form of remuneration for their participation in the UAC,\textsuperscript{156} they volunteer readily in order to benefit from the unique exposure to trial-like practice and direct client contact.\textsuperscript{157} The program has a reputation for providing high quality representation, which is bolstered by extremely high success rates on appeal.\textsuperscript{158}

Among the many strengths of the UAC is the large pool of motivated and qualified advocates willing to represent significant numbers of claimants at no fee to the claimant and at relatively minor overhead costs to the program. With law

\begin{itemize}
\item \textsuperscript{151} Response of Unemployment Action Ctr., New York, N.Y., to NELP Survey of Representation at Unemployment Compensation Proceedings 1, 4 (on file with the University of Michigan Journal of Law Reform).
\item \textsuperscript{152} See id. at 4; see also Martin Fox, Unemployment Law Clinic Finds Time Is Now, N.Y. L.J., Feb. 18, 1992, at 1 (noting that the UAC's participants come from Benjamin N. Cardozo, New York University, Columbia University, and Hofstra University law schools); Jill Kirschenbaum, Legal Aids, STUDENT LAW., Nov. 1991, at 13, 14 (noting founder David Raff's views of the program); Pamela Mendels, The Benefit of an Advocate: Having a Lawyer Often Makes the Difference Between Winning and Losing Unemployment Benefits Hearings, NEW YORK NEWSDAY (Nassau and Suffolk Edition), June 8, 1993, at 25 (describing the experience of a claimant represented by the UAC).
\item \textsuperscript{153} David Raff & John C. Gray, Jr., Law Student Pro Bono Award Nomination to New York Bar Association Committee on Legal Education and Admission to the Bar 1 (on file with the University of Michigan Journal of Law Reform) (nominating the UAC for Pro Bono Award).
\item \textsuperscript{154} Id. at 2.
\item \textsuperscript{155} Id. at 1.
\item \textsuperscript{156} Id.
\item \textsuperscript{157} Response of Unemployment Action Ctr., supra note 151, at 1, 5.
\item \textsuperscript{158} Id. at 4–5.
\end{itemize}
schools located throughout the country, and with the popularity of clinical programs among students, significant opportunities exist to expand the program beyond the New York metropolitan area. Note that one drawback of the UAC, although a relatively minor one, is the limited ability of law students to work continuously during peak study periods and during semester breaks. Also, if expanded, the program would have to be modified to accommodate restrictions in states that require representation by a licensed attorney or direct attorney supervision in unemployment compensation cases.

E. Clinical Legal Education

Corresponding with the significant expansion of clinical legal education programs, a number of law school clinics and at least one undergraduate program have developed an expertise in unemployment compensation cases. As reflected by the experience of the UAC students, unemployment compensation cases are ideally suited as a teaching tool for practical legal skills. They provide a challenging experience in a real-life dispute. In addition, the cases do not consume too much time and are discrete in duration. They also provide an opportunity to test the basic advocacy skills of factual and legal preparation, presentation of testimony, cross-examination, and other legal practice skills.

In clinical programs, students generally receive class credit and evaluations for their participation. The unemployment compensation cases primarily involve individual claims at the first-level hearing stage of the appeal. Typically, the clinics

159. See, e.g., Response of East San José Community Law Ctr., San José, Cal., to NELP Survey of Representation at Unemployment Proceedings 6 (on file with the University of Michigan Journal of Law Reform) (describing goal of preparing mostly non-English-speaking persons for hearings); Response of Loyola University Law Ctr., Chicago, Ill., to NELP Survey of Representation at Unemployment Proceedings 5 (on file with the University of Michigan Journal of Law Reform) (describing the Center's services as essential to the city). At the undergraduate level, the University of Massachusetts-Boston operates the Community Advocates Law Office through the College of Public and Community Service, focusing on unemployment and public utility cases. Response of Community Advocates Law Office, Boston, Mass., to NELP Survey of Representation at Unemployment Proceedings 1 (on file with the University of Michigan Journal of Law Reform).
handle a small volume of appeals with significant supervision and training in the preparation of the case. Thus, the emphasis is on the educational value of the experience, resulting in an extremely high quality of representation. As with most law school clinical programs, the law school associated with the clinic, grant programs of the United States Department of Education, and the Legal Services Corporation tend to fund these projects.\(^6\)

Clinical programs thus provide a valuable resource to communities. While clinical programs are limited in the volume of cases that they handle, the resources and expertise of clinical faculty can often extend far beyond individual cases to include representation on appeals involving novel legal issues and other cases having broad impact on the unemployment compensation system. In addition, as more clinical programs begin focusing on walk-in counseling and public education, including lay advocacy training in unemployment compensation cases, the number of claimants that clinical programs serve will increase. Yet, as with the UAC program, the resources of a law school clinic tend to be limited by the availability of law students during the academic calendar year.

\section*{F. Special Government-Funded Projects}

Several state projects have developed to finance representation for claimants and small employers directly,\(^{161}\) with funding generated from penalties and from interest collected on delinquent employer contributions to the state unemployment trust funds. Additionally, a program has been proposed under which local and state funding would go to claimant representation with the aim of ultimately reducing overall welfare expenditures, under the theory that providing unemployment benefits would reduce government spending on food, housing, and other welfare benefits.

\footnotesize

160. \textit{See}, \textit{e.g.}, Response of East San José Community Law Ctr., \textit{supra} note 165, at 3 (receiving funding from the U.S. Department of Education and Santa Clara University Law School).

