

FILLING OUT FORMS, STANDING IN LINE: ADDRESSING THE TOLL OF THE MODERN UNEMPLOYMENT INSURANCE SCHEME*

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Battles over the legislative details of unemployment insurance appear to have been waged solely by professional, academic and political elites in orderly conferences and hearing rooms. Absent are the voices and politics of those millions in fear and in pain.¹

I. INTRODUCTION

In the years since the inception of American unemployment insurance, states have developed adversarial administrative schemes that have forced workers to devote time and effort in a process marked by uncertainty, inconsistently applied standards, and outcomes that usually favor employers.² This is the result of a scheme that is primarily concerned with determining whether the unemployed person is morally worthy, as opposed to mathematically eligible.³ This needs to be fundamentally reconsidered. Focusing on the moral aspects of individual employees, as opposed to objective black and white criteria, creates a bizarre, Atwood-esque

* Many statements in this Article are drawn from the authors' experience working in labor and employment law and their recollections regarding specific cases in which they served as counsel.

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¹ Kenneth M. Casebeer, *Unemployment Insurance: American Social Wage, Labor Organization and Legal Ideology*, 35 BOS. C. L. REV. 259, 265 (1994).

² See Richard Eisenberg, *Why Unemployment Insurance Isn't Working*, FORBES (Apr. 16, 2018, 11:49 AM), <https://www.forbes.com/sites/nextavenue/2018/04/16/why-unemployment-insurance-isnt-working/?sh=6d93785d509f> [<https://perma.cc/CP6C-9KHB>].

³ See Constantine Von Hoffman, *Capitalism Happens: Why Unemployment Shouldn't Be a Moral Issue*, CBS NEWS (June 15, 2011, 12:08 PM), <https://www.cbsnews.com/news/capitalism-happens-why-unemployment-shouldnt-be-a-moral-issue/> [<https://perma.cc/BP7K-SFGL>].

framework for what should be a simple determination. The key is to rework our understanding of unemployment. As opposed to a tax on the employer, it is really a wage earned by the employee and held in trust for their benefit.⁴ While small gains have been made to help workers achieve efficient outcomes and hold dishonest employers accountable,⁵ the only effective method for addressing the broken parts of this system will be a complete overhaul, wherein the system is reconstructed to differentiate between types of unemployment and solutions to each. The one-size-fits all system does not work even when administered even-handedly.⁶ Further, while worker confidentiality is necessary for many aspects of a benefits application, there needs to be an effective method for ensuring that policies and standards are being consistently administered, and the bureaucrats within the system need to be held accountable for disparate treatment and outcomes. A dynamic solution is the elimination of the adversarial system by which a worker proves lack of fault, replaced by a simple entitlement system that treats the unemployment insurance payment as deferred compensation held in trust for the worker.

II. BACKGROUND OF AMERICAN UNEMPLOYMENT INSURANCE SYSTEM

A. Purpose and History

The fundamental case for unemployment protection lies in the fact that under a democratic form of society we are forced to prevent any large-scale starvation. Funds must be provided somehow . . . It is practical sense to build a system which will gather the funds in good times and disburse them in bad times. This simple theory underlies all formal proposals for unemployment insurance, for unemployment reserves.⁷

The basic concept of unemployment insurance was that it would keep workers in the work force, rather than on the welfare rolls.⁸ The benefits were to be paid in by an employer on behalf of the worker during prosperous or

⁴ *Key Elements of the U.S. Tax System*, TAX POL'Y CENTER (May 2020), <https://www.taxpolicycenter.org/briefing-book/what-unemployment-insurance-trust-fund-and-how-it-financed> [<https://perma.cc/8CTB-7PBY>].

⁵ See Eduardo Porter, *How the American Unemployment System Failed*, N.Y. TIMES (Jan. 21, 2021), <https://www.nytimes.com/2021/01/21/business/economy/unemployment-insurance.html> [<https://perma.cc/YR4Z-M4S7>].

⁶ See *id.*

⁷ Stanley King, *Unemployment Reserves and Insurance*, 23 AM. LAB. LEGIS. REV. 170, 170 (1933).

⁸ See *Social Security: Unemployment Insurance*, SOCIAL WELFARE HISTORY PROJECT, <https://socialwelfare.library.vcu.edu/social-security/social-security-unemployment-insurance/> [<https://perma.cc/9FQA-8TFG>] (last visited Apr. 12, 2021).

productive times, and they would sit in reserve for the workers until they were needed.⁹ Because they were imagined as an alternative to welfare and attendant work force exit, and because they were discussed in that manner, the idea was always to preserve the workers' overall participation in the work force.¹⁰ For that reason, they were designed to be temporary, to be less than full-employment wages, and to be guarded by stewards in state programs.¹¹ The benefits are supposed to keep workers off of welfare programs by providing this basic and temporary subsistence.¹²

Unemployment insurance was a significant legislative feature of the New Deal's answer to the Depression of the 1930s in the United States.¹³ But many of its theoretical underpinnings would seem radical, even alien, to us now. In large part this is because unemployment insurance was passed in the wake of the Great Depression, where the unemployment rate eventually reached twenty-five percent.¹⁴ By contrast, the highest unemployment rate since then was in 1982 when it hit ten percent.¹⁵ To put it mildly, very few Americans currently alive have ever seen a labor crisis on par with the Great Depression.

In the wake of this disaster, the unemployment insurance system was created.¹⁶ It sought to balance two societal interests: first, a desire that people be employed and productive;¹⁷ second, that people who become unemployed are able to sustain income while looking for suitable work without resorting to public assistance programs.¹⁸

Commentators described these interests by discussing the competing visions for the unemployment system as viewed by those who created it.¹⁹ "On the one hand it is viewed as a restricted system whose object is to provide payments based upon past earning to a carefully selected group of workers" during periods of unemployment.²⁰ "On the other hand the system is viewed as the major protection against income loss due to unemployment, covering all or almost all workers" and paying high enough benefits for a significant time period that allow the "vast majority . . . to cover subsistence without

⁹ *See id.*

¹⁰ Eisenburg, *supra* note 2, at 8–10.

¹¹ *See id.*

¹² *See id.*

¹³ *The New Deal: Part II*, SOCIAL WELFARE HISTORY PROJECT, <https://socialwelfare.library.vcu.edu/eras/great-depression/the-new-deal-part-ii/> [<https://perma.cc/XCQ8-99MH>] (last visited Apr. 12, 2021).

¹⁴ *Id.*

¹⁵ Richard C. Auxier, *Reagan's Recession*, PEW RES. CTR. (Dec. 14, 2010), <https://www.pewresearch.org/2010/12/14/reagans-recession/> [<https://perma.cc/5EWL-UVQK>].

¹⁶ *See The New Deal: Part II*, *supra* note 13.

¹⁷ *See* Eveline M. Burns, *Unemployment and Socio-Economic Objectives*, 55 *Yale L.J.* 1, 8 (1945).

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ *Id.*

resort[ing] to supplementary public aids.”²¹ In essence, these two competing views sought to stabilize employment for “those ordinarily employed” and to ensure expansive benefit availability, respectively.²²

Neither of these two views became entirely ascendant. Rather, when Congress passed the Social Security Act of 1935, the unemployment provisions “reflected a none-too-happy merger” of them.²³ The first view was accommodated by providing rigorous eligibility requirements relating to terms of employment and requirements for seeking suitable replacement employment.²⁴ The second view was accommodated by putting the burden on employers seeking to disqualify claimants who had established baseline eligibility.²⁵

Despite not being a perfect solution for either side, this should have led to a generally acceptable state of affairs. But that promise has not materialized primarily due to how these programs are administered and implemented.²⁶

Trust funds are maintained by state agencies administering the federal program.²⁷ The employers who pay into the trust funds through state unemployment taxes have individual ledgers, such that state workers can assess whether the employer needs to pay to replenish its fund (i.e., whether the employer has caused a volume of claims against its own account such that it must pay more in either prospective unemployment taxes or one-time replenishment payments).²⁸ Those funds address the benefits themselves, but the funds necessary for administering the program come from the federal unemployment tax.²⁹

²¹ *Id.*

²² *Id.*

²³ *Id.* at 7–8.

²⁴ *Id.* at 8–10.

²⁵ *Id.* at 12–14.

²⁶ See Emily Stewart, *The American Unemployment System is Broken by Design*, VOX (May 13, 2020), <https://www.vox.com/policy-and-politics/2020/5/13/21255894/unemployment-insurance-system-problems-florida-claims-pua-new-york> [<https://perma.cc/M6R9-KDSR>].

