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June 25, 2021

Texas Workforce Commission
Edward Serna, Executive Director
CC: Clay Cole, Division Director, Unemployment Insurance
Via email to: edward.serna@twc.state.tx.us, clayton.cole@twc.state.tx.us

Re: Systemic issues in TWC delivery of unemployment compensation

Mr. Serna:

We write you today to address several systemic issues in the delivery of unemployment benefits. Texas RioGrande Legal Aid (TRLA) is a nonprofit that provides free legal services to indigent Texans. Over the course of the past year, we have assisted hundreds of unemployment claimants in Texas, many of whom have been harmed by TWC's repeated failure to deliver unemployment benefits in the manner required by state and federal law. One of the many unemployment claimants we represent is Kathryn Kawazoe, who was denied unemployment benefits in October of 2020. She filed an appeal in November 2020 and has not yet had an appeal hearing scheduled in her case. She has retained TRLA to represent her in this matter and to address systemic issues that impact her and other unemployed Texans who have lost their livelihoods as a result of the pandemic.

The purpose of this letter is to raise these issues with you in hopes that we can negotiate an agreement to resolve these widespread harms to low-income Texans. If we are unable to reach an agreement, we intend to pursue litigation to vindicate our clients' rights under the law. If you believe that there are any administrative procedures that would need to be exhausted prior to such litigation, please let us know.

I. TWC should create a functioning phone queuing system that guarantees claimants a call back within 72 hours.

Fifteen months into the pandemic, TWC's phone system is still largely nonfunctional. TRLA clients report finding it near impossible to get through to TWC representatives on the phone – sometimes failing to get through after literally hundreds of calls over the course of weeks or months. In order to safeguard claimants' basic due process rights, TWC should have a functional phone queuing system to guarantee claimants the opportunity to promptly have their voices heard. The queuing system should also guarantee that claimants have an opportunity to speak to a specialist if needed. These procedures will also assure TWC compliance with the recently-passed SB2099.

II. TWC should permit claimants to file DUA applications concurrently with UI applications and issue a determination of eligibility for PUA benefits while a UI appeal is pending.

TWC requires that an unemployment claimant first receive a denial of UI benefits before TWC may process them for Pandemic Unemployment Assistance (PUA) and other Disaster Unemployment Assistance (DUA) benefits. While this tracks with the federal requirement that DUA claimants must be ineligible for UI benefits, 20 C.F.R. § 625.4(i), the way in which TWC processes UI and DUA/PUA separately leads to massive delays in benefit processing. TWC employees also frequently deny claimants the ability to apply for PUA until after their UI denial is final. By the time claimants actually apply for and receive PUA, often several months after they made their initial UI claim, it is already too late for many.

TWC has failed to follow the basic mandates of the CARES Act and the Social Security Act by preventing some claimants from filing PUA claims concurrently with their initial UI applications. The DUA regulations require that TWC “shall promptly, upon the filing of an initial application for DUA, determine whether the individual is eligible” and pay benefits. 20 C.F.R. § 625.9(a)(1). TWC should correct its failure by ensuring that a determination of PUA eligibility has been issued to every claimant who received a UI denial after January 27, 2020 (the effective date of the CARES Act). Going forward, TWC should permit claimants to file UI and DUA applications concurrently through a unified process and resolve the DUA application as soon as the initial UI determination is reached.

III. TWC should find that, in order to prevent hardship and injustice, it is necessary to award claimants full benefits, backdated to the claimant’s date of separation from work, unless specific circumstances mitigate against the grant of backpay to individual claimants.

TWC’s regulations give it the authority to permit the filing of backdated benefit claims “for adequate cause shown” and “in order to prevent hardship and injustice.” 40 Tex. Adm. Code § 815.22(a). However, TWC has never provided claimants a formal avenue to request backdated claims. The Commission’s website has an FAQ which purports to instruct claimants how to file backdated claims, but only directs claimants to respond after they are “given the opportunity” to request back claims.¹

In practice, claimants must get lucky enough to get through to a TWC representative via the Tele-Center. Once they have reached a representative, claimants who are resourceful enough to request backdated benefits (about which TWC has never provided them any information) are subject to the whims of the TWC representative they reach. The TWC representative then makes an often unwritten, informal, and unchallengeable determination about the claimant’s entitlement to backdated benefits.

