United States Senate

June 8, 2020

The Honorable Eugene Scalia
Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Dear Secretary Scalia:

When Congress enacted the CARES Act, it created a new Pandemic Unemployment Assistance (PUA) program for workers who otherwise fell through the cracks of our existing safety nets. Specifically, PUA was intended to expand unemployment coverage to workers who otherwise cannot access regular state unemployment insurance (UI).

We are deeply concerned with the reports of confusion and difficulty that misclassified workers, many of whom already are eligible under law and should be receiving regular state UI as employees, are being processed presumptively for the federal PUA program, with only bare consideration—if any at all—for regular unemployment.

Across the country, in states like Nevada, Ohio, and many other states, millions of people employed in the so-called "gig economy" have been out of work. Because their employers have improperly classified them as independent contractors rather than employees, app-based workers have long faced challenges in accessing regular UI. Meanwhile, the companies that hire them avoid their obligations, such as paying into much-needed state UI trust funds. These workers are employees and should have benefits as such, and their employers need to meet the obligations shared by all employers.

In passing the CARES Act, Congress intended to provide emergency benefits for the many individuals out of work who are excluded from traditional unemployment coverage during the pandemic. Congress did not intend to supplant states' own laws and court decisions, cementing business practices that have been determined unlawful.[1]

Further, by creating a federal PUA program that supplements the existing UI system, Congress did not intend to permit employers to inappropriately push their employees to PUA, absolving employers of their obligation to pay into much-needed state trust funds during an unprecedented crisis when states need to ensure they are fully and fairly resourced.

[1] *See, e.g.*, *In re Vega*, 2020 NY Slip Op 02094 (N.Y. 2020); *Razak v. Uber Techs.*, 951 F.3d 137 (3d Cir. 2020).

When employers skip out on paying their fair share, the public must make up the difference. Federal, state, and local governments suffer hefty losses of revenue due to independent contractor misclassification, in the form of unpaid and uncollectible income taxes, payroll taxes, and unemployment insurance and workers' compensation premiums.[2] A 2009 report by the Government Accountability Office estimates independent contractor misclassification cost federal revenues $2.72 billion in 2006.[3] According to a 2009 report by the Treasury Inspector General for Tax Administration, misclassification contributed to a $54 billion underreporting of employment tax and losses of $15 billion in unpaid FICA taxes and UI taxes.[4]

The availability of PUA during an unprecedented crisis is supposed to be a lifeline for truly self-employed individuals who cannot otherwise access unemployment assistance. It should not be a pathway for low road companies to undercut honest businesses, eroding competition in a fair market. Employers that correctly classify workers as W-2 employees often are unable to compete with lower-bidding companies that reap the benefits of artificially low labor costs. Misclassification, as the Treasury Inspector General found, "plac[es] honest employers and businesses at a competitive disadvantage."[5]

Misclassification, especially when pervasive in an industry, skews markets and can drive responsible employers out of business. Law-abiding employers also suffer from inflated unemployment insurance and workers' compensation costs, as "free riding" employers that misclassify employees as independent contractors pass off costs to employers that play by the rules. A 2010 study estimated that misclassifying employers shifts $831.4 million in unemployment insurance taxes and $2.54 billion in workers' compensation premiums to law-abiding businesses annually.[6]

While PUA was meant to be an emergency benefit to meet the unprecedented crisis of the moment, we are concerned that dishonest businesses will use the program as a tool to enshrine their workers' misclassification and skew markets against fair competition.

It is essential that the Department properly administer the PUA program to fulfill Congressional intent to support workers who "otherwise would not qualify for regular unemployment or extended benefits under State or Federal law[.]" Many workers, in spite of their misclassification

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[2] U.S. Dep't of Labor, Wage and Hour Division, "Misclassification of Employees as Independent Contractors," available at https://www.dol.gov/whd/workers/Misclassification/.

[3] U.S. Government Accountability Office, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* (August 2009), available at http://www.gao.gov/new.items/d09717.pdf.

[4] Treasury Inspector General for Tax Administration, *While Actions Have Been Taken to Address Worker Misclassification, Agency-Wide Employment Tax Program and Better Data Are Needed*, February 4, 2009, available at http://www.treas.gov/tigta/auditreports/2009reports/200930035fr.pdf.

[5] Treasury Inspector General for Tax Administration, *Additional Actions Are Needed to Make the Worker Misclassification Initiative with the Department of Labor a Success*, February 20, 2018, available at https://www.treasury.gov/tigta/iereports/2018reports/2018IER002fr.pdf.

[6] Douglas McCarron, "Worker Misclassification in the Construction Industry," BNA Construction Labor Report (April 7, 2011), available at https://web.carpenters.org/Libraries/PDFs_Misc/Construction_Labor_Report_--_McCarron_on_Misclassification_4-7-2011_sm.sflb.ashx.

as contractors by their employer, already do qualify *as employees* for regular unemployment benefits.

The Department should immediately issue clarifying guidance that the determination whether app-based workers are eligible for regular unemployment benefits is a state-by-state determination. While ride-hail drivers and other "platform" workers are statutorily classified as independent contractors in some states, it remains critical that state agencies apply their state laws to determine app-based workers' eligibility for regular UI.

The urgent nature of this crisis demands swift action from the DOL. To that end, we request that the Department issue guidance that clarifies that:

- While *some* "gig economy workers" may only be eligible for PUA, many workers are misclassified and in some cases already are employees under state law, and that agencies should process app-based workers by applying their state's existing laws to determine if they are employees eligible for regular unemployment compensation, rather than presumptively processing them for PUA;
- At the same time, state agencies should make it as convenient and quick for eligible workers to receive regular UI benefits as it is to receive PUA benefits, including by acceptance of workers' proof of earnings where wage records are not in the system and the employer fails to provide them;
- A determination that a worker is eligible for PUA has no bearing on the question of whether that worker is an employee under any state or federal law;
- As state agencies perform required quarterly reviews that individuals receiving PUA are ineligible for regular UI and PEUC, the agencies transfer any workers who are misclassified to regular UI;
- State agencies should audit companies for which there is a demonstrated pattern of non-W-2 workers who have been found eligible for UI as employees.[7]

We appreciate your timely attention to this important issue for workers and states. We eagerly await your response.

[7] *See, e.g.*, Ken Jacobs and Michael Reich, "What would Uber and Lyft owe to the State Unemployment Insurance Fund?", UC Berkeley Labor Center (May 2020), available at http://laborcenter.berkeley.edu/pdf/2020/What-would-Uber-and-Lyft-owe-to-the-State-Unemployment-Insurance-Fund.pdf; Chris Opfer, "Uber Hit With $650 Million Employment Tax Bill in New Jersey," Bloomberg Law (Nov. 14, 2019), available at https://news.bloomberglaw.com/daily-labor-report/uber-hit-with-650-million-employment-tax-bill-in-new-jersey.

Sincerely,

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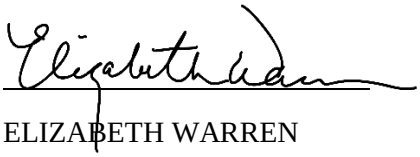

ELIZABETH WARREN
United States Senator