²⁷ See generally State UI Trust Fund Solvency Report, U.S. DEP’T OF LAB., <https://oui.doleta.gov/unemploy/solvency.asp> [<https://perma.cc/PR7G-YJ28>] (last visited Apr. 12, 2021).

²⁸ See generally Jeff Oswald, *What Does an Unemployment Claim Cost an Employer?*, UNEMPLOYMENT INS. SERVICES, <https://www.unemployment-services.com/unemployment-claim-cost-employer/> [<https://perma.cc/UKF5-DLAD>] (last visited Apr. 12, 2021).

²⁹ *Id.*; see also State Unemployment Insurance Benefits, U.S. DEP’T OF LAB., <https://oui.doleta.gov/unemploy/uifactsheet.asp> [<https://perma.cc/BN2T-NWY6>] (last visited Apr. 12, 2021).

B. Typical Process

States currently administer unemployment entitlements for work performed within their borders, even when the money originates from federal funding.³⁰ Employers pay unemployment tax to states on their workers' behalf.³¹ That money is maintained in reserve accounts, and workers are supposed to be able to draw from the reserve accounts when they experience a qualified unemployment event.³² Those events are broadly defined by two categories: (1) a voluntary quit for good cause associated with the work; and (2) involuntary termination for reasons other than misconduct.³³

A "good cause" voluntary quit occurs when the working conditions are so intolerable that no reasonable person would endure them.³⁴ It is supposed to keep employers that maintain poor work environments from being able to run off their workers with such conditions and then avoid the unemployment reserve account draw.³⁵ In Kentucky, we have had to litigate whether that includes an unaccommodated disabled worker being asked to work without accommodation (the worker lost at the initial level, then won on appeal). We have also had to litigate whether that includes people enduring unsafe working conditions, which has led to inconsistent results (it was deemed applicable to unsafe work equipment, but not applicable to COVID-19 pandemic safety protocols). When a worker claims to have quit for good cause, the worker bears the burden of proof for having to show that good cause.³⁶

The involuntary termination category can apply to the broad spectrum of circumstances ranging from large-scale terminations such as reductions-in-force to being fired for refusing to break the law.³⁷ The "reasons other than misconduct" standard means that an employer's defense to being charged for the benefits is to claim that the worker engaged in some sort of misconduct

³⁰ Manuel Alcalá Kovalski & Louise Sheiner, *How Does Unemployment Insurance Work? And How is it Changing During the Coronavirus Pandemic?*, BROOKINGS (July 20, 2020), <https://www.brookings.edu/blog/up-front/2020/07/20/how-does-unemployment-insurance-work-and-how-is-it-changing-during-the-coronavirus-pandemic/> [<https://perma.cc/ZV5G-R566>].

³¹ *Id.*

³² See, e.g., KY. REV. STAT. § 341.530 (2019).

³³ *Id.*; see also State Unemployment Insurance Benefits, U.S. DEP'T OF LAB., <https://oui.doleta.gov/unemploy/uifactsheet.asp> [<https://perma.cc/BN2T-NWY6>] (last visited Apr. 12, 2021).

³⁴ Kovalski & Sheiner, *supra* note 30.

³⁵ *Id.*

³⁶ See Sherrie Scott, *Voluntarily Quitting & Unemployment Benefits*, HOUSTON CHRON., <https://smallbusiness.chron.com/organization-required-pay-unemployment-benefits-dismissed-employees-10124.html> [<https://perma.cc/WLN2-BS2G>] (last visited Apr. 12, 2021).

³⁷ *Id.*

and that the behavior was the actual reason for the separation. The burden of proof is theoretically on the employer.

Although the allocation of the proof burdens should have some meaning in the initial stages of an application, they often do not. For example, Kentucky tilts the system against the worker from the second the newly unemployed person accesses a website seeking benefits. In the initial application stage, the Kentucky Unemployment Commission wants to know the reason the employer gave for terminating the employee.³⁸ This may seem like a minor quibble, but it is important. The reason being that the employee may not agree with the reason their employer gave; it may be entirely contrived. Instead asking “why are you no longer employed?” would give the employee the ability to tell their version of the story at the outset. But instead the employee is required to carry the employer’s water immediately.

This is probably part of the reason why, in Kentucky particularly, a worker is no more likely to have benefits begin quickly if the worker was terminated involuntarily or voluntarily. Instead, when the application is opposed by the employer, the norm is for the state agency to deny the application and require the worker to appeal, delaying the commencement of benefits.³⁹ As a practical matter, that seems reasonable when considering workers do not ordinarily set aside their benefits payments in case they need to repay them. It could be argued that erring on the side of non-payment eases the state’s difficulty in recouping overpayment. But this doesn’t really make a lot of sense. Recouping overpayments can be done directly from the employee’s paycheck once they get rehired.⁴⁰ As a more practical matter, though, workers often cannot wait the weeks and months required to appeal an initial denial,⁴¹ creating an incentive to take the first available replacement job and ultimately presenting a serious risk of underemployment.

This initial denial probability contains two hidden issues. First, a difficult-to-measure portion of applicants who do not attempt to appeal an initial denial because it does not occur to them that they stand much of a

³⁸ See Lisa Guerin, *Collecting Unemployment Benefits in Kentucky*, NOLO, <https://www.nolo.com/legal-encyclopedia/collecting-unemployment-benefits-kentucky.html#:~:text=You%20must%20be%20unemployed%20through,must%20be%20actively%20seeking%20employment> [https://perma.cc/T47G-36B7] (last visited Apr. 12, 2021).

³⁹ See generally *What Steps Can I Take If My Employer Gets My Unemployment Claim Denied?*, EMP. L. FIRMS, <https://www.employmentlawfirms.com/resources/employment/unemployment/what-steps-can-i-take-after-my-employer-denied-my-unemployme> [https://perma.cc/773M-NZG5] (last visited Apr. 12, 2021).

⁴⁰ Alison Doyle, *Repaying an Overpayment of Unemployment Benefits*, THE BALANCE CAREERS (Apr. 30, 2020), <https://www.thebalancecareers.com/repaying-an-overpayment-of-unemployment-benefits-2064188> [https://perma.cc/6YPU-33F3].

⁴¹ See Guerin, *supra* note 38.

chance of reversing a state agency's decision.⁴² We have represented people in this situation in their subsequent employment practices cases, and we have also observed employers claiming this as a failure of the employee to mitigate economic damages. It is impossible to know, based on currently available information, how many claimants simply drop the matter right then and there.

The second problem is one that is equally difficult to measure. While it may sound great to promote a policy that encourages people to take whatever job comes around at any given time, not every job is appropriate for every person. And an overqualified person who has to take a lower-level job is taking that job from someone whose experience caps their employment possibilities.⁴³ This can create a cascading effect where too many people are not meeting their true earning capacity while also shoving others out of employment.⁴⁴

Kentucky's agencies recently revealed, albeit unwillingly, the training documents that the referees follow in deciding an appeal.⁴⁵ The documents have not been updated since March 2011.⁴⁶ Thus, none of the training documents contain materials updated to assess the COVID-19 expansions, which have created chaos in the state agencies, with inconsistent opinions coming out of these tribunals on a weekly basis.⁴⁷

Further, the Office of Unemployment in Kentucky has had to disclose that it trains its referees to search an archive for "appropriate canned language" to generate decisions.⁴⁸ The referees search an archive to find this canned language, apply it to a case they believe is like the case described in the canned language, and issue an opinion.⁴⁹ In later appellate proceedings, the state argues vigorously for deference to the referee's assessment and the canned language supporting that assessment.⁵⁰ It is impossible to know how

⁴² This observation is based on the authors' own experiences in labor and employment law.

⁴³ Daniel Indiviglio, *The Overqualified Worker Problem*, THE ATLANTIC (Mar. 29, 2010), <https://www.theatlantic.com/business/archive/2010/03/the-overqualified-worker-problem/38164/> [<https://perma.cc/UD5Y-M8UE>].

⁴⁴ *Id.*

⁴⁵ See Open Records Decision, In re: Robyn Smith/Labor Cabinet, 21-ORD-006 (Jan. 14, 2021) (deeming training materials public record). An open records request was made of the Office of Unemployment Insurance on September 25, 2020 for these training materials. *Id.* at 1. The agency denied the request, arguing that its training materials—the rules that the decision-makers are supposed to follow—were "confidential." *Id.* at 1–2. The denial was appealed to the Office of the Attorney General of Kentucky. *Id.* at 1. On January 14, 2021, the Attorney General ordered that the materials were public records not shielded by confidentiality, and that the public could finally see the rules that governed the Kentucky unemployment hearings process. *Id.* at 4–5. Many of the following statements are based on the authors' personal review of these materials and evidence from later proceedings.