TWC’s regulations regarding backpay do not require that determinations of hardship be made on a case-by-case basis. Given the broad impact the pandemic has had on TWC’s ability to promptly and thoroughly review unemployment claims, TWC should make broad-based determinations that backpay is presently necessary in most, if not all, cases.

¹ <https://www.twc.texas.gov/jobseekers/request-benefit-payments>

For example, TWC should make a determination under 40 Tex. Adm. Code § 815.22(a) that, in order to prevent hardship and injustice, applicants who were denied the opportunity to file PUA applications are now entitled to backdated claims as far back as their initial date of separation from work. TWC should also determine that all UI claimants whose initial application was received between March 1, 2020 and the end of 2021 are entitled to file back payment requests in light of delays caused by TWC's lack of processing capacity. TWC should then review all claims processed during that period and automatically issue such backpay awards unless it makes specific findings about why backpay is inappropriate in a given case.

- a. At a minimum, TWC should create a formal process for all claimants to request back payments.

TWC's present haphazard system in which many claimants either never learn of the possibility of requesting backpay or are subject to the whims of the TWC representative they reach over the phone unlawfully denies claimants the opportunity to show "adequate cause" as to why backpay might be appropriate in their individual circumstances. 40 Tex. Adm. Code § 815.22(a). The best way to address this problem in these unprecedented times, discussed above, is to issue broad-based determinations regarding backpay eligibility. But at a minimum, due process and the governing regulations require that all claimants be given the opportunity to present a claim for back payments. TWC should therefore update its initial application process to allow claimants the opportunity to formally request back pay and to explain what hardship or injustice might result if the request for back pay is denied. TWC should also create a formal process for claimants who applied prior to the institution of this process to request backdated benefits and inform every applicant of their right to request backdated benefits through this new process.

- b. TWC should issue claimants a formal, appealable determination on requests for back payments.

When a claimant speaks with a TWC representative and is denied the ability to request backdated benefits, this is a denial of a claim for unemployment compensation. Such a denial triggers the Social Security Act's mandate of an "opportunity for a fair hearing." 42 U.S.C. § 503(a)(3). But at present, that denial often goes unmarked by any sort of notice or opportunity to appeal. By failing to provide a denial of back benefits of pandemic unemployment benefits without a notice of appeal, TWC also violates the DUA regulations. 20 C.F.R. § 625.9(d). Furthermore, the lack of formal notice on back payments is a violation of claimants' due process rights. Claimants must be informed of whether they were awarded backpay and, if so, to what date, so that they can determine whether they have been awarded the proper amount of unemployment benefits or if an appeal might be necessary.

Going forward, examiners should automatically issue a written, appealable determination regarding backdated pay whenever the date of separation occurs more than two weeks before any UI application is processed.

- c. When TWC issues a claimant backpay, the claimant should also receive back payment for FPUC compensation.

The back pay awards that TWC does issue at present often fail to include Federal Pandemic Unemployment Compensation (FPUC). This is a violation of the agreement entered into between Texas and the U.S. Department of Labor, which provides that TWC “will” make FPUC payments to claimants for claim weeks for the duration of the agreement to provide pandemic-related unemployment benefits. 15 U.S.C. § 9023(b)(1). Failure to provide FPUC benefits is thus a violation of Texas’s agreement with the Department of Labor and a failure to provide benefits “when due” as required by the Social Security Act. TWC should review all backpay awards made from Jan 1, 2020 to present to ensure that claimants received the appropriate amount in FPUC benefits for each claim week.

IV. TWC should provide claimants with satisfactory initial determinations that clearly communicate claimants’ rights to both federal and state unemployment benefits.

TWC’s communication with claimants about their rights to federal unemployment benefits available during the pandemic has been so incomplete as to make it impossible for many claimants to determine how best to protect their rights to unemployment benefits of any kind. Applicants eligible for PUA but not UI have often ended up in months of fruitless appeals because they do not understand that under TWC’s policies they need a UI denial in order to access PUA, and do not understand TWC’s refusal to process their application for the PUA that they are due. Others receive multiple contradictory determinations on the same day and are unable to determine what, if any, benefits they are actually eligible for. Still others receive determinations of ineligibility for PUA that do not contain the information required by the DUA regulations, including information “sufficiently detailed so that [the claimant] will understand why he is ineligible or why he has been disqualified, and what he must do in order to requalify for benefits or purge the disqualification.” 20 C.F.R. § 625, App. B. Even claimants who receive some amount of benefits struggle, for lack of a clear accounting, to determine whether they are receiving the full amount they are entitled to, including FPUC.

