ARTICLES

RECONSIDERING "ABLE AND AVAILABLE": USING THE ADA TO COMBAT DISABILITY DISCRIMINATION DUE TO OUTDATED STATE UNEMPLOYMENT LAWS

*Rachael Kohl**

Antiquated state unemployment insurance programs stand in tension with current anti-discrimination laws. Perhaps unsurprisingly, unemployment insurance law was founded using harmful, archaic stereotypes that hold white men without disabilities to be the only valuable members of the labor force worthy of protection. Although the present workforce reflects broader diversity, states have uniformly failed to update their unemployment insurance laws to accommodate the needs of workers today. In particular, this failure has prevented workers with disabilities from accessing crucial unemployment benefits.

In recent years, Congress has both encouraged and demanded states to provide more inclusive unemployment benefits, but neither Congress nor states have chosen to enact lasting change. Congress responded to the COVID-19 pandemic by passing the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which was intended to provide all workers affected by the pandemic with unemployment benefits, including those with disabilities. But despite directives from Congress, some states have shown that they remain either unable or unwilling to extend benefits to workers with disabilities.

This Article is the first to examine how neglected unemployment insurance programs bar workers with disabilities equal access to the benefits of a major social insurance program and how the Americans with Disabilities Act (ADA) can be used as a tool to prevent states from discriminating against individuals with disabilities in the absence of modernized unemployment laws. While more legislative action is needed to serve all workers, using the ADA is a novel solution to prevent states from unjustly denying unemployment benefits to workers with disabilities.

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* Rachael Kohl wrote this Article while she was a Clinical Assistant Professor and the Director of the Workers' Rights Clinic at the University of Michigan Law School. She would like to thank her talented research assistant, Bella Book, for her dedication to jobless workers and for her valuable contributions to this Article.

INTRODUCTION

Three of my clients, whom I'll call "Sam," "Jamie," and "Charlie," were laid off along with millions of other workers due to the COVID-19 pandemic. Sam had a part-time job they[1] loved where they worked twenty-eight hours per week. Sam is a worker with a disability that prevents them from working full-time. Jamie also has a disability, and they earn a living through non-traditional employment relationships. They hold a limited part-time job a few hours per month as an employee while also working as an independent contractor in various jobs. Given Jamie's disability, contract work gives them the flexibility they need to maintain employment. Even with these jobs, Jamie is not able to earn very much, and the work is sporadic. Charlie had to quit their job because they developed a medical condition. Now immunocompromised, Charlie cannot perform in their previous position. Now that Sam, Jamie, and Charlie are involuntarily unemployed, they have each filed for state unemployment benefits. Unfortunately, under many state laws, all three of these workers will be ineligible to receive unemployment benefits.

Sam filed in a state[2] that deems part-time workers as "not available" for work, so the unemployment agency denied their claim because their disability prevents them from doing full-time work. In cases like Sam's, the unemployment eligibility question involves the state's so-called "able and available" provisions. Although Sam was ready to work and consistently held a part-time job prior to being laid off because of the pandemic, they live in a state that does not consider their part-time ability to be a sufficient connection to the labor market. The second client, Jamie, is likely to be denied no matter which state they live in because wages from contract work do not count to establish a state claim for unemployment

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[1] Using they/them pronouns and gender-neutral names is an intentional choice because the gender of the worker is not the focus of this Article. Instead, I focus on the issues surrounding workers like these who have been prevented from accessing unemployment insurance because of their disability. Sam, Jamie, and Charlie are not the clients' names but are based on clients I had with the Workers' Rights Clinic.

[2] *See* Part II.C and Part III for a fuller discussion of the 53 jurisdictions and their provisions regarding unemployment benefits for part-time workers. Currently, at least 2 states explicitly deny benefits to claimants who work part-time, and a total of 14 do not directly address part-time workers in their statutes. Also, even more states require claimants to search for full-time work. *See generally Comparison of State Unemployment Insurance Laws*, 1-1, 5-27 tbl.5-15, U.S. DEP'T OF LAB., OFF. OF UNEMPLOYMENT INS. (2019), https://oui.doleta.gov/unemploy/pdf/uilawcompar/2019/complete.pdf [hereinafter *Comparison of State Unemployment Insurance Laws*].

benefits.[3] Charlie would also be denied in a handful of states because they quit their job–even though their health required that they do so.[4]

As many other newly-unemployed workers have discovered, state unemployment insurance (or "UI") programs have numerous pitfalls that prevent workers with medical conditions[5] from collecting unemployment benefits.[6] When the program was established in 1935, Congress delegated power to the states to determine which workers were worthy of unemployment insurance benefits.[7] This delegation led to unique state-specific rules and requirements for workers to gain access to the program.[8] Workers with a disability are barred from accessing unemployment benefits at a higher rate than workers without disabilities because of variations in state rules concerning benefit entitlement.[9] Workers with disabilities who *are* able to work and were just let go from their job in the labor market could be denied benefits because 1) their part-time wages were not enough to qualify for the program (like Jamie), 2) they

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[3] *See Comparison of State Unemployment Insurance Laws*, *supra* note 2, at 3-4 ("All states require an individual to have earned a certain amount of wages or to have worked for a certain period of time (or both) within the base period to be monetarily eligible to receive any benefits. Most individuals qualify for benefits based on employment and wages in a single state."). ("For UI purposes, employment is generally defined as the performance of any services, of whatever nature, by an employee for the person employing him or her."). *Id.* at 1-7. ("Employment, for purposes of UI coverage, is employment of workers who work for others for wages; it does not include self-employment. . . . Because base-period employment and/or earnings are an imperfect proxy for labor market attachment, there are instances when individuals with labor market attachment are ineligible for benefits."). *Id.* at 1-11, 3-2; *see also id.* at 1-9, tbl.1-5.