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *id.*

firm the convictions of the referees are in any given opinion, as opposed to the grandfathered convictions contained in the canned language used.

It is possible to know, however, the statistics of employer success in defeating claims. In 2019, of the 92,363 claims for unemployment benefits filed in Kentucky, 37,175 (almost thirty-six percent) were challenged by employers.⁵¹ Of those employer protests, over half—18,790—resulted in disqualification of benefits for the worker.⁵² By the time these challenges have been subject to hearings and rulings, the employee can expect to have gone without benefits for weeks, even months. Most need income of some sort, and as discussed below, deprivation takes a devastating toll.

Despite the impressive success rate for employers seeking to avoid the payment of benefits, Kentucky's trust fund was in serious trouble as of January 1, 2020, when its solvency ratio of 0.57 fell far enough short of the minimum 1.00 ratio required by the federal government that it qualified for interest-free bargaining.⁵³ It was against this backdrop that Kentucky entered the COVID-19 unemployment crisis in the spring of 2020—with too little money in the trust accounts, through no fault of Kentucky workers.⁵⁴

III. NATURE OF UNEMPLOYMENT FOR WORKERS

According to the Bureau of Labor Statistics, you are unemployed if you are a person in the labor market who has looked for work in the recent past without obtaining it.⁵⁵ Within that broad definition is an ambiguous standard—whether you count as a participant in the labor market. If you are a child, for example, you do not count as part of the qualified labor market, even if your family depends upon your income.⁵⁶ If you have exited the labor market after a long period without work (the discouraged worker effect), you likewise will not show up in the unemployment statistic.⁵⁷

From the qualified labor market, the people counted as unemployed are those who are actively looking for work and not finding it.⁵⁸ And

⁵¹ Unemployment Insurance Trust Fund Annual Report CY 2019 10, KY. EDUC. & WORKFORCE DEV. CABINET (2019), <https://kcc.ky.gov/Documents/2019%20Trust%20Fund%20Annual%20Report.pdf> [<https://perma.cc/9WTJ-YZA9>].

⁵² *See id.*

⁵³ *See* State Unemployment Insurance Trust Fund Solvency Report 2020 23, U.S. DEP'T OF LABOR (Feb. 2020), <https://oui.doeleta.gov/unemploy/docs/trustFundSolvReport2020.pdf> [<https://perma.cc/987H-V3GV>].

⁵⁴ *See id.*

⁵⁵ Technical Documentation, How the Government Measures Unemployment 3–4, U.S. BUREAU OF LAB. STAT. (June 2014), https://www.bls.gov/cps/cps_htgm.pdf [<https://perma.cc/37TT-TWL8>].

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ *See id.*

interestingly, in the United States' burgeoning gig economy, you will not show up in this statistic if you have found work, however impermanent or inadequate to meet your financial needs.⁵⁹ The Government Accountability Office reported that in 2005 about 42.6 million Americans were so-called "contingent" workers.⁶⁰ These workers might be underemployed, but they still avoid making the cut into the unemployment statistic.⁶¹ It is with this imperfect statistic that policymakers frequently attempt to address the needs of a group of unemployed workers.⁶² But not all unemployment is the same, making the one-size-fits-all approach hopelessly clumsy and inadequate.

A. Types of Unemployment

Labor economists recognize several major categories of unemployment: cyclical, frictional, structural, and seasonal.⁶³ Cyclical unemployment occurs when dips in the broad economy, caused by macroeconomic recession, compel firms to scale back operations or close workplaces in response.⁶⁴ Cyclical unemployment is not personal to the worker.⁶⁵

Frictional unemployment is the term used to describe the period of time between jobs for workers who are looking for the best "fit" in terms of work.⁶⁶ For instance, college students who leave college without a job that uses their higher education and skills may experience frictional unemployment.⁶⁷ Although one could argue that realistic workers should anticipate frictional unemployment and plan accordingly, it is not often that workers experiencing frictional unemployment have sufficient savings or assets to cover these proverbial bumps in the road.⁶⁸

⁵⁹ Elka Torpey & Andrew Hogan, *Working in a Gig Economy*, U.S. BUREAU OF LAB. STAT. (May 2016), <https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm> [<https://perma.cc/R998-W8YM>].

⁶⁰ Report to the Ranking Minority Member, Committee on Health, Education, Labor, and Pensions, U.S. Senate (GAO-06-656), *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification* 3, U.S. GOV'T ACCOUNTABILITY OFFICE (July 2006), <https://www.gao.gov/assets/gao-06-656.pdf> [<https://perma.cc/MY9W-7GUE>].

⁶¹ *See id.*

⁶² *See id.*

⁶³ William Levernier & Bill Z. Yang, *A Note on the Categories of Unemployment in a Principles of Macroeconomics Course*, 7 PERSP. ECON. EDUC. RES. 58, n.49 (2011).

⁶⁴ *Id.* at 64.

⁶⁵ *Id.*

⁶⁶ *Id.* at 60.

⁶⁷ *Id.* *See also* Yu Liu, *Economic Reasons for Unemployment of College Students*, 65 INT'L CONF. ON EDUC. TECH. & INFO. SYS. 271, 272 (2013), <https://www.atlantis-press.com/article/7911.pdf> [<https://perma.cc/H5QW-TKVQ>].

⁶⁸ *See* Ann Carrns, *Even in Strong Economy, Most Families Don't Have Enough Savings*, N.Y. TIMES (Oct. 25, 2019, 11:18 PM), <https://www.nytimes.com/2019/10/25/your-money/emergency-savings.html> [<https://perma.cc/PS36-BM9S>] (noting that families should have about six weeks of take-home pay to account for dips in income, but two-thirds of families do not have that buffer); Ann Carrns,

Structural unemployment, on the other hand, presents a worker with much more dire prospects.⁶⁹ Structural unemployment occurs when a worker's skills are no longer in demand in the labor market.⁷⁰ For example, when coal mines in Central Appalachia shut down operations, workers who had spent years learning that trade were left without any available work for their skills.⁷¹ It is estimated that between 1993 and 2017, coal mining jobs in the region dipped from roughly 60,000 to roughly 20,000.⁷² This structural unemployment creates a labor overflow into other industries, driving down wages and making even low paying jobs scarce.⁷³ This, in turn, leads to a host of other problems.

Harlan County, Kentucky, site of the famous Harlan County War during the 1930s, is a poster child of sorts for structural unemployment.⁷⁴ In 1950,

The Dangerous State of Americans' Savings, N.Y. TIMES (Jan. 31, 2015), <https://www.nytimes.com/2015/01/31/your-money/the-dangerous-state-of-americans-savings.html> [<https://perma.cc/96JX-UNS8>] (remarking that more than half of American households have less than one month of income to use in case of emergency); Mike Hicks, *Certain Unemployment Causes Worse Than Others*, INDIANAPOLIS BUS. J. (June 29, 2009), <https://www.ibj.com/articles/3255-hicks-certain-unemployment-causes-worse-than-others> [<https://perma.cc/UV3M-U4RQ>] (claiming that "frictional unemployment is a natural part of an economy").

⁶⁹ Hicks, *supra* note 68 (explaining that structural unemployment happens when a worker's skills are no longer needed, leaving workers with outdated skills).

⁷⁰ See Kevin S. Dubina, *Full Employment: An Assumption Within BLS Projections*, U.S. BUREAU OF LAB. & STAT. MONTHLY LAB. REV. 2 (Nov. 2017) (noting that structural factors are long-lasting changes in the economy); Hicks, *supra* note 68 (arguing that structural job losses leave communities with large numbers of unemployed residents); Liu, *supra* 67 (commenting that structural unemployment causes mismatching of labor supply and demand).

⁷¹ See Stephan Weiler, *The Economics of the Struggling Structurally Unemployed*, 3 J. OF APPALACHIAN STUD. 71, 73–74, 82–83, 93 (1997) (explaining that out of work blue-collar workers who are young will find other jobs, but older workers will have trouble finding replacement work); Michael Sainato, *The Collapse of Coal: Pandemic Accelerates Appalachia Job Losses; More Coalminers Lost their Jobs in March and April as the Industry Suffers Biggest Decline in 60 Years*, THE GUARDIAN (May 29, 2020, 11:45 AM), <https://www.theguardian.com/us-news/2020/may/29/coal-miners-coronavirus-job-losses> [<https://perma.cc/B6CW-W2WS>] (stating that the collapse of the coal industry hurts both miners and non-mine workers and well-paid jobs are difficult to find).

