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October 31, 2013

By Electronic Mail: regulations@labor.ny.gov

Peter Rivera, Commissioner
New York State Department of Labor
Building 12, State Campus
Albany, New York

Re: Comments on Proposed New Section 473.4 of Title 12 NYCRR on Work Search

Dear Commissioner Rivera:

We are writing to comment on the proposed new Section 473.4 of Title 12 NYCRR. MFY Legal Services, Inc. ("MFY") is dedicated to equal access to justice for all, and assists highly vulnerable, low-income New Yorkers resolve legal problems in the areas of employment, housing, civil rights, public benefits, disability rights, elder issues, mental health, consumer and family matters. MFY's Workplace Justice Project has counseled and represented hundreds of low-wage workers in employment-related matters such as unemployment insurance (UI) claims, as well as claims for unpaid wages and discrimination. We represent UI claimants at hearings and in appeals and we advise clients on their rights under the UI law through an intake line, bi-weekly clinic at our office, and through participation at an information table at UI hearings offices. We speak to approximately 200 claimants each year.

We are extremely concerned that the proposed work search regulations will render ineligible otherwise eligible low-wage workers because they are unable to comply with bureaucratic requirements. The brunt of the impact will fall on workers who worked the lowest-wage jobs, who are not fully literate, or who need modifications because of a disability. At the same time, MFY does not believe that this sort of mandatory recordkeeping will enhance our clients' work search efforts. The proposed regulations will more likely result in a large shift in Department of Labor (DOL) resources away from assisting people with obtaining benefits to which they are entitled and with finding work and in favor of using those resources to enforce strictly bureaucratic requirements and resolve disputes arising from that enforcement. Indeed, either the regulation will not be cost neutral as the proposal claims, or it will drain enormous resources from understaffed parts of the UI Division that currently process claims for benefits and prepare hearing files. At the same time, the increased denial of benefits will create unnecessary and avoidable economic insecurity and crises, for example, in housing.

We also believe the regulations violate Title II of the Americans with Disabilities Act by failing to provide for the required interactive process to develop reasonable modifications for people with disabilities. Moreover, given the racial breakdown of workers who lack adequate education and training, we believe that implementation of the ineligibility provisions will yield a disparate racial impact in violation of the regulations enforcing Title VI of the Civil Rights Act of 1964. We oppose the regulations and propose that the focus of the regulations instead be exclusively on using the Career Centers to provide assistance to those who need it, rather than creating new opportunities to churn otherwise eligible claimants off the rolls, keeping them from receiving their payments when due.

**Background**

In our experience, low-wage workers who lose their jobs are desperate to find other employment. They do not need prompting or penalties from the government to seek out new jobs. The pressing need to pay the rent, put food on the table, and otherwise provide for themselves and their families provides ample incentive. Low-wage workers rarely have savings to live on, and if they do have savings, they see their small nest eggs disappear rapidly after a short time without paid employment. The small amount of UI that they receive, often delayed by false accusations by their employers, does not adequately substitute for actual wages.

As a result, low-wage workers receiving UI put considerable effort into finding jobs. Rather than devote scarce resources to intensively monitoring low-wage workers' activities, the more helpful role for government is to assist workers who are looking for jobs, as it does at the Career Centers operated by the Department of Labor (DOL). Nevertheless, even with such help, usually the best method of work search for unskilled workers is to hit the pavement and to make calls based on social networks that they have through family, friends, and former co-workers. Often, they do not even have the opportunity to submit an application or have a job interview, but these word-of-mouth activities through informal networks ultimately prove the best way to find new work. However, this low-tech method of job searching often leaves little or no paper trail.

Documentation or proof of work search efforts is not a simple process for low-wage workers. Because we frequently advise clients on how to document their efforts so that they can prove mitigation if their unlawful termination claims are litigated, we are acutely aware of the barriers to documentation that our clients face. Many clients have very limited literacy levels in any language, whether because of disability or poor education. They cannot prepare intelligible notes on their job searches. Yet, since they are not searching by sending letters to potential employers and the businesses they speak to do not offer business cards, they do not have a record of their contacts unless they write notes. In addition, many clients have to move precisely because of the sudden loss of income. Some become homeless and move around frequently or find themselves in the shelter system. It is very difficult for people with unstable housing to maintain paper records and they are often unlikely to have access to electronically stored information.