[4] *Id.* at 5-2–5-3, 5-4 tbl.5-2 (Louisiana, South Carolina, and Vermont explicitly do not cover an employee when they leave work due to illness; fourteen other states requiring the illness be either work-related or require the worker to seek accommodation before leaving due to illness).

[5] This Article intentionally uses the phrase "medical condition" and "disability" interchangeably to follow the Americans with Disabilities Act (ADA)'s purposefully broad definition of disability. Stereotypes have created a perception that those with disabilities may not be able to work, but that is not the case for millions of American workers. Moreover, some disabilities develop *because* of a person's job. Both occurrences could contribute to a worker's need to work part-time. The ADA defines the term "disability" as

> "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102 (2009).

[6] In Figure B, data reveals that unemployment insurance coverage of the total number of unemployed persons peaked to 38% in 1980. *See* Rick McHugh & Will Kimball, *How Low Can We Go? State Unemployment Insurance Programs Exclude Record Numbers of Jobless Workers*, ECON. POL'Y INST. (Mar. 9, 2015), https://www.epi.org/publication/how-low-can-we-go-state-unemployment-insurance-programs-exclude-record-numbers-of-jobless-workers/.

[7] *See* Chad Stone & William Chen, *Introduction to Unemployment Insurance*, CTR. ON BUDGET & POL'Y PRIORITIES 1, https://www.cbpp.org/sites/default/files/atoms/files/12-19-02ui.pdf (last updated July 30, 2014).

[8] *See* Jeremy Pilaar, *Reforming Unemployment Insurance in the Age of Non-Standard Work,* 13 HARV. L. & POL'Y REV. 327, 331 (2018).

[9] *See infra* Part II.

were forced to leave work due to their medical condition (like Charlie), and/or 3) their disability means they are only able and available for part-time work (like Sam).[10] In Sam's case, they were denied because they were not available for full-time work, which means they may not be entitled to benefits in at least fourteen of the fifty-three unemployment insurance systems.[11] The way state UI systems navigate these three threshold issues varies widely, which means that each of these workers' ability to collect unemployment benefits while involuntarily unemployed depends solely on what state they live in.

Outside of public health measures, the expansion of unemployment insurance coverage has been the federal government's primary response to managing the COVID-19 pandemic. When Congress passed the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"),[12] it set up a new federal program, Pandemic Unemployment Assistance (PUA). The goal of PUA was to ensure that workers who are normally excluded from state UI coverage could access these stabilizing funds.[13] Indeed, PUA was meant to cover the worker who "is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify" for state unemployment benefits.[14] However, the CARES Act mandated that "individuals must demonstrate that they are otherwise able to work and available for work within the meaning of applicable state law."[15] After being denied access to state unemployment benefits because of their inability to work full-time, Sam, Jamie, and Charlie applied for PUA. Sam was, however, again denied access because of the same state law that excluded them before: the state's law considers part-time workers "unavailable" for work. Now, Sam finds themselves completely excluded from this social safety net by

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10 *See* Lisa Guerin, *Who is Eligible for Unemployment Benefits?*, NOLO, https://www.nolo.com/legal-encyclopedia/collecting-unemployment-are-you-able-32445.html; *Benefit Denials*, U.S. DEP'T OF LAB., https://oui.doleta.gov/unemploy/content/denialinformation.asp (last updated Nov. 1, 2019).

11 *See infra* Part II.

12 *See* Coronavirus Aid, Relief, and Economic Security Act of 2020, 15 U.S.C. § 9001 *et seq.* (2020).

13 Without access to unemployment benefits during economic downturns, workers and their families face financial ruin, housing insecurity, food insecurity, and more. *See* Heather Boushey & Matt Separa, *Unemployment Insurance Dollars Create Millions of Jobs*, CTR. FOR AM. PROGRESS (Sept. 21, 2011, 9:00 AM), https://www.americanprogress.org/issues/economy/news/2011/09/21/10367/unemployment-insurance-dollars-create-millions-of-jobs/; *see also* Robert A. Moffitt, *Unemployment Benefits and Unemployment*, IZA WORLD OF LAB. (May 2014), https://wol.iza.org/uploads/articles/13/pdfs/unemployment-benefits-and-unemployment.pdf; 15 U.S.C § 9021 (2020); *see also* Program Letter 14-20, *infra* note 16.

14 15 U.S.C. § 9021(3)(II).

15 Unemployment Insurance Program Letter No. 14-20 from John Pallasch, Assistant Secretary, U.S. Dep't of Lab., to State Workforce Agencies, U.S. Dep't of Lab., (Apr. 2, 2020) [hereinafter Program Letter 14-20].

virtue of their disability. COVID-19 has placed a magnifying glass on the major holes in state-level unemployment insurance coverage.

There is a clear gap between the Congressional intent animating the CARES Act's coverage of non-traditional workers and the states' abilities to administer this federal program via the existing state laws that all too often exclude these same workers. States' restrictive approaches to granting benefits have prevented millions of workers from accessing unemployment benefits.[16] The conflicting language between the CARES Act and state laws combined with the large disparities in coverage amongst state programs leads to workers like Sam, who were intended to be covered through PUA, to be left out entirely.

This profound and consequential disconnect between states and Congress has been a barrier since the unemployment insurance program's creation in 1935. After Congress relinquished control of unemployment to the states, it largely abandoned the program except for in times of crisis.[17] Nearly a century later, Congress has not enacted any major reform apart from adding coverage for agricultural and domestic workers in 1976.[18] Congress recently attempted to entice states to cover more workers through incentive legislation passed in 2009,[19] but this has fallen far short of creating lasting and expansive coverage.[20]

The original logic animating this two-tiered implementation of unemployment insurance was that local jurisdictions know their workers best and require programmatic flexibility to respond to the local needs of

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16 Of note, there is a question here as to whether the reason states are not paying out PUA benefits to people like Sam is due to the state agency's restrictive reading of the statute or due to the statute itself. See Part III.B for further discussion on this point.