Due process of law requires all claimants to receive satisfactory notice of their determinations, the basis for those determinations, and their related rights. TWC should ensure that notices of determinations to claimants are intelligible and contain all the information required by 20 C.F.R. § 625, App. B. Where TWC issues a claimant multiple determinations in a single day, TWC should issue a single, intelligible “master” determination which explains to the claimant their eligibility going forward for benefits generally. Such language should be simple and understandable by low-literacy claimants. The notice should also include a detailed accounting explaining exactly what amount is awarded for each week of benefits and why.

V. TWC should provide claimants with timely appeal hearings.

Under the Social Security Act, states must complete 60% of first level appeals within 30 days, and 80% within 45 days. 20 C.F.R. § 650.4(b). According to the most recent data reported by TWC to the Department of Labor, the current 30-day completion level is 2.3%, and the 45-day completion level is 15.8%.² The average age of pending appeals is 174 days – nearly 6 months.³

These delays are so long that they fail to comply with the Social Security Act’s mandates that payments be issued to claimants “when due” and that claimants have an “[o]ppportunity for a fair hearing.” 42 U.S.C. § 503(a)(1), (3). Delaying unemployment compensation for months “defeats” the statutory purpose of the Social Security Act and is unlawful. *Cal. Dept. of Human Res. Development v. Java*, 402 U.S. 121 (1971). Such a delay also meaningfully deprives claimants of their rights to procedural due process under the 14th amendment. TWC should ensure that claimants receive an opportunity to be heard on an appeal in a timely manner in compliance with 20 C.F.R. § 650.4(b).

VI. TWC should ensure claimants are able to request waivers of overpayments.

TWC does not currently have a procedure available to claimants to request a waiver of an overpayment of benefits. This is a violation of the Texas Unemployment Compensation Act, TWC’s own regulations, and claimants’ constitutional rights to due process.

- a. When TWC sends a claimant a notice of overpaid unemployment benefits, it should send the claimant information about the underlying determination and a notice of information of the procedure to request a waiver.

Since the beginning of the pandemic, TWC has begun issuing notices of overpaid unemployment benefits which do not give claimants any information about the reason for the underlying determination of overpaid unemployment benefits. Because proper notice is essential to due process and statutory and regulatory compliance, TWC should ensure that claimants who are issued a notice of overpaid unemployment benefits have information about the underlying determination and the process to apply for a waiver if they are eligible. The underlying, dated determination of overpayment should be included so claimants can verify they are not being subject to improper and untimely redeterminations, discussed further below.

- b. TWC should create a process for claimants to request waivers of overpayments where the overpayment was caused by TWC’s error or a third party’s fraud.

² Appeals Time Lapse Report (ETA 9054) (Apr. 2021), https://oui.doleta.gov/unemploy/ui_insurance_appeal.asp.

³ Appeals Case Aging Report (ETA 9055) (Apr. 2021), https://oui.doleta.gov/unemploy/ui_insurance_appeal.asp.

Under *Martinez v. Texas Employment Commission*, TWC cannot recover overpaid benefits where a claimant can show that (a) there was no misrepresentation or nondisclosure, and (b) that the mistake leading to the overpayment was caused solely by TWC itself. 570 S.W.2d 28, 32 (Tex. App. – Corpus Christi, 1978). This is due to the statutory language of the Texas Unemployment Compensation Act – TWC never had authority to assess an overpayment in an instance where the mistake leading to the overpayment was caused solely by TWC itself. Tex. Lab. Code § 214.002.

Likewise, TWC has no process through which claimants can request waiver of overpayments caused by fraud perpetuated on TWC by third parties. TWC has issued overpayment notices to many claimants who never claimed unemployment benefits at all, but rather had their personal information used to defraud TWC. While individuals assessed a fraud-related overpayment can report the fraud to TWC’s fraud hotline and pray that TWC dismisses the fraud of its own accord, this process is a black box. TWC does not make information available about the status of a fraud claim to anyone, even if the reporting party was personally victimized by the fraud. If TWC does not fix the problem of its own accord, through some mysterious procedure wholly unknowable by the victim of fraud, they have no procedure through which to challenge their overpayments.