We also note that the original proposed legislative language in Section 12 of Part O of the January 2013 budget bill would have required "contacting at least two prospective employers for each week claimed" and participation in other activities. That language was removed because it was considered too restrictive. Instead of honoring the deletion of that requirement, the proposed

regulations would instate requirements that are more rigid and restrictive and even less appropriate.

## The Proposed Regulations

The proposed new Section 473.4 of Title 12 NYCRR first sets forth the general rule that a UI claimant must be ready, willing, and able to work and must be actively seeking work during each week for which she claims benefits. It then defines "systematic and sustained efforts to find work" by enumerating specific types of job activities that would count as sufficient to maintain eligibility for benefits. The proposed section then sets forth the requirements for maintenance of a work search record and the sanctions for not succeeding at doing so. The proposed section then offers several limited exemptions and examples of good cause for limiting work search.

### 1. Acceptable Work Search Activities

The list of proposed countable work search activities is unduly narrow.[1] The proposed requirement is that a claimant engage in at least three work search activities per week, that these activities must be conducted on different days of the week, and that the activities include at least one of five enumerated activities: using resources at a Career Center; visiting a job site and completing a job application in person with employers who "may reasonably be expected to have openings"; submitting a job application and/or resume in response to a public notice or want ad or to employers who "may reasonably be expected to have openings"; attending job search seminars, scheduled career networking meetings, job fairs, or workshops on improving skills for obtaining employment; and interviewing with potential employers.

None of these examples includes the methods used successfully by the vast majority of low-wage workers: informal networking with friends, family members, and former co-workers either in person or by phone; calling or visiting employers that have been identified by members of these networks; and visiting job sites that generally offer the type of work for which the claimant is qualified even without knowing whether they have openings and even if they do not offer formal written applications. In many of the sectors that low-wage workers actually find employment in, *e.g.*, food service, construction, and retail, these are the ways people most often find jobs. Some jobs might have a person fill out a written application, but others will not, and the claimant will have no way of establishing whether there is a reasonable expectation of openings. In fact, if they limit their searches to places where they have such information, it would greatly reduce their likelihood of finding a job.

In addition, this list would tend to screen out people with disabilities, for example, intellectual impairments and low levels of literacy who may have limitations in their ability to submit written applications, for whom most seminars and workshops will not be appropriate, and who may face discrimination in getting job interviews.

Finally, the rigidity in the timing requirements reflects bureaucratic demands more than the needs of people looking intensively for work. Making workers go through the motions, *e.g.*,

[1] Instead of honoring the deletion of the Section 12 Part O of the January 2013 budget bill that would have required "contacting at least two prospective employers for each week claimed" and other activities, the proposed regulations would instate requirements that are more rigid and restrictive and even less appropriate.

submitting applications over and over again only to keep up appearances, only discourages job seekers. It may make much more sense to do an intensive search one week and pursue more informal networking the next. Imposing this rigid framework addresses the prejudices of those who doubt the motivation and desire of workers to find work rather than what workers need to support them in their efforts.

In short, this list is unduly narrow and simply does not reflect the methods that low-wage workers actually use to find jobs. Instead, the list reflects the methods used by skilled professional workers, people who are able to research the job market, submit resumes and formal job applications, and for whom attending seminars and job fairs might be helpful. If not eliminated altogether, this list of mandatory activities should be expanded to reflect the reality of low-wage workers' job markets and the needs of people with disabilities.

### 2. Work Search Record Requirements

The work search recordkeeping requirements in proposed subsections (f) and (g) envision the typical job search of person who communicates with potential employers in writing. It does not reflect the reality of the kind of job search described above or the limitations that people with low levels of literacy face. If a claimant goes door to door to fast-food establishments and restaurants looking for work as a cook, cashier, clean up worker, delivery worker, he or she will not always be able to identify the phone numbers of these establishments, or the names or job titles of the people with whom he or she speaks. Supporting documentation will rarely be available. And if the worker loses his or her home because he or she can no longer afford the rent, maintaining these records for a year may prove impossible. People living in overcrowded conditions may also not be able to maintain all of their paperwork for reasons beyond their control. Moreover, if the claimant cannot read and write or reads and writes at a very low level, he or she may simply be unable to write down the information required by the proposed regulations.