⁷² Report, *Coal Industry Annual 1993 60* (Dec. 1994), ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, <https://www.eia.gov/coal/annual/archive/05841993.pdf> [<https://perma.cc/JU4L-CQCP>] (last visited Apr. 13, 2021); *Annual Coal Report 2017 27* (Nov. 2018), ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, <https://www.eia.gov/coal/annual/archive/05842017.pdf> [<https://perma.cc/TE5J-7MRQ>] (last visited Apr. 13, 2021).

⁷³ See Albert Lauterbach, *Employment, Unemployment and Underemployment: A Conceptual Re-Examination*, 36 AM. J. OF ECON. & SOC. 283, 287 (1977) (remarking that replacement industries cannot absorb the overflow of unskilled workers from their previous industry); Lucia Mutikani, *Structural Unemployment Crisis Stalking U.S. Economy*, REUTERS (Oct. 6, 2009, 2:09 PM), <https://www.reuters.com/article/idUSTRE5955NE20091006> [<https://perma.cc/W87D-9BNF>] (noting that as industries go through extreme changes some workers' skills are no longer relevant in the market).

⁷⁴ See Michael Sainato, *Laid Off and Owed Pay: The Kentucky Miners Blocking Coal Trains; The Protest Has Endured for More than Six Weeks, Gaining National Attention and Support from Bernie Sanders*, THE GUARDIAN (Sep. 18, 2019, 7:00 AM), <https://www.theguardian.com/us-news/2019/sep/17/harlan-county-coalmine-train-protest> [<https://perma.cc/9RZH-HWWL>].

nearly 14,000 people were employed in coal mining.⁷⁵ That figure dropped to 764 by June 2016.⁷⁶ During that time, the population declined from roughly 71,000 to 27,000.⁷⁷ Roughly thirty percent of the county lives at or below the poverty line, with over forty percent of the population under the age of eighteen below the line.⁷⁸ Life expectancy for men in Harlan County is 68.4 years for men and 74.7 years for women, both nearly ten years below the national average.⁷⁹ The effects of the coal mine closures and loss of paying jobs have been severe, particularly as no industries have emerged to replace the lost jobs on any significant scale.⁸⁰

Seasonal unemployment occurs when demand for a good or service ebbs during a foreseeable part of the year, such as lifeguards for outdoor pools being off from work in the cooler months.⁸¹ Although this sort of unemployment matters to the economy, its foreseeability makes it more manageable.⁸² Within the unemployment benefits system, this group of workers can be furloughed by their employers and can receive benefits during

⁷⁵ Chris Kenning, *Layoffs Leave Coal Families at Bottom; After Latest Bankruptcy, Paychecks Bounce and Spirits Sag*, THE COURIER J. (Aug. 4, 2019), <https://www.courier-journal.com/story/news/2019/07/31/kentucky-mines-close-and-miners-struggle-murky-futures/1864972001/> [<https://perma.cc/5FKT-XCDQ>].

⁷⁶ Kentucky Quarterly Coal Report April to June 2016 4 (Jul. 30, 2016), KY. ENERGY & ENV'T CABINET, <https://eec.ky.gov/Energy/News-Publications/Quarterly%20Coal%20Reports/2016-Q2.pdf> [<https://perma.cc/5Y2Q-S57J>].

⁷⁷ U.S. CENSUS BUREAU, 1950 CENSUS: POPULATION OF KENTUCKY BY COUNTIES, at 3 (Sep. 5, 1950), <https://www2.census.gov/library/publications/decennial/1950/pc-02/pc-2-31.pdf> [<https://perma.cc/XL6H-ZKVJ>]; *Resident Population in Harlan County, Ky*, ECON. RES. FED. RES. BANK OF ST. LOUIS, (Mar. 27, 2020), <https://fred.stlouisfed.org/series/KYHARL5POP> [<https://perma.cc/MPN4-8W8D>].

⁷⁸ QuickFacts: Harlan County, Kentucky, U.S. CENSUS BUREAU (2019), <https://www.census.gov/quickfacts/fact/table/harlancountykentucky/IPE120219#IPE120219> [<https://perma.cc/RJC4-WJAA>]; Julie N. Zimmerman & Cameron McAlister, *Kentucky By the Numbers: Harlan County Data Profile*, UNIV. OF KY. COLLEGE OF AGRIC., FOOD & ENV'T (Jan. 2019), <https://kybta.ca.uky.edu/sites/kybta.ca.uky.edu/files/4-8.5x11/Harlan%20County8.5x11.pdf> [<https://perma.cc/8ENS-386L>].

⁷⁹ U.S. County Profile: Harlan County, Kentucky, INST. FOR HEALTH METRICS & EVALUATION (2016), http://www.healthdata.org/sites/default/files/files/county_profiles/US/2015/County_Report_Harlan_County_Kentucky.pdf [<https://perma.cc/QT7E-3DQ5>].

⁸⁰ See Matthew Boyle, *As Coal Industry Continues to Struggle, the Nation's Miners are in Need of an Energy Revolution*, LONGVIEW NEWS J. (Aug. 30, 2020), https://www.news-journal.com/news/business/as-coal-industry-continues-to-struggle-the-nations-miners-are-in-need-of-an-energy/article_d28c9d2c-e8b1-11ea-8cca-6be005c5cf6b.html [<https://perma.cc/8CFE-F7LD>] (arguing that without having another industry to replace coal, those in mining regions will not be able to survive).

⁸¹ See *May v. James H. Drew Shows, Inc.*, 576 S.W.2d 524, 526 (Ky. Ct. App. 1979) (“Another example of a seasonal occupation . . . is that of a lifeguard at an outdoor pool.”); Labor Force Statistics from the Current Population Survey: How the Government Measures Unemployment, U.S. BUREAU OF LABOR & STAT. (Oct. 8, 2015), https://www.bls.gov/cps/cps_htgm.htm [<https://perma.cc/3X9R-ZMWN>] (“Total employment and unemployment are higher in some parts of the year than in others.”).

⁸² See U.S. BUREAU OF LABOR & STAT, *supra* note 81 (demonstrating that seasonal fluctuations follow the normal seasonal weather patterns and the changes in hiring and layoffs that accompany these fluctuations).

their off months without looking for other work.⁸³ If they are not seeking other work, the labor statistics gathered by the Department of Labor will not recognize them as unemployed.⁸⁴

Oddly enough, the current unemployment benefits framework is much better suited to serve seasonally unemployed workers than it is suited to serve the structurally unemployed. Because the benefits are supposed to be temporary and less than a full wage, a person looking forward to a seasonal uptick in work can more easily withstand the financial pinch. As discussed further below, however, the one-size-fits-all system barely distinguishes between the circumstances of unemployment when awarding benefits, leading to workers having their needs disproportionately addressed.

B. Impact on Workers

Apart from the financial loss, the effect of unemployment on morale is severe,⁸⁵ which in turn threatens their abilities to achieve new employment.⁸⁶ In order to craft an unemployment insurance system that might actually address the needs of workers, it is vital that policymakers take into account how workers come to be unemployed, as well as the resulting, foreseeable effects on morale. The worker who is experiencing a few weeks between a job that simply didn't work out is not going to suffer in the same way that a worker who has been fired due to an unaccommodated disability will. The former clearly has brighter prospects and a better reason to maintain optimism in the job market.

Scientists studying unemployment and its correlation to psychological suffering have found that unemployment is “uniquely associated with lower psychological health.”⁸⁷ Far from a vacation, a period of unemployment is

⁸³ See Jennifer Liu, *Hundreds of Thousands of Workers Have Recently Been Furloughed—Here's Exactly What that Means*, CNBC (Apr. 3, 2020, 11:14 A.M.), <https://www.cnbc.com/2020/04/03/what-happens-if-youre-furloughed-during-the-coronavirus-pandemic.html> [<https://perma.cc/Y43S-CB9W>] (remarking that some companies regularly furlough workers to account for seasonal needs and be hired back); Sean Ludwig, *Everything You Need to Know When an Employee Files for Unemployment*, U.S. CHAMBER OF COM. (2020), <https://www.uschamber.com/co/run/human-resources/employers-guide-to-unemployment-benefits> [<https://perma.cc/9GZC-GJRG>] (explaining that employees who have been laid off or furloughed may file an unemployment claim in the state they live in).

⁸⁴ See U.S. BUREAU OF LAB. STAT., *supra* note 55.

⁸⁵ See Leon Grunberg et al., *Differences in Psychological and Physical Health Among Layoff Survivors: The Effect of Layoff Contact*, 6 J. OF OCCUPATIONAL HEALTH PSYCHOL. 15, 15 (2001) (noting that layoffs can impact the mental and physical health of terminated employees).