17 *See* Stephen A. Wandner, *Options for Unemployment Insurance Structural and Administrative Reform: Proposals and Analysis*, W.E. UPJOHN INST. FOR EMP. RES., Apr. 2020, at 1, 6–8.

18 This expansion improved access for people of color given that many people of color worked in these fields. *See* Richard Rodems & H. Luke Shaefer, *Left Out: Policy Diffusion and the Exclusion of Black Workers from Unemployment Insurance*, 40 SOC. SCI. HIST. 385, 398 (2016) ("In the fall of 1976, agricultural and domestic workers were incorporated into the UI system with little fanfare. Coverage of the inclusion was buried at the end of a legislative roundup on page 7 of the *New York Times*. For 41 years, UI had operated without these groups.") (internal citation omitted).

19 *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 U.S. Stat. 115, §§ 115-116.

20 *See Modernizing Unemployment Insurance: Federal Incentives Pave the Way for State Reforms,* NAT'L EMP. L. PROJECT (May 2012), https://www.nelp.org/wp-content/uploads/2015/03/ARRA_UI_Modernization_Report.pdf?nocdn=1 ("Of special significance, the ARRA targeted low-wage workers, who are unfairly denied benefits in large numbers, not because they failed to work enough to qualify but simply because of the antiquated eligibility rules that ignore their most recent earnings. Indeed, low-wage workers are twice as likely as higher-wage workers to become unemployed, but they are only one-third as likely to collect jobless benefits."); McHugh & Kimball, *supra* note 6, at 13; *see also* Wandner, *supra* note 17, at 51.

the workforce.[21] Instead of providing responsive coverage, states have eroded their unemployment systems and have not updated their laws to reflect the needs of the modern workforce.[22] This state-level failure hurts all workers and renders the program ineffectual for many who need and deserve it. Because state legislatures have failed to modernize their unemployment insurance coverage, the number of workers eligible to receive unemployment insurance has dwindled.[23] Now, in some states, only one in four workers will receive benefits when they involuntarily lose a job.[24] In other words, most of the labor market is foreclosed from accessing unemployment benefits if they become involuntarily unemployed. Most of the excluded workers are low-wage earners, women, people of color, and/or those with disabilities—exactly the people deemed unworthy nearly a century ago at the program's inception.[25]

Congress's addition of the temporary PUA program[26] further reveals the states' power to exclude a federal program's intended benefi-

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[21] *See* 42 U.S.C. § 503(a)(1); *Social Security: Unemployment Insurance,* VCU LIBRARIES: SOC. WELFARE HIST. PROJECT, https://socialwelfare.library.vcu.edu/social-security/social-security-unemployment-insurance/ (last visited Aug. 4, 2021) ("It would permit complete freedom to the States as to the type of State law to be adopted . . . it provided for Federal supervision, but permitted far more local responsibility through . . . . [d]evelopment of all the details of the law in the States[.]"); *See* Wandner, *supra* note 17, at 51 ("The Social Security Act determined how the UI program would be administered. The fact that Congress designed the UI program as a federal-state program was due to its strange early history. The U.S. government had delayed enacting a UI program until after most European countries had implemented such programs. As a result, the states had engaged in early UI policy development, well before the federal government finally enacted a program in 1935. Those states with preexisting state UI laws (Wisconsin, California, New Hampshire, New York, and Utah) wanted to retain them and convinced federal policymakers to establish a joint federal-state UI program under which the states would administer the program and establish most of the legislative and operational rules rather than construct a single national program (Blaustein 1993). The Roosevelt administration also believed that a federal-state program was more likely to survive a constitutional challenge. . . . The expectation of federal policymakers for the original 1935 UI program was that the states would run programs that provided adequate benefits that were adequately funded. The effectiveness of the UI program over the last 80 years, however, has been uneven and has not met expectations. Some states have created effective and efficient UI programs, but many have not.").

[22] *See* Conor McKay, Ethan Pollack & Alastair Fitzpayne, *Modernizing Unemployment Insurance for the Changing Nature of Work*, ASPEN INST. FUTURE OF WORK INITIATIVE 1, 2 (Jan. 2018), https://www.aspeninstitute.org/wp-content/uploads/2018/01/Modernizing-Unemployment-Insurance_Report_Aspen-Future-of-Work.pdf.

[23] *See id.* at 2–3.

[24] *See* McHugh & Kimball, *supra* note 6, at 4.

[25] *See Policy Basics: Unemployment Insurance*, Ctr. on Budget & Pol'y Priorities, https://www.cbpp.org/research/economy/policy-basics-unemployment-insurance ("[U]I has not adapted to changes in the labor market since it was established. . . . This prevents large numbers of unemployed workers, many of whom are women and people of color, from receiving UI benefits.") (last updated Mar. 15, 2021) [hereinafter *Policy Basics*].

[26] *See* Richard Reibstein, *CARES Act, Take 2: Pandemic Unemployment Assistance Extended for Independent Contractors*, JD SUPRA (Dec. 28, 2020), https://www.jdsupra.com/legalnews/cares-act-take-2-pandemic-unemployment-43031/.

ciaries. In December 2020, about nineteen million people were collecting unemployment benefits during the pandemic, and most of them, over twelve million, only had access to this essential lifeline because of PUA.[27] Consistently, states legislatures have shown little desire to improve their unemployment programs.[28] Instead, in times of crisis, they wait for the federal government to step in to pay for the expansion of their otherwise miserly coverage. Even then, states continue to approach unemployment access restrictively, as seen in the case of Sam's PUA claim.

Notably, if an employer refused to provide Sam with a part-time accommodation, the employer may have been liable under the Americans with Disabilities Act (ADA).[29] Because state unemployment laws have failed to provide for the modern workforce, workers like Sam are unilaterally denied access to this crucial social safety net that was, from its inception, intended to cover workers who involuntarily lose their jobs. It is illogical that Sam would be protected from disability discrimination while employed by a private employer but then face blatant discrimination when accessing a state-run unemployment insurance benefits system.