As in *Martinez*, TWC cannot lawfully collect on an overpayment against the victim of the fraud because it is not authorized by the Texas Unemployment Compensation Act. The Act only authorizes TWC to collect overpayments from “[a] person who has received improper benefits.” Tex. Lab. Code § 214.002(a). Fraud victims have not received improper benefits, so TWC has no legal authorization by which to collect these overpayments. Rather, TWC must collect the overpayment, if at all, from the perpetrator of the fraud. Further, denying a victim of fraud the ability to challenge an overpayment which can negatively impact their future eligibility for unemployment benefits or tax refunds is a violation of that person’s right to due process.

TWC should therefore create a formal process by which individuals may challenge overpayments on the basis that the overpayment was caused by TWC’s error or a third party’s fraud. An individual who follows that process should receive a formal, appealable determination regarding their waiver request.

- c. TWC should immediately cease collection on overpayments of federal unemployment benefits unless proper notice was provided.

TWC’s own regulations require that “[w]hen a decision of the Agency or Commission results in a federal extended unemployment compensation overpayment, the Agency or Commission will also determine whether the overpayment will be waived.” 40 Tex. Adm. Code § 815.12(b). In addition to appealing the underlying determination, TWC regulations

also provide that a claimant should be able to challenge a decision that an overpayment will not be waived. *Id.* at (d).

Unfortunately, TWC is currently failing to comply with its own regulations. As described above, TWC does not generally provide determinations of waiver under § 815.12(b) when it issues notices of overpaid benefits. Claimants do not receive any information regarding the process of waiver of overpaid unemployment benefits, nor do they receive any information regarding their appeal rights under state law, depriving them of their right to due process.

TWC should therefore immediately cease all collection activity on overpaid amounts of FPUC, Federally Reimbursed Work Week, and Pandemic Emergency Unemployment Compensation on which TWC has not issued a formal, written, appealable determination of waiver of overpayment.

VII. TWC should immediately cease its practice of illegally issuing untimely redeterminations of eligibility and reverse the harm caused by those redeterminations.

In the summer of 2020, after the initial rush of pandemic-related unemployment claims died down, TWC began issuing waves of redeterminations of unemployment eligibility to claimants who were already receiving benefits. These redeterminations often came months after TWC's initial determination of eligibility, long after TWC's right to issue a redetermination had expired. These redeterminations are unlawful and should be reversed.

The Texas Unemployment Compensation Act makes it clear that an examiner may only issue a redetermination of eligibility “not later than the 14th calendar day after the date on which the copy of the determination is mailed to the last known address of the claimant.” Tex. Lab. Code § 212.053-4. If no party appeals the determination and the examiner does not issue a redetermination within 14 days of their initial determination, then the initial determination is final. Tex. Lab. Code § 212.053.

To the extent that any timely redeterminations concern eligibility for PUA benefits, the TWC should also evaluate whether the notices sent to claimants comply with the DUA regulations. A redetermination of DUA benefits must include “an explanation of the reason for the ineligibility or disqualification.” 20 C.F.R. § 625, Appx. B. Further, the notice must include a statement justifying the disqualification that “must be individualized to indicate the facts upon which the determination was based.” *Id.* TWC's PUA-related redetermination notices do not include this information – for example, many merely state that TWC “obtained new information” and “after investigation” determined that the claimant was ineligible without giving any detail as to the new information obtained by TWC that caused the redetermination.



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TWC should immediately cease its practice of issuing unlawful redeterminations. Further, TWC should review its files for unlawful redeterminations, reverse those redeterminations, and allow negatively impacted claimants to file backdated claims for the weeks they were denied benefits as a result of TWC's unlawful actions. Finally, to the extent that TWC attempts to issue these redeterminations in the future, they should provide claimants with the factual and legal information required by law.

Thank you for your attention to these matters. We look forward to working with you to resolve them.

Sincerely,

A handwritten signature in black ink, appearing to read "Dave Mauch", with a long horizontal flourish extending to the right.

Dave Mauch
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