⁸⁶ See John R. Rudisill & Jean M. Edwards, *Coping With Job Transitions*, 54 CONSULTING PSYCHOL. J. PRAC. & RES. 55, 57 (2002) (discussing that the way unemployed workers cope with their job loss may significantly impact future employment potential).

⁸⁷ Connie R. Wanberg, *The Individual Experience of Unemployment*, 63 ANN. REV. PSYCHOL. 369, 372 (2012) (citing Karsten I. Paul & Klaus Moser, *Unemployment Impairs Mental Health: Meta-analyses*, 74 J. VOCATIONAL BEHAV. 264, 265 (2009)).

stressful on a worker from the first day, and that pressure continues at least until reemployment is achieved.⁸⁸ A normal response to sudden unemployment, particularly involuntary unemployment, resembles the stages of grief.⁸⁹ To make matters worse, the person rarely has the luxury of processing these emotions fully.⁹⁰ Instead, they are expected to move as quickly as possible to obtain replacement employment with as little disruption in wages as possible—or, at least, that is the onus created by the failure to mitigate damages defense in employment lawsuits.⁹¹

We often deal with workers who are made physically sick in the aftermath of job loss.⁹² Peer-reviewed studies have found that decline in physical health is linked to unemployment.⁹³ Worse, being fired raises the likelihood of being diagnosed with a new health problem by forty-three percent.⁹⁴ It is common for workers who are reeling from workplace dysfunction or conflict to experience a fear of repetition of those events, which often causes some delay or lack of success in reemployment efforts.⁹⁵ At the same time, job search activities themselves tend to increase psychological distress.⁹⁶

Even cyclical unemployment—the most impersonal—places a worker at risk for poor mental health outcomes.⁹⁷ In the wake of the Great Recession, the Spanish construction industry experienced high levels of cyclical

⁸⁸ *Id.* at 370–71, 378.

⁸⁹ Deb Balzer, *Coping With Effects of Unemployment During COVID-19*, MAYO CLINIC (May 20, 2020), <https://newsnetwork.mayoclinic.org/discussion/5-20-draft-coping-with-effects-of-unemployment-during-covid-19/> [https://perma.cc/CSF6-N39E].

⁹⁰ Sarah Damaske, *Job Loss and Attempts to Return to Work: Complicating Inequalities Across Gender and Class*, 34 GENDER & SOC'Y 7, 17–18 (Feb. 2020), <https://journals.sagepub.com/doi/pdf/10.1177/0891243219869381> [https://perma.cc/U8N2-WFP6].

⁹¹ Eric Bachman, *What Does it Mean to “Mitigate Your Damages” in an Employment Case?*, FORBES (May 6, 2020, 9:29 A.M.), <https://www.forbes.com/sites/ericbachman/2020/05/06/what-does-it-mean-to-mitigate-your-damages-in-an-employment-case/?sh=5dce73a45cc2> [https://perma.cc/BW9H-FXZT].

⁹² Wanberg, *supra* note 87, at 371.

⁹³ Kate W. Strully, *Job Loss and Health in the U.S. Labor Market*, 46 DEMOGRAPHY 221, 223 (May 2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2831278/pdf/dem-46-0221.pdf> [https://perma.cc/TT8B-V4FB].

⁹⁴ *Id.* at 233.

⁹⁵ See, e.g., Liz Ryan, *If You're Stuck in a Toxic Workplace, Read This!*, LINKEDIN (May 2, 2016), <https://www.linkedin.com/pulse/youre-stuck-toxic-workplace-read-liz-ryan> [https://perma.cc/KW9G-DKJY].

⁹⁶ Frances M. McKee-Ryan et al., *Psychological and Physical Well-Being During Unemployment: A Meta-Analytic Study*, 90 J. APPLIED PSYCHOL. 53, 58 (2005), https://www.researchgate.net/publication/8089237_Psychological_and_Physical_Well-Being_During_Unemployment_A_Meta-Analytic_Study [https://perma.cc/ZN85-CCC8].

⁹⁷ Lidia Farré, Francesco Fasani & Hannes Mueller, *Feeling Useless: The Effect of Unemployment on Mental Health in the Great Recession*, 7 IZA J. LAB. ECON. 8, 12 (2018) <https://izajole.springeropen.com/articles/10.1186/s40172-018-0068-5> [https://perma.cc/H8RT-N9SC].

unemployment.⁹⁸ Studies of the affected population demonstrated a rise in mental health disorders, which was attributed to the deep levels of unemployment.⁹⁹

Particularly when a skill is not rendered entirely obsolete but is instead placed on a temporary hold due to macroeconomic factors, it is not desirable to retrain workers for other jobs.¹⁰⁰ If those workers exit an industry in favor of another with temporarily better prospects, it will be harder for the recovering industry to rally back once the other factors are in place.¹⁰¹ The loss of workers of all skill levels from an industry, and their reemployment in industries perceived as more stable, will mean the recovering industries will need to bid these workers away from their replacement jobs—surely an expensive prospect.¹⁰²

IV. WORKERS SUFFERING IN THE BENEFITS PROCESS

Although workers dealing with unemployment have enough to contend with already in terms of morale and financial stress, the current unemployment benefits process provides another layer of adversity and stress. It pits the unemployed worker against the former employer, making value judgments on fault and job-worthiness. In our experience, the adversarial process and its indifference to workers' dignity worsens the experience of unemployment and renders a worker less likely to achieve meaningful, positive reemployment quickly.¹⁰³

In the ordinary course of the unemployment process, a worker can check on the status of an application by calling the benefits office or checking an online portal.¹⁰⁴ The system gives the worker information about what stage

⁹⁸ *Id.* at 35.

⁹⁹ *Id.* at 15, 22.

¹⁰⁰ See Policy Brief, Retraining Displaced Workers 2, THE HAMILTON PROJECT (Mar. 2015), https://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/10_displaced_workers_lalonde.pdf [<https://perma.cc/EL9Q-X7EL>].

¹⁰¹ See, e.g., Rebecca Elliott, *Oil Industry Frets About Recruiting its Next Generation of Workers*, THE WALL ST. J. (Aug. 18, 2020, 11:18 A.M.), <https://www.wsj.com/articles/oil-industry-frets-about-recruiting-its-next-generation-of-workers-11597763882> [<https://perma.cc/W3TT-2CQQ>].

¹⁰² See *id.*

¹⁰³ See, e.g., Jared Bennett, *Gov. Beshear Offered 'Self-Quarantine' Unemployment. Now State is Backtracking – and Billing*, KY. CTR. FOR INVESTIGATIVE REPORTING (Oct. 14, 2020), <https://kycir.org/2020/10/14/gov-beshear-offered-self-quarantine-unemployment-now-state-is-backtracking-and-billing/> [<https://perma.cc/83B9-HNPD>]; Jared Bennett, *How Kentucky Missed Out on a \$90 Million Unemployment Upgrade*, WFPL (Nov. 30, 2020), <https://wfpl.org/how-kentucky-missed-out-on-a-90-million-unemployment-upgrade/> [<https://perma.cc/65BG-KFP6>].

¹⁰⁴ What You Need to Know: Unemployment Insurance, KY. CAREER CTR., <https://kcc.ky.gov/career/Pages/What%20You%20Need%20To%20Know.aspx> [<https://perma.cc/4XJ7-NHF4>] (last visited Mar. 14, 2020).

of the evaluation process the application is in.¹⁰⁵ This stage is never short enough for the worker, since the effect of unemployment is an immediate cessation of wage income. The longer a claim remains under review, the longer the worker goes without income and must deal with uncertainty. Usually, this process ends with a determination that the worker is either eligible or ineligible.¹⁰⁶ Ineligibility notices are mailed in Kentucky, and they do not contain many details describing the investigator's reasoning for denying the application.¹⁰⁷ Many vague denial documents say simply: "The Office has determined the claimant is **not eligible** (not payable) to receive unemployment benefits in regard to the above listed issue."¹⁰⁸ A claimant must appeal in order to even learn the reasoning behind the denial.¹⁰⁹

From there, it is difficult for the claimant to prove that he or she is not actually disqualified. It is harder still for the claimant to prepare for a hearing where this information is not known well in advance. Often, the state agency will transmit another document closer in time to the hearing, where a similarly unhelpful amount of information will be set forth, such as "Issue: KRS 341.370(1)(B)(C) & (6) whether claimant was discharged for misconduct or dishonesty or claimant voluntarily quit without good cause."¹¹⁰ From that broad statement, a worker does not have much notice of what the agency has identified as the barrier to benefits.¹¹¹ It is difficult to prepare a rebuttal under those circumstances.