This clash between ossified state unemployment insurance laws—which were created using historic stereotypes of workers as full-time-employed, white, "able-bodied"[30] men—and current anti-discrimination laws has been brewing for decades.[31] In contrast to state unemployment law, Congress has passed significant civil rights legislation, including the ADA,[32] to outlaw disability discrimination. And yet, workers like Sam are among the most likely to be denied unemployment benefits on the basis of their disability alone.[33] There has not been enough political will

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[27] *See* Amanda Novello, *Looming Unemployment Cliff Will Hit Women and People of Color the Hardest*, CENTURY FOUND. (Dec. 11, 2020), https://tcf.org/content/commentary/looming-unemployment-cliff-will-hit-women-people-color-hardest/.

[28] *See* Emily Badger & Alicia Parlapiano, *States Made It Harder to Get Jobless Benefits. Now That's Hard to Undo*, N.Y. TIMES (Apr. 30, 2020), https://www.nytimes.com/2020/04/30/upshot/unemployment-state-restrictions-pandemic.html.

[29] *See* 42 U.S.C. § 12131 ("The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.").

[30] *See* Paul K. Longmore & David Goldberger, *The League of the Physically Handicapped and the Great Depression: A Case Study in the New Disability History*, 87 J. AM. HIST. 888, 912 (2000).

[31] *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1545 (2002).

[32] *See generally* 42 U.S.C. § 2000e *et seq.*; 29 U.S.C. § 621; 29 U.S.C. § 2601; 42 U.S.C. § 12101; 29 U.S.C. § 794; 20 U.S.C. § 1400.

[33] This argument can also be made for workers in the examples above, such as Jamie and Charlie.

to improve unemployment benefits access for all workers, and this Article is the first to argue that the ADA should be used as a tool to aid workers with disabilities in gaining access to the unemployment insurance program.

Part I begins with a history of unemployment insurance, including weighing the program's purpose with who was originally covered. Part II discusses how workers with disabilities, like Sam, Jamie, and Charlie, are often denied access to unemployment insurance programs. Much of this discussion involves evaluating employment relationships, "medical quits," and the "ability and availability" eligibility requirements.

Part III highlights two major instances of Congressional unemployment interventions: the American Recovery and Reinvestment Act (ARRA)[34] and the CARES Act.[35] Even with federal efforts to encourage states to cover their workers, many states continue to bar workers with medical conditions. Because unemployment insurance is a federal program that is administered differently in every state, a worker's coverage is determined solely by geography. This section also critically reviews the federal government's role in modernizing the country's unemployment system. While the federal government can compel states to cover their workforce, these options—incentive programs, setting federal floors, federalizing the program—all require Congressional action. Without the necessary political will, workers with disabilities will continue to be denied access to unemployment benefits.

Part IV then explores the application of Title II of the ADA to workers with disabilities who are denied access to state unemployment benefit programs.[36] Lawyers overlook unemployment programs just as often as federal and state lawmakers. Given that claimants in this system are typically *pro se* and there is no financial incentive for attorneys to take on this niche area of law, claimants often fight their unemployment claims alone without a lawyer's eye toward discrimination. The absence of lawyers in this area of law has led to the ADA being underutilized in the unemployment context. However, a viable ADA claim could force states to modernize their unemployment coverage for workers with medical conditions.

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34 *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 U.S. Stat. 115, §§ 115-116.

35 *See* 15 U.S.C. § 9001 *et seq.*

36 *See* 42 U.S.C. § 12132.

I. THE DEVELOPMENT OF UNEMPLOYMENT INSURANCE

The stock market crash of 1929 caused one of the worst financial downturns in history,[37] leaving millions of workers out of their jobs for years.[38] At this time, breadlines wrapped around blocks as Americans tried to gather enough resources to support their families.[39] The United States saw similar effects of unemployment during subsequent recessions, including the Great Recession of 2008[40] and again from the economic downturn due to COVID-19.[41] Fortunately, for the latter two economic recessions, the American public had unemployment benefits to help bolster the economy and provide relief to millions of people.[42]

A. Creating Unemployment Insurance

Before the Great Depression, the United States had not set up any social programs to promote economic stabilization or to help families weather through joblessness.[43] For decades leading up to the Great Depression, the labor movement had been pressuring the leaders of the country to respond to the needs of the workers, to which President Theodore Roosevelt was the first to decree "no country could be strong whose people were sick and poor."[44] Nearly 30 years later and after the largest economic downturn in the country's history, President Franklin D. Roosevelt signed the New Deal into law on August 14, 1935.[45] While other countries at the time had national relief programs in place for jobless workers,[46] the United States relied on local programs to support the

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37 *See* Nicholas Crafts & Peter Fearon, *Lessons from the 1930s Great Depression*, 26 OXFORD REV. ECON. POL'Y 285, 285 (2010).

38 *See id.* at 286 ("Even in recovery, both the UK and the USA experienced persistent mass unemployment, which was the curse of the depression decade.").

39 *See id.* at 291–92.

40 *See id.* at 286 ("[D]uring 2007–8, an astonishing and unexpected collapse occurred which caused all key economic variables to fall at a faster rate than they had during the early 1930s.").

41 *See* Mara Mordecai & Shannon Schumacher, *In Many Countries, People Are More Negative about the Economy Amid COVID-19 Than During Great Recession*, PEW RES. CTR. (Sept. 14, 2020), https://www.pewresearch.org/fact-tank/2020/09/14/in-many-countries-people-are-more-negative-about-the-economy-amid-covid-19-than-during-great-recession/ ("In April, the International Monetary Fund predicted the economic downturn resulting from the coronavirus outbreak would be far graver than the Great Recession.").