161. \textit{See}, \textit{e.g.}, \textbf{MICHIGAN EMPLOYMENT SEC. COMM'N}, ADVOCACY PROGRAM FOR CLAIMANTS AND EMPLOYERS: ANNUAL REPORT 1992, at 1 (1992) (defining program mission as providing information, consultation, and representation to members of the employer and claimant communities).
An example of the first model is the Illinois Legal Services Program (LSP), which was created in 1987 to provide free legal services by licensed attorneys to claimants and small employers unable to afford representation.\textsuperscript{162} Illinois legislation authorized the Department of Employment Security to request up to one million dollars from the "special administrative account" for claimant representation and an additional one million dollars for small employers representation.\textsuperscript{163} The agency then advertised for public bidders and awarded contracts to providers of legal services.\textsuperscript{164} Significantly, any participating representative had to be licensed to practice law as an attorney.\textsuperscript{165} An appropriate level of malpractice insurance was required of the participating attorneys.\textsuperscript{166}

In 1992, LSP representatives handled five percent of the 38,198 hearings in Illinois.\textsuperscript{167} The LSP-represented claimants received twenty-five percent more favorable decisions than unrepresented claimants, and represented employers received six percent fewer favorable decisions than their unrepresented counterparts.\textsuperscript{168} Satisfaction with LSP services was very positive, except in those cases where prospective clients were denied service.\textsuperscript{169} Average hearing time increased when one or both parties were represented at the hearing, and continuances were requested and granted in a larger percentage of cases.\textsuperscript{170}

The South Brooklyn Legal Services Corporation B presented the second model in a proposal to fund the Unemployment Insurance Advocacy Project (UIAP), which is currently under consideration at the New York City Department of Welfare.\textsuperscript{171} The proposal mimics the very successful Disability Advocacy Project, which provides local and state funding for representation of applicants to the federally financed Supplemental Security Income program in order to provide savings in welfare expenditures greater than the cost of funding the repre-
presentation. The UIAP proposal estimates that the total savings to New York and New York City would be at least $3000 for each successful case. The estimation rests on a determination that the average receipt of unemployment benefits is $200 per week over an average of five months and that the government would save the cost of state welfare benefits for a comparable period of time with additional savings in Medicaid expenditures. The savings is also based on an estimated success rate on appeal when represented, offsetting the seventy percent success rate of cases handled by the legal services programs against the twenty percent success rate of cases appealed with or without representation.

**G. Ombudsman Proposal**

The ABA has had a longstanding interest in the area of unemployment compensation. For example, in 1989, the Labor and Employment Law Committee turned its attention to representation at unemployment compensation hearings because of the complexity of these hearings and the insufficient resources available to the unemployed. The Committee urged the UIS to study a proposal to create an Office of Ombudsman similar to state-funded public defenders. The Secretary of Labor would initially fund and run the program as a pilot project in a select number of states. The UIS, however, has never established such a program and rejected the pilot in 1990.
A program such as the ABA-proposed ombudsman, in conjunction with increased claimant representation, could provide a real service to those claimants and employers who could not otherwise afford representation. As the ABA Labor and Employment Law Section report proposing the ombudsman program stated:

Competent advice should be encouraged to the end that parties do not lose cases due to ignorance of unemployment insurance law and procedure, or due to the inability to marshal favorable evidence. Generally, indigent, middle-class claimants and small business employers cannot afford competent counsel or representatives . . . [S]ome parties lose cases they could possibly have won if they had been properly represented or advised by competent representatives or counselors.\(^{179}\)

Echoing the ABA's concern with claimants' inadequate understanding of the unemployment insurance process, the Advisory Council on Unemployment Compensation recently recommended that each state establish an ombudsman's office to provide claimants or employers with information regarding eligibility and the claims process.\(^{180}\)

As these projects continue to expand services at a time of significant need, additional resources for representing the unemployed become increasingly necessary. The challenge lies in creating, supporting, and replicating models of representation that are cost-efficient and that can serve large numbers of the unemployed while at the same time providing quality services responsive to the needs of claimants experiencing the trauma of job loss.

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\(^{179}\) ABA Section of Labor and Employment Law, Report to the House of Delegates 2 (Aug. 1989).

\(^{180}\) 1996 ACUC REPORT, supra note 34, at 13.
CONCLUSION

Representation is vital to unemployment compensation fair hearings, because claimants seeking unemployment benefits face many obstacles in their endeavors to claim benefits. Most employers have the resources to challenge successfully an ex-employee's claim: they have counsel, documents, and witnesses. Claimants, however, often do not, and must also face a loss of livelihood that can dampen their ability to mount a successful suit. Furthermore, despite the relative strength of the employer's position, the unemployment compensation system does very little to aid the unrepresented claimant. The complex system forces the claimant to participate in a typically foreign adversary proceeding, and hearing officers do not step in uniformly to help the claimant negotiate her way through the confusing procedure.

Concomitantly, other factors intervene to make the unemployment compensation claimant's position even more precarious. The experience-rating system encourages employers to oppose even meritorious unemployment compensation claims, and third-party employer representatives make it their business to oppose meritorious claims. Thus, even if the unemployment compensation proceeding was designed to protect the unrepresented claimant in all cases, these other factors throw up yet more roadblocks in the claimant's bid for unemployment benefits.

To be sure, community-based organizations, legal services, labor unions, private pro bono projects, and law student clinics successfully supply a much-needed service to the unemployment compensation claimant. Yet, despite the efficacy of such diverse programs, the representation provided is not enough. It is time for the unemployment compensation system to recognize the need for representation and meet the remaining need for the purpose of ensuring fair hearings to unemployment compensation claimants.