This uncertainty adds additional stress during a time when workers ought to be focusing their time and energy on obtaining reemployment. When reflecting on the original policy purpose of unemployment entitlement, it is clear that the idea was for workers to use it as a temporary aid with the optimum economic goal of reemployment.¹¹² Instead, they are spending their time participating the best they can in a system with few published rules, little

¹⁰⁵ Unemployment Insurance Claims System, KY. CAREER CTR., <https://uiclaims.des.ky.gov/ebenefit/eben.htm> [<https://perma.cc/DZ8T-8X44>] (last visited Mar. 14, 2020).

¹⁰⁶ *See id.*

¹⁰⁷ *See* Benefits Appeals, KY CAREER CTR., <https://kcc.ky.gov/career/If-you-are-Unemployed/Pages/Benefits-Appeals.aspx> [<https://perma.cc/9EUM-3GDP>] (last visited Mar. 14, 2020); *see also* Matthew Glowicki, *Have You Been Denied Unemployment Benefits? These Attorneys Offer Advice on Appealing*, COURIER J. (Aug. 13, 2020, 6:10 A.M., updated Aug. 21, 2020, 1:45 P.M.), <https://www.courier-journal.com/story/news/investigations/readers-watchdog/2020/08/13/unemployment-benefits-attorneys-offer-advice-appeals-process/3290221001/> [<https://perma.cc/AU6D-GUZZ>].

¹⁰⁸ Notice of Determination from Kentucky Office of Unemployment Ins. to Claimant No. 2-1C10Y5N (July 28, 2020) (on file with author) (emphasis in original).

¹⁰⁹ *See generally* Benefits Appeals, *supra* note 107.

¹¹⁰ Notice of Administrative Hearing for AD No. 1861037CA from Kentucky Office of Unemployment Ins. to Unidentified Claimant (Oct. 18, 2018) (on file with author).

¹¹¹ *Id.*

¹¹² *See generally* California Dep't of Human Res. Dev't v. Java, 402 U.S. 121, 130–31 (1971).

articulable reasoning, and a dangerous level of deference to a non-jury factfinder.

Compounding this stress is the adversarial anxiety that comes from an intense fact dispute. Because employers can avoid having their reserve accounts charged (and thus having their tax rates increase) by successfully opposing a worker's application, there is a financial incentive for a company to vigorously oppose a worker's application.¹¹³ Employers, seeking to sway the tribunal, sometimes submit a list of every mistake or judgment error they can recall. This strategy is actually effective, particularly if the employee hears the employer's specific complaints for the first time in the hearing. The referee has full domain over credibility determinations, and it is fairly difficult for an employee to refute such claims with no advance notice.¹¹⁴ Kentucky courts have yet to review these procedural due process problems, which are built into the current system to the detriment of workers.¹¹⁵

V. EFFECTS OF THE COVID-19 PANDEMIC

The broken unemployment insurance system existed in the proverbial shadows of state government for years, where it would lurk undetected until the sudden and massive unemployment of millions of workers in the spring of 2020.¹¹⁶ Apart from the jarring economic effects of a sudden lack of wage income, the workers' claims surged in a system that had barely been turning around the much lower levels of claims.

As this Article is being written, states like Kentucky are feeling their way through the morass of claims. The expanded coverage, lack of clear guidance, and the pressure to render quick decisions has resulted in

¹¹³ See Greg Iacurci, *Coronavirus Bill Will Create 'Devastating' Incentive to Lay Off Employees, Critics Say*, CNBC (Mar. 25, 2020, 11:34 A.M., updated Mar. 27, 2020, 1:54 P.M.), <https://www.cnbc.com/2020/03/25/coronavirus-bill-boosts-unemployment-benefits-covers-gig-workers.html> [<https://perma.cc/86T8-NFYZ>].

¹¹⁴ See Matthew Glowicki, *supra* note 107.

¹¹⁵ See *id.*; see also *Matthews v. Eldridge*, 424 U.S. 319, 348–49 (1976) (explaining requirements for procedural due process in property deprivation cases, with unemployment being categorized as a property interest).

¹¹⁶ See generally Christopher J. O'Leary & Kenneth J. Kline, *State Unemployment Insurance Reserves Are Not Adequate*, 20 W.E. UPJOHN INST. FOR EMP'T RESEARCH 321 (Mar. 2020), <https://www.econstor.eu/bitstream/10419/228425/1/1693358786.pdf> [<https://perma.cc/QW5B-KYZ7>] (discussing how unemployment insurance reserve accounts have not been successfully and fully rebuilt in several states following the Great Depression, leaving funding for unemployment benefits insufficient to meet the nation's needs even before the onset of the COVID-19 pandemic); see also News Release, *The Employment Situation—March 2021* 1–2 BUREAU OF LAB. STATS., U.S. DEP'T OF LAB. (2021), <https://www.bls.gov/news.release/pdf/empstip.pdf> [<https://perma.cc/KU34-M2VN>] (as of March 2021, the employment rate was in the United States was 6.2%, and roughly 10,000,000 Americans were categorized as unemployed persons).

inconsistent outcomes.¹¹⁷ We have had claimants with the same fact circumstances—staying home to self-quarantine or to take care of children displaced from care facilities—receive different outcomes.¹¹⁸ Claimant T.H. was awarded benefits until her employer complained, and then she was denied benefits and had to appeal all the way through the administrative agencies and into the court system.¹¹⁹ In contrast, Claimant T.O. was adjudicated to be entitled to her benefits under the same circumstances.¹²⁰ The claimants' referees applied two standards so dissimilar that they may as well have described the law in different states.¹²¹

Because of social media, these claimants are able to compare notes—something that was not widespread during the Great Recession's unemployment crisis.¹²² Facebook groups have emerged where claimants can share tips and discuss outcomes.¹²³ Thus, for perhaps the first time in American history, the lack of uniformity in standards can be known, and people are coming to terms with the reality that luck is a large factor in whether they get the result their families need, rather than predictable standards that comply with due process.

Kentucky's Office of Unemployment Insurance has strenuously opposed transparency during this time, even fighting open records requests for standards applied to the benefits process.¹²⁴ This is likely a political by-product, as the Executive Branch faces extraordinary criticism due to the inefficient roll-out of COVID-19 emergency relief.¹²⁵ The state has changed its entitlement standards, which has confused and panicked affected workers.¹²⁶ As of January 2021, there was a backlog of over 80,000

¹¹⁷ See *Gov. Beshear Offered 'Self-Quarantine' Unemployment*, *supra* note 103.

¹¹⁸ In the discussion of the cases that follow, the authors rely on their own recollection and notes.

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ See *id.*

¹²² See *id.*

¹²³ See, e.g., Kentucky Unemployment, FACEBOOK, <https://www.facebook.com/groups/837927736686798> [<https://perma.cc/2K9G-ALKU>] (last visited Mar. 15, 2021); Unofficial Unemployment Kentucky Information and Help, FACEBOOK, <https://www.facebook.com/groups/604189580441408> [<https://perma.cc/5HB8-FS3Y>] (last visited Mar. 15, 2021); Kentucky Unemployment Help Us Help You, FACEBOOK, <https://www.facebook.com/groups/583741855913089> [<https://perma.cc/4Z72-25Q2>] (last visited Mar. 15, 2021).

¹²⁴ See Open Records Decision, *supra* note 45.

¹²⁵ See, e.g., *Scathing Audit of Kentucky's Unemployment System Says 400k Emails Went Unread*, WLKY (updated Feb. 9, 2021 at 8:21 P.M.), <https://www.wlky.com/article/scathing-audit-of-kentucky-unemployment-system-says-400k-emails-went-unread/35460954> [<https://perma.cc/4JCC-HXKQ>].

¹²⁶ See, e.g., Bennett, *supra* note 117; see also Jared Bennett, *Kentucky Violated Federal Rules in Rush to Pay Some Unemployment Benefits*, KY. CTR. FOR INVESTIGATIVE REPORTING (Aug. 20, 2020), <https://kycir.org/2020/08/20/state-violated-federal-rules-in-rush-to-pay-some-unemployment-benefits/> [<https://perma.cc/7N44-GEK2>]; Jared Bennett, *Beshear Says Federal Changes Responsible for Unemployment Confusion*, KY. CTR. FOR INVESTIGATIVE REPORTING (Oct. 16, 2020), <https://kycir.org/2020/10/16/beshear-says-federal-changes-responsible-for-unemployment-confusion/>

unresolved claims clogging up the system.¹²⁷ There are no clear standards, no ability to adjust expectations, and no end in sight.