42 *See* Till Von Wachter, *Unemployment Insurance Reform*, 686 ANNALS OF THE AM. ACAD. 121, 122 (2019) ("The UI program is the largest social insurance program available to the general working-age population in the United States.").

43 *See* Crafts & Fearon, *supra* note 37, at 292.

44 Nicole Huberfeld, *Federalizing Medicaid*, 14 U. PA. J. CONST. L. 431, 437 (2011).

45 *See* Kennedy, *infra* note 50, at 254 ("[A]bove all the Social Security Act had a common cardinal purpose: not simply to end the immediate crisis of the Depression, but to make life less risky and more predictable, to temper for generations thereafter what FDR repeatedly called the 'hazards and vicissitudes' of life.").

46 *See id.*

community and economy.[47] Longstanding unemployment was one of the largest issues stemming from the Great Depression as the unemployment rate rose from 2.9% in 1929 to 22.9% in 1932.[48] To curb the negative effects of unemployment, the federal government created the United States' first set of social insurance programs.

Realizing the importance of protecting the economy through building a safety net for its jobless citizens, Congress passed the New Deal.[49] The legislative package created a federal unemployment insurance program to be administered through the states to act as an economic stabilizer during economic downturns[50] and to help buoy workers between jobs.[51] In a statement made on August 14, 1935, while signing the Social Security Act (SSA) into law, President Roosevelt said:

> This law, too, represents a cornerstone in a structure [. . .] intended to lessen the force of possible future depressions. It will act as a protection to future Administrations against the necessity of going deeply into debt to furnish relief to the needy. The law will flatten out the peaks and valleys of deflation and of inflation. It is, in short, a law that will take care of human needs and at the same time provide the United States an economic structure of vastly greater soundness.[52]

President Roosevelt's statement underscores the dual function of the program: it would provide aid to workers in need and strengthen the national economy on the whole. On the twentieth anniversary of the SSA in 1955, the Secretary of Labor published a list describing the persisting fundamental objectives of the unemployment system, all of which remain

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47 *See id.*

48 *See id.*

49 *See* David M. Kennedy, *What the New Deal Did,* 124 POL. SCI. Q. 251, 251 (2009); Longmore & Goldberger, *supra* note 30, at 898.

50 *See* Gabriel Chodorow-Reich & John Coglianese, *Unemployment Insurance and Macroeconomic Stabilization*, in Recession Ready: Fiscal Policies to Stabilize the American Economy 153, 154 (Heather Boushey, Ryan Nunn, & Jay Shambaugh eds., 2019) ("UI can increase aggregate expenditure in periods of economic slack and serve as a macroeconomic stabilizer . . . . Even in a severe recession, regular UI provides the bulk of the increase in transfers. As such, reforms to enhance the automatic stabilizer properties of UI should also address regular UI benefits."); Alan S. Blinder & Mark Zandi, *The Financial Crisis: Lessons for the Next One,* CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 15, 2015), https://www.cbpp.org/research/economy/the-financial-crisis-lessons-for-the-next-one.

51 *See* Rodems & Shaefer, *supra* note 18, at 386 ("Unemployment compensation is a common program across industrialized welfare states aimed at both reducing the negative impact of involuntary unemployment on workers and their families and stabilizing the economy during economic retractions.").

52 *FDR's Statements on Social Security,* SOC. SEC. ADMIN., https://www.ssa.gov/history/fdrstmts.html#signing (last visited Aug. 5, 2021).

the same goals of the program today.[53] First, the system offers workers income maintenance during periods of unemployment and provides partial wage replacement as a matter of right.[54] Second, it helps maintain purchasing power and stabilization of the economy.[55] Third, it prevents dispersal of the employer's trained labor force, the sacrifice of skills, and the breakdown of labor standards during temporary unemployment.[56] Unemployment insurance allows jobless workers to "continue to spend as a means of automatically stabilizing the economy in hard-hit labor markets."[57] Communities that have been disproportionately excluded from benefits take longer to recover from recessions.[58]

In order to pass the New Deal, "the Roosevelt administration had to compromise inclusiveness and accept the exclusion of agricultural and domestic employees from the program, with notably imbalanced racial consequences."[59] In the 1930s, the workers covered by this new supportive program were primarily white men without any physical or mental limitations.[60] Those who were outside of traditional employment (full-time employer/employee relationship) were not covered workers, which disproportionately excluded people with disabilities, women, and people of color.[61] Despite these clear gaps, lawmakers believed they "tailored the program to fit the labor market of their time."[62] It should be noted that while unemployment insurance programs were among the first federal welfare policies, localities had their own programs for the "deserving poor based upon that particular state's colonial policy as adopted from Elizabethan Poor Laws."[63]

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53 *See* Daniel N. Price, *Unemployment Insurance, Then and Now, 1935–85*, 48 SOC. SECURITY BULL. 22, 24 (1985).

54 *See id.*

55 *See id.*

56 *See id.*

57 Von Wachter, *supra* note 42, at 122.

58 *See* Michele Evermore, *NELP Testimony of Michele Evermore on Michigan Unemployment Claims Processing*, NAT'L EMP. L. PROJECT (May 21, 2020), https://www.nelp.org/publication/nelp-testimony-michele-evermore-michigan-unemployment-claims-processing/.

59 Rodems & Shaefer, *supra* note 18, at 386 ("[T]he exclusions of these two categories of workers created a racially bifurcated welfare state[.]"); *but see id.* at 398 ("In the fall of 1976, agricultural and domestic workers were incorporated into the UI system with little fanfare. Coverage of the inclusion was buried at the end of a legislative roundup on page 7 of the New York Times. For 41 years, UI had operated without these groups.").

60 *See* Longmore & Goldberger, *supra* note 30, at 897–99; *Policy Basics*, *supra* note 25.