The regulations should not only reflect the work search efforts of literate people. Creating unrealistic paper trail requirements can only lead to bureaucratic findings of ineligibility that are unrelated to whether the person is actually seeking work in the most effective way possible.

### 3. Sanctions, Exemptions, and Good Cause

The proposed regulations establish the circumstances under which a claimant will be rendered ineligible for failing to conduct or document the required job search. If the claimant has an established work search plan, failures "shall result" in a determination of ineligibility. If the claimant does not yet have such a plan, he or she will be called in to develop one and "any failure to report" to such an appointment "shall result" in a determination of ineligibility. The regulations do not indicate how long the period of ineligibility will apply or how, if at all, it can be cured.

These rules are unduly rigid and harsh and should be deleted. For all of the reasons described above, low-wage workers may be unable to comply with the work search requirements and/or the documentation requirements. If a worker is having difficulty complying, even after having a plan, the worker should receive assistance, not penalties. Given the problems with the restrictive

rules addressed above, the worker simply may not be able to comply with a plan that follows these rules. Moreover, eliminating all of the benefits that a worker depends on for necessities because of a bureaucratic infraction is counterproductive, needlessly punitive and dangerous. Eliminating workers' source of income does not encourage job search. It generates crises in housing, nutrition, utilities, transportation, and so forth, which impede job search efforts. It not only affects their job searches, it also has dire consequences for their families. Should children go without proper nutrition because a parent has run afoul of a bureaucratic requirement? This harsh approach has had demonstrably bad effects in the welfare system and should not be imported into the UI system.

Moreover, the exemptions and good cause provisions lack any safe harbor that would exonerate a claimant who fails to comply for reasons beyond his or her control, including disability. As such, the proposed regulations facially violate Title II of the Americans with Disabilities Act.

In addition, the proposed regime threatens to punish people for events out of their control, for example, because their train broke down en route to an appointment or because they had to attend to a child's sudden illness rather than make an appointment at a Career Center, and so forth. Indeed, the regulations make no provision for people who do not even claim for an entire week, perhaps because of illness or childcare needs, or even part-time employment. If they do not meet the requirements of the plan or if they miss the appointment, they "shall" be determined ineligible and lose benefits.

**Cost and Paperwork**

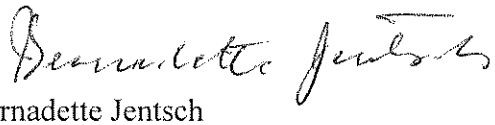
In the Regulatory Impact Statement in the State Register, the DOL asserts that "no additional costs will be incurred pursuant to the adoption of these proposed regulations." However, implementation of these regulations will require an enormous marshalling of staff resources, including auditors, Career Center personnel, and all those involved in the dispute resolution process both within the DOL and the Appeal Board. If no additional funds are spent to support these staff requirements, then significant resources will be diverted away from other critical functions of the DOL. Career Center staff will have to devote precious time to enforcement activities, not to mention confronting indignant claimants, and Adjudication Services Office (ASO) staff will have to devote considerable amounts of time to the new ineligibility cases that these requirements will certainly generate. Delays in providing benefits "when due" after hearing for all cases will be significantly increased by the increase in volume of hearings on the issues generated by these regulations. And if the DOL provides additional resources to address these needs, then the cost neutrality statement in the State Register will be proven false.

**Conclusion**

In sum, the proposed work search regulations should be rejected and replaced with regulations providing a more flexible definition of "systematic and sustained efforts to find work" that is broad enough to include methods that low-wage and unskilled workers use routinely to find jobs. Rather than taking a punitive approach that looks to churn eligible claimants off the rolls, the regulations should focus on assisting people with their job searches. Special attention should be paid to barriers, including those related to disabilities, lack of literacy, and unstable housing.

If the regulations are accepted in substantially the form proposed, the DOL should maintain records of the racial impact of its ineligibility decisions to monitor compliance with civil rights laws and should develop a protocol for providing reasonable modifications to people with disabilities.

Respectfully submitted,



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