VI. SOLUTIONS

A. “No Fault” Unemployment

Among all solutions to fundamentally reform unemployment, removing the idea of “fault” from eligibility determinations may be the most important. In essence, our current system creates two classes of terminated workers: the deserving and the un-deserving. But why? In part, it is because unemployment is paid vis-à-vis taxes on employers.¹²⁸ So, the theory goes, “why should my tax dollars support a person who doesn’t deserve it?”¹²⁹ This changes when one realizes that unemployment should not be considered a tax on the employer. It is more akin to an earned wage, held in trust for the employee. Evolving past the archaic notion of fault will streamline the process for applicants and save significant time and taxpayer dollars for those administering the programs.

Kentucky is instructive on “deserving” versus “undeserving” workers. A deserving worker must meet all baseline eligibility requirements and must not be terminated for “misconduct.”¹³⁰ The state’s definition of misconduct is provided below, but it is really more of a shotgun blast of potential grievances than any kind of smoothly delineated concept:

“Discharge for misconduct” as used in this section shall include but not be limited to, separation initiated by an employer for falsification of an

[<https://perma.cc/X7FK-2GGE>]; Jared Bennett, *Gov. Beshear: Save Unemployment Money in Case of Overpayment Debt*, KY. CTR. FOR INVESTIGATIVE REPORTING (Oct. 19, 2020), <https://kycir.org/2020/10/19/gov-beshear-save-unemployment-money-in-case-of-overpayment-debt/> [<https://perma.cc/L96V-WJWL>]; Jared Bennett, *Substitute Teachers Given Unemployment Now Face Overpayment Debt*, KY. CTR. FOR INVESTIGATIVE REPORTING (Nov. 12, 2020), <https://kycir.org/2020/11/12/substitute-teachers-given-unemployment-now-face-overpayment-debt/> [<https://perma.cc/9NFK-UJ7S>].

¹²⁷ See Stacey Case, *Digging Out: Kentucky Unemployment Backlog Persists*, FOX NEWS 17 (Jan. 13, 2021), <https://fox17.com/news/digging-out/digging-out-kentucky-unemployment-backlog-persists> [<https://perma.cc/3H6E-Y9L5>]; WLKY, *supra* note 125 (reporting a recent audit of the Kentucky Office of Unemployment, which revealed approximately 400,000 emails to the office requesting assistance were never even opened as of November 9, 2020).

¹²⁸ See Jeff Oswald, *What Does an Unemployment Claim Cost to an Employer?*, UNEMPLOYMENT INS. SERVS., <https://www.unemployment-services.com/unemployment-claim-cost-employer/> [<https://perma.cc/6B74-HSZ4>] (last visited Mar. 16, 2021).

¹²⁹ See, e.g., Cheyenne Haslett et al., *Employers Struggle to Compete with \$600 Coronavirus Unemployment Payments*, ABC NEWS (May 21, 2020 at 5:01 A.M.), <https://abcnews.go.com/Business/employers-struggle-compete-600-unemployment-payments/story?id=70800696> [<https://perma.cc/2E39-DLXN>].

¹³⁰ See KY. REV. STAT. ANN. § 341.370 (LexisNexis 2021).

employment application to obtain employment through subterfuge; knowing violation of a reasonable and uniformly enforced rule of an employer; unsatisfactory attendance if the worker cannot show good cause for absences or tardiness; damaging the employer's property through gross negligence; refusing to obey reasonable instructions; reporting to work under the influence of alcohol or drugs or consuming alcohol or drugs on employer's premises during working hours; conduct endangering safety of self or co-workers; and incarceration in jail following conviction of a misdemeanor or felony by a court of competent jurisdiction, which results in missing at least five (5) days work.¹³¹

On its face, this system's requirements do not seem unreasonable. It scratches our primal itch to sort out the good and bad people. But there are serious problems with this framework. Simply applying them in practice can be a nightmare. Attempting to determine whether someone was terminated for misconduct can create lengthy, mind-bogglingly pedantic debates about what these words mean in any given context. From a practical perspective, if we reconsider the nature of unemployment from a tax on the employer to a wage earned by the employee's labor, then fault no longer has a logical role.

While it is hard to know precisely how much total time our current system spends deciphering the nature of "misconduct," it is easy to find examples that took years. For example, let us consider a hypothetical that frequently occurs in application: what is a good cause for absences or tardiness? This question recently made its way up to the Kentucky Supreme Court.¹³²

For roughly three years, Trevor Runyon worked five shifts a week as a night loader for Western Kentucky Coca-Cola Bottling (WKCC).¹³³ For several weeks leading up to March 26, 2009, Runyon had been coming to WKCC on Wednesdays to work extra hours.¹³⁴ His shift supervisor explained that this was so Runyon could get enough hours to be considered full-time.¹³⁵ For slightly over a month, Runyon worked at WKCC on Wednesdays from noon to about 6 P.M., in addition to his night shifts.¹³⁶

On Sunday, March 22, 2009, WKCC scheduled Runyon to work. Runyon testified that he called-in that morning due to illness.¹³⁷ Runyon also missed his scheduled shift the following day, and testified that he called in.¹³⁸ On

¹³¹ *Id.* at § 341.370(6) (LexisNexis 2021).

¹³² *W. Ky. Coca-Cola Bottling Co. v. Runyon*, 410 S.W.3d 113, 113-19 (Ky. 2013).

¹³³ *Id.* at 115.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

Tuesday, March 24, 2009, Runyon worked his normal night shift.¹³⁹ Runyon approached a supervisor and asked to make up the hours he had missed on Sunday and Monday.¹⁴⁰ The supervisor agreed but allegedly reprimanded Runyon for the absences.¹⁴¹

On Wednesday, March 25, 2009, Runyon clocked out approximately two hours after the shift began.¹⁴² His supervisor told Runyon that he could not “come and go as he pleased.”¹⁴³ Runyon did not reply, except to cryptically inform his supervisor he was “taking care of business” and left.¹⁴⁴ WKCC fired Runyon the next day.¹⁴⁵

Runyon filed for unemployment benefits.¹⁴⁶ A saga began. Initially, the Division of Unemployment Insurance determined that Runyon had not been discharged for misconduct.¹⁴⁷ WKCC appealed.¹⁴⁸ A hearing was held and the referee decided that Runyon was discharged for misconduct.¹⁴⁹ Runyon appealed the referee’s decision to the Kentucky Unemployment Insurance Commission, which reversed the referee.¹⁵⁰ WKCC appealed to Warren Circuit Court, naming both KUIC and Runyon. KUIC answered, but Runyon did not.¹⁵¹ Warren Circuit then entered a default against Runyon, while simultaneously affirming KUIC’s reversal of the referee’s reversal of the Division.¹⁵² WKCC then appealed to the Court of Appeals, which affirmed the Warren Circuit Court.¹⁵³ The Court of Appeals also determined that the default judgment was a legal nullity, because the circuit court’s order affirmed KUIC.¹⁵⁴

The Kentucky Supreme Court reversed the Court of Appeals, ruling that Runyon was disqualified.¹⁵⁵ The court specifically found that undisputed evidence showed Runyon was aware his attendance was an issue and that his job was in jeopardy.¹⁵⁶ The court also stated that KUIC had erred in finding that “two absences were insufficient” to show chronic tardiness because there

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 115–16.

¹⁴⁸ *Id.* at 116.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 119.

¹⁵⁶ *Id.* at 118.

was “no such bright-line rule” in the statute.¹⁵⁷ Because the statute contains no bright-line rule, “[w]hether or not sufficient absences have been proven must be considered in light of the particular circumstances of the employment.”¹⁵⁸

More than four years after his termination, the issue of whether Runyon was qualified for unemployment benefits was finally settled by the Commonwealth’s highest court.¹⁵⁹ And an opinion that settled absolutely nothing else was issued. But at what cost? The benefits that would have been due to Runyon could not have amounted to more than a few thousand dollars at most. That is a great deal of money for a lot of Americans, but it is a drop in the bucket compared to what it costs to litigate a case all the way to the Kentucky Supreme Court. His employer probably burned through Runyon’s total benefit by the time briefing was done at the circuit court level.

And for what? The Kentucky Supreme Court issued an opinion that settled absolutely nothing outside of the specific case. WKCC could have a nearly identical situation occur today only for a wholly opposite result to be upheld because of tiny factual variances. To be clear—that is in no sense the court’s fault. The statute contains no bright-lines, and the court is not able to write one in for the sake of economy. The court was in a straitjacket. Any attempt to write a more sweeping opinion would have risked legislating from the bench.