61 *See* Rebecca Smith, Rick McHugh & Andrew Stettner, *Unemployment Insurance and Voluntary Quits: How States' Policies Affect Today's Families* 46 CHALLENGE 89, 89 (2003) ("From its earliest days, the nation's UI programs reflected a 'male breadwinner' model."); Signe-Mary McKernan, Caroline Ratcliffe, Eugene Steuerle & Sisi Zhang, *Less Than Equal: Racial Disparities in Wealth Accumulation,* URB. INST. 1, 1 (Apr. 25, 2013), https://www.urban.org/research/publication/less-equal-racial-disparities-wealth-accumulation/view/full_report.

62 *See* Pilaar, *supra* note 8, at 335.

63 *See* Huberfeld, *supra* note 44, at 439.

In 1935, employment primarily existed through the traditional employer-employee relationship rather than through independent contractor, gig worker, or self-employment models that have developed today.[64] Using the traditional employment model, the government set up the financing of unemployment insurance through both a state and federal tax on the employer.[65] Because of the New Deal's increased tax liability on employers, more non-traditional, contractor-based employment options began to emerge.[66] But the modern understanding of "independent contractor" did not begin until the globalization of the 1970s.[67] Since then, we have seen non-traditional employment through the development of the self-employed independent contractor and, more recently, the gig worker who freelances through digital platforms.[68] In 2016, the McKinsey Global Institute estimated that 27% of the working-age population in the United States had non-traditional employment.[69] Because employers do not pay taxes for independent contractors or gig workers, these workers are not entitled to benefits under current unemployment programs even when they become involuntarily unemployed.[70] As non-traditional employment increased, fewer workers were eligible for unemployment benefits since the system was designed for traditional workers.[71]

While unemployment insurance is a federal program, each state administers the program with their own rules.[72] "In other words, the states

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64 *See* Pilaar, *supra* note 8, at 335–36 ("Standard employment relations lie at the foundation of not just the UI system, but of many welfare institutions in the United States.").

65 *See* Wayne Vroman & Stephen A. Woodbury, *Financing Unemployment Insurance*, 67 NAT'L TAX J. 253, 254 (2014).

66 *See* Micah Prieb Stoltzfus Jost, *Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach*, 68 WASH. & LEE L. REV. 311, 315 (2011).

67 *See* Pilaar, *supra* note 8, at 337 ("Since the mid-1970s, globalization has pushed firms to abandon the standard contract. Heightened capital mobility, cheaper shipping, and the internet have moved price competition to a global level, pressuring firms to pay more attention to profitability and consumer preferences.").

68 *See* Nancy K. Cauthen, Annette Case & Sarah Wilhelm, *Promoting Security in a 21st Century Labor Market: Addressing Intermittent Unemployment in Nonstandard Work*, FAM. VALUES AT WORK (Oct. 2, 2015), https://familyvaluesatwork.org/new-paper-looks-at-unemployment-and-underemployment-in-nonstandard-work/.

69 *See* James Manyika et al., *Independent Work: Choice, Necessity, and the Gig Economy*, MCKINSEY GLOBAL INST. (Oct. 10, 2016), https://www.mckinsey.com/featured-insights/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy.

70 *See* Cauthen, Case & Wilhelm, *supra* note 70, at ii ("Independent contractors are not covered by UI and workers in other types of nonstandard employment face numerous barriers to UI eligibility and receipt."); Phoebe V. Moore, *E(a)ffective Precarity, Control and Resistance in the Digitalised Workplace*, DIGITAL OBJECTS, DIGITAL SUBJECTS 127 (2019) ("Workers have very little legal protection, and platforms are designed to reduce employer liability.").

71 *See* McKay, Pollack & Fitzpayne, *supra* note 22, at 2.

72 *See* 42 U.S.C. § 503(a)(1); *see also* Stéphane Auray & David L. Fuller, *Eligibility, Experience Rating, and Unemployment Insurance Take-up*, 11 QUANTITATIVE ECON. 1059, 1063 (2020).

were free to implement federal funding as they saw fit, which could be described loosely as a system of federal-state cooperation but was really a set of federal grants to the states to continue providing assistance to the deserving poor with no conditions attached to the federal spending."[73] Today, the Department of Labor ("DOL") oversees a total of fifty-three unemployment programs, which includes all fifty states as well the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories.[74] Each state has the authority to write its own rules to determine who is "worthy"[75] for the social benefits and how they are to be distributed.[76] Having this federal system administered by the states has led to significant variations across unemployment programs, given that each state has a different political will to spend the state's budget on paying benefits.[77]

The DOL has mandated that state unemployment programs review workers on three basic criteria:

> 1) Did they earn enough wages to qualify for the program;
> 2) Is their separation from work involuntary; and
> 3) For every week that they collect, are they able to work, available for work, and actively seeking work?[78]

The third prong is also known as the "continuing eligibility" requirement.[79] Workers need to show that for every week they collect benefits, they are still attached to the workforce, and they do so by certifying that they are able and available to work.[80] These three requirements were meant to be uniform across the country, but each state has developed

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73 Huberfeld, *supra* note 44, at 442.

74 The Employment and Training Administration maintains six regional offices whose staff monitor programs, services and benefits provided under the Unemployment Insurance Program and other targeted grant investments for fifty-six territories and states divided into six regions. There are 53 established jurisdictions in the federal-state partnership – each of the 50 states plus the District of Columbia, Puerto Rico, and the Virgin Islands have established state-run systems. The remaining territories do not generally have a standing UI program, but in times of federal Congressional intervention like PUA, federal programs are set up and overseen by the DOL. *Regional Offices*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/eta/regions.

75 Huberfeld, *supra* note 44, at 442.

76 *See* Pilaar, *supra* note 8, at 331.

77 *See id.* ("Though federal guidelines mandate a set of minimum criteria, states' differing appetites for social spending lead to varying program generosity across the country.").

78 *See* 20 C.F.R. § 604.5; 20 C.F.R. § 604.4.

79 *See* 20 C.F.R. § 604.5.

80 States can have additional requirements, including reporting income received while also collecting benefits, providing proof of the search for new work and other efforts in finding a new job, and reporting job offers and any refusals to work. *See State Unemployment Insurance Benefits*, U.S. DEP'T OF LAB., https://oui.doleta.gov/unemploy/uifactsheet.asp.

them differently in their unemployment statutes.[81] The impact of the different statutory language across these state programs means that a worker might be entitled to benefits in one state but not in another.

B. The Workforce Has Changed. Unemployment Laws Have Not

Today's workforce is unquestionably more diverse than it was at the creation of unemployment insurance. For example, women make up nearly half of the labor market compared to 20%[82] in 1935. At the same time, those engaged in a traditional employer-employee relationship have become a smaller proportion of the overall workforce. Furthermore, beyond the workers themselves, the employment relationship between employer and employee has changed. However, it is improper to compare independent contract work in 1935 to present day.[83] Labor scholar, Ruth Milkman, cautions that it is important to put the current economic situation in a bit more context.[84] While companies have been trying to find ways to maximize profit for centuries, "independent or contingent work was relatively rare between 1935-1975 because labor regulations passed in the New Deal and the growth of unions gave workers other options."[85] However, workers' protections began to erode in the 1970s, which led in part to the growth in non-traditional, contracting employment relationships.[86]

Recent projections from Edelman Intelligence predict that in 2027, over 50% of all jobs in the United States will be freelance.[87] The spread of the independent contracting relationship exists across professions:

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81 *See* Wandner, *supra* note 17, at 5–25; *see also* Pilaar, *supra* note 8, at 344–47.

82 *See* Smith, McHugh, & Stettner, *supra* note 61, at 90 ("The percentage of adult women participating in the labor force was roughly 20 percent in the 1930s.").

83 *See* Rose J. Cho, Gail Cooper & Aine Duggan, *Independent Workers and the Changing Workforce*, INT'L CTR. FOR RES. ON WOMEN 1, 4 (2016), https://www.icrw.org/publications/independent-workers-and-the-changing-workforce-regender; *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries,* NAT'L EMP. L. PROJECT 1, 1 (Oct. 26, 2020), https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020/ ("Employers in an increasing number of industries misclassify their employees as independent contractors, denying them the protection of workplace laws, robbing unemployment insurance and workers' compensation funds of billions of much-needed dollars, and reducing federal, state and local tax withholding and revenues, while saving as much as 30 percent of payroll and related taxes otherwise paid for "employees.") [hereinafter *Independent Contractor Misclassification]*; *see generally* Auray & Fuller, *supra* note 72.

84 *See* Cho, Cooper & Duggan, *supra* note 83, at 4.

85 *Id.*

86 *Id.*

87 *See* Press Release, Adam Ozimek, Report: Freelancing and the Economy in 2019 (2019), https://www.upwork.com/press/releases/freelancing-and-the-economy-in-2019.

about 45% of accountants, 50% of IT workers, and 70% of truckers were working as contractors rather than employees in 2015.[88]

Furthermore, the way that labor force data is tracked and cataloged is also radically different than it was in the 1930s and 1940s.[89] At that time, the Bureau of Labor Statistics simply did not count anyone who was over seventy, who was temporarily idle, who indicated that they had a permanent disability, or who was returning to the workforce after a long period of sickness or injury as part of the workforce.[90] Now, the Bureau of Labor Statistics regularly disaggregates workforce data along lines of race, gender, job type, and ability.[91]

Given the current breadth of knowledge and data, it borders on nonsensical that unemployment insurance laws are still using the same classifications and eligibility requirements that were implemented at a time when the country's own data metrics only really considered white, male breadwinners without disabilities as the valued workforce.[92] Even so, unemployment laws across the country have remained largely unchanged since 1935.

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88 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-168R, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS (2015), https://www.gao.gov/assets/670/669766.pdf.

89 *See* Cho, Cooper & Duggan, *supra* note 83, at 4 (illustrating that as worker protections decreased, independent contracting work rose, which has led to employers misclassifying workers to avoid additional taxes and the rise of the gig economy); NAT'L EMP. L. PROJECT, *supra* note 84, at 1 (discussing how misclassification of workers has steadily increased since the split between employee and contractor developed); *see generally* Auray & Fuller, *supra* note 72 (highlighting how there has historically been high rates of "unclaimed" unemployment benefits and states issuing improper denials).

90 *See* U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, *Population: Estimates of Labor Force, Employment, and Unemployment in the United States, 1930s and 1940s* (1944), https://www2.census.gov/library/publications/decennial/1940/population-labor-force/population-labor-force.pdf (excluding 23,000 workers who were over seventy, temporarily idle, or indicated disability from labor force statistics).

91 This statutory limitation on who can receive benefits when they leave work due to medical necessity disproportionately affects older workers because the likelihood of developing a chronic medical condition increases with age. In 2020, the Bureau of Labor Statistics reported that "[h]alf of all persons with a disability were age 65 and over, about three times larger than the share for those with no disability." *See* Economic News Release, U.S. Bureau of Labor Statistics, Persons with a Disability: Labor Force Characteristics Summary (Feb. 24, 2021), https://www.bls.gov/news.release/disabl.nr0.htm.

92 *See* Smith, McHugh, & Stettner *supra* note 61, at 89–90 ("From its earliest days, the nation's UI programs reflected a 'male breadwinner' model."); McKernan, Ratcliffe, Steuerle & Zhang, *supra* note 61, at 4 (demonstrating that unemployment benefit eligibility classifications contribute to the racial wealth gap); Pilaar, *supra* note 8, at 329.