But in keeping with the notion of fault, would a bright-line rule even make sense? A person who misses three days of work and failed to call in because they were hit by a bus is not the same as a person who misses three days of work and failed to call in because they were on a tequila bender in Cabo. Fault does not lend itself to bright-lines; it is subjective. And, as we saw in Runyon’s case, different people can see the exact same case differently. A different referee here, a different judge or justice there, and Runyon’s case may have ended with the opposite result.

This all brings us back to perhaps the only fact about Runyon that was undisputed: he worked for WKCC for almost three years. He was unquestionably qualified as far as baseline eligibility was concerned. No one disagreed with that. Shouldn’t that be enough to receive a comparatively minor benefit? But because our system turns on fault, the parties spent four years in courts and administrative hearings. Judges and clerks were peeled off of cases involving wrongful convictions, medical malpractice, nursing home abuse, childcare, civil liberties, and matters of literal life and death to

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See id.* at 115.

determine a truly awesome question of historic import: why did Trevor Runyon miss work? And this is normal practice. The KUIC has been a party in literally thousands of cases at the circuit court level since its inception and has made dozens of trips up the appellate ladder.¹⁶⁰

This is a gross waste of judicial resources that has been hoisted on our unsuspecting court system by a misbegotten statutory scheme. Removing fault fixes this problem permanently. From a practical perspective, if we reconsider the nature of unemployment from a tax on the employer to being a wage earned by the employee's labor, then fault no longer has a logical role. At that point, we can finally send this pointless ritual to history's scrap heap.

A no-fault system promotes business needs as well. With the current adversarial system, businesses have a duty to conserve their resources, and to thus fight *even meritorious* claims in order to avoid repaying the cost of the benefits. If businesses are relieved of this incentive, they can engage in behavior that is certainly more pleasant from a public relations perspective, since fame for opposing one's own workers is hardly the kind of publicity companies seek. They will also be less likely to experience the "bad blood" and lifelong grudges that come from embittering former workers by trying to keep them from having meager subsistence benefits during a period of unemployment. These grudges run deep, perhaps deeper than the disenchantment of an unhappy customer. If businesses lack the power to oppress an employee after separation, as well as the incentive to do so, a clean split is possible.

We have noticed that often, workers who have experienced discrimination or retaliation come to us only after their unemployment benefits have been challenged—the proverbial last straw for the camel's weary back. Put simply, most workers do not decide to seek attorneys because they have made an objectively unbiased assessment that the law was broken with regard to their separation. They seek attorneys because they feel abused. Oftentimes it is that final kick in the rear on their way out the door that does it. In developing the unemployment case, we gather evidence that is later used for the underlying discrimination or retaliation cases. It is probably impossible to quantify, at this stage, how many employees would choose to simply let their civil claims go if they had the ability to move

¹⁶⁰ See, e.g., *Thompson v. Ky. Unemployment Ins. Comm'n*, 85 S.W.3d 621 (Ky. Ct. App. 2002); *Sunrise Children's Servs. v. Ky. Unemployment Ins. Comm'n*, 515 S.W.3d 186, 188 (Ky. Ct. App. 2016); *Ky. Unemployment Ins. Com. v. Carter*, 689 S.W.2d 360, 360 (Ky. 1985); *Taylor v. Ky. Unemployment Ins. Comm'n & River Metals Recycling, LLC*, 382 S.W.3d 826, 828 (Ky. 2012); *Ky. Unemployment Ins. Com. v. Kaco Unemployment Ins. Fund, Inc.*, 793 S.W.2d 845, 846 (Ky. Ct. App. 1990).

forward without interference. We believe it would be a considerable number. Of course, this is to say nothing of the millions of dollars employers or their insurers pay attorneys defending these claims.

B. Reform to Address the Nature of Unemployment

Only when the root causes of unemployment are addressed can reemployment be possible. In the same sense, understanding why and how a person is unemployed is necessary to fashion an effective and adequate unemployment benefit. For a person who is predictably structurally unemployed once a year, the current system works well enough. For people whose particular skills are no longer in demand in any aspect of the labor market, and who thus require new skills in order to be eligible for new work, restricting the amount of the unemployment benefit and the duration of payments misses the mark.

Development of new skills often requires education, which is usually an investment by a worker, both of time and money. As noted above, having unemployment benefits at a subsistence-only level guarantees that the funds will be spent only on the most basic family and household needs, and also that the worker will devote attention to reemployment efforts to the exclusion of other efforts.¹⁶¹ Long-run investments like education are then crowded out.

C. Increase Penalties and Detection Efforts for Employers Who Wrongfully Oppose Benefits

The connection between an employer's finances and the worker's post-discharge subsistence creates a significant incentive for a company to oppose a meritorious application. As discussed above, why not? An employer may prevail and thus avoid the charge to its reserve account. As of the date of this Article, there is no observable desire by state agencies to pursue employers who engage in this practice. No executive wants to be known as the "anti-business administration."

In Kentucky, a civil right exists that grants workers a private right of action against employers who use deceit to wrongfully oppose benefits.¹⁶² But when we asked the Kentucky Unemployment Insurance Commission to quantify how many employers it pursued for violation of KRS 341.990(6), the Commission could not identify any.¹⁶³ It claimed that it could not track these prosecutions, and when a method for doing so was explained, the

¹⁶¹ Burns, *supra* note 17, at 8; see also discussion *supra* Part III.

¹⁶² Hickey v. GE Co., 539 S.W.3d 19, 25 (Ky. 2018).

¹⁶³ This observation is based on the authors' own recollection.

Commission expressed mystification.¹⁶⁴ Certainly, going after businesses who wrongfully oppose benefits would be more difficult than pursuing workers who make false statements, but that is no reason to turn a blind eye to the practice.

D. Addressing the Libertarian Argument

Inevitably, a criticism will emerge of this proposal due to its tendency to “force savings.” After all, libertarians argue, why not just abolish the system and let workers keep all of their wages as they are earned?¹⁶⁵ There are good moral responses to this point, but for our purposes, we will respond on a purely practical basis. Simply put, we tried that. It didn’t work. And we didn’t like the consequences.

Before the 1929 market crash, the American market was a laissez-faire capitalist dream for the most part.¹⁶⁶ The common wisdom was that government should not intervene in the market.¹⁶⁷ This was largely based on the idea of market efficiency (i.e., the market will regulate itself).¹⁶⁸ On some levels, this mistake was understandable. After all, in 1929, unemployment was 3.2%, and businesses issued \$9.4 billion in new securities.¹⁶⁹ By all outward appearances, we were doing well. But we were in for a surprise.

In the wake of the 1929 crash, unemployment skyrocketed and fluctuated between twenty-five and fifteen percent for the next ten years.¹⁷⁰ Rates of home foreclosure tripled between 1929 and 1932, and “by 1933 one thousand homes per day were subject to foreclosure.”¹⁷¹ Investors lost all confidence in the market.¹⁷² In any event, thousands of other scholars have detailed the unprecedented horrors of the Great Depression, and we will not copy their work here.

The Great Depression revealed many simple truths, but among them was this: when people in a consumer-based economy cannot spend, the economy

¹⁶⁴ *See id.*

¹⁶⁵ Brian Duignan, *Libertarianism*, BRITANNICA, <https://www.britannica.com/story/libertarianism> [<https://perma.cc/6JN6-W8DQ>] (last visited Oct. 15, 2020).

¹⁶⁶ Steven A. Ramirez, *The Law and Macroeconomics of the New Deal*, 62 MD. L. REV. 515, 523–24 (2003).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 528.

¹⁶⁹ *Id.* at 524.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 525.

¹⁷² *Id.* at 524.

cannot work.¹⁷³ The bedrock of America's economy is people buying goods and services. We want to encourage spending, not discourage it.¹⁷⁴

When the market crashed in 1929, people had to live on their savings, and that clearly was not enough.¹⁷⁵ Without any government backstop, America burned through its savings and spending largely stopped.¹⁷⁶ That led to a cascade of foreclosures, industries shutting down due to demand going through the floor, and investment shutting down.¹⁷⁷ Unemployment is not an end all solution to economic depression, but it ameliorates the impact and creates an additional level of economic protection for American workers.

VII. CONCLUSION

At the end of the day, our unemployment system is never going to be perfect, if for no other reason than because no human endeavor can be. But the fact is that our system is not doing what it is supposed to at this point, and it is in need of reform. And while practitioners have been watching our unemployment system struggle for a long time, COVID-19 has thrown its shortcomings into stark public relief.

¹⁷³ *Id.* at 527.

¹⁷⁴ *See id.* at 563.

¹⁷⁵ *See id.* at 524–26.

¹⁷⁶ *See id.*

¹⁷⁷ *Id.*