C. Unemployment Programs are Crucial for the Economy as Well as Jobless Workers and Their Families

Unemployment benefits stabilize the economy and prevent families from falling into poverty.[93] In 2011, as the country was still slowly recovering from the 2008 Recession, the Center for American Progress released an analysis which found that unemployment benefits "provide the biggest bang for the buck of the various kinds of government spending. Over the Great Recession, for every $1 spent on unemployment insurance benefits, the economy grew by $2, since recipients typically spend—not save—those dollars."[94] During the Great Recession, the federal government expanded unemployment insurance, which lifted millions out of poverty.[95] In addition to regular state benefits, the federal government extended the number of weeks to which people were entitled and added additional money on top of their weekly benefit amount.[96] The impact of this federal action meant that there was more money being spent in the economy, which in turn allowed more businesses to stay open and keep their workers employed.[97] Estimates suggest that these unemployment benefits pulled more than 9 million people out of poverty, prevented 1.4 million foreclosures, and saved 2 million jobs during the Great Recession.[98]

During the COVID-19 pandemic, the federal government expanded unemployment benefits even further, which led to an even higher estimated return to the community and kept consumer spending up to pre-

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93 *See* Moffitt, *supra* note 13, at 5 ("Unemployment benefit programs work against this downward spiral by stabilizing the incomes of the unemployed and reducing any drops in spending. The net effect, therefore, is to reduce the fall in gross domestic product and to mitigate the effects of a downturn.").

94 *See* Boushey & Separa, *supra* note 13 ("Over the past few years, unemployment benefits have played a key role in helping unemployed workers pay their bills while they search for a new job. There are fewer people living in poverty in the United States because of these benefits. The Census Bureau has reported that unemployment benefits pulled 3.2 million people out of poverty in 2010, on top of 3.3 million in 2009 . . . . That spending helps boost local economies as the unemployed can continue to pay their mortgage or rent and put food on the table.").

95 *See* Michele Evermore, *In Case of a Downturn: Extended Unemployment Insurance Is an Economic Lifeline,* NAT'L EMP. L. PROJECT (Aug. 22, 2019), https://www.nelp.org/blog/in-case-of-a-downturn-extended-unemployment-insurance-is-an-economic-lifeline/ ("During the last recession, UI's countercyclical benefits closed almost one-fifth of the shortfall in GDP, prevented an estimated 1.4 million foreclosures and, in 2009, prevented five million workers from falling into poverty while saving two million jobs.").

96 *See* Mitchell Hirsch, *Unemployment Insurance Was Crucial to Workers and the Economy in the Last Recession*, NAT'L EMP. L. PROJECT (Mar. 23, 2020), https://www.nelp.org/blog/unemployment-insurance-crucial-workers-economy-last-recession/.

97 *See id.*

98 *See* Evermore, *supra* note 95.

vent further economic decline.[99] The COVID-19 expansions are discussed further in Part III, but millions of people were again spared falling into poverty and losing their homes.[100] Moreover, because jobless workers were able to spend their unemployment benefits, consumer spending kept the economy from spiraling.[101] Further, workers spending their unemployment benefits in the community provides an economic boost that leads to job creation.[102] Unemployment insurance is the United States' only economic tool in place to protect workers and their families from involuntary unemployment, and it is the only economic stabilization option given directly to citizens.

For decades, there has been mounting evidence establishing the many barriers present for workers seeking unemployment benefits.[103] These barriers primarily stem from the states failing to reform their statutes to fit the modern workforce. After the 2008 recession, states added additional red-tape provisions to their statutes that ended up cutting out more workers in their state laws.[104] A state's UI system's coverage of unemployed workers is known as that state's "recipiency rate."[105] As a result of these state-imposed obstacles, the country has seen a steady decline in UI recipiency rates since the implementation of the pro-

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99 *See* 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/; Mike Cummings, *Yale Study Finds Expanded Jobless Benefits Did Not Reduce Employment,* YALE NEWS (July 27, 2020), https://news.yale.edu/2020/07/27/yale-study-finds-expanded-jobless-benefits-did-not-reduce-employment.

100 *See* Andrew Stettner & Elizabeth Pancotti, *11.4 Million Workers Facing Jobless Benefit Cliff Starting March 14, Unless Congress Acts Swiftly*, CENTURY FOUND. (Feb. 10, 2021), https://tcf.org/content/report/11-4-million-workers-facing-jobless-benefit-cliff-starting-march-14-unless-congress-acts-swiftly ("The jobless benefits passed in the December stimulus package are responsible for lifting more than 7 million Americans out of poverty in January.").

101 *See id.* ("In the short term, consumer spending, which comprises nearly 70 percent of GDP, would measurably decline. Research suggests that grocery and medical out-of-pocket spending declines by 15 percent when jobless workers exhaust UI benefits, and the drop persists for at least five months.").

102 *See* Boushey & Separa, *supra* note 13 ("The boost that benefits provide leads to job creation."). Additionally, as the Director of the Workers' Rights Clinic, the students and I handle hundreds of cases. In a typical year, we return over $1 million in benefits into the community.

103 *See* H. Luke Shaefer & Liyun Wu, *Unemployment Insurance and Low-Educated Single Working Mothers Before and After Welfare Reform*, 85 SOC. SERV. REV. 2, 205, 206–08 (2011); Von Wachter, *supra* note 42, at 132.

104 *See* discussion *infra* Part III.A; Von Wachter, *supra* note 42, at 132; *see generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-281, UNEMPLOYMENT INSURANCE: STATES' REDUCTIONS IN MAXIMUM BENEFIT DURATIONS HAVE IMPLICATIONS FOR FEDERAL COSTS 4–5 (2015).

105 *See* McHugh & Kimball, *supra* note 6, at 4 ("One important performance indicator for state UI programs is the proportion of unemployed individuals who get UI benefits, or the benefit recipiency rate.").

gram.[106] Given that the original program in 1935 was already exclusionary, the implications are only worse for the diverse workforce trying to access the programs today.

II. THE INTERSECTION OF UNEMPLOYMENT AND DISABILITY

States have the ability to draft their own rules about who they want to cover in their unemployment programs.[107] This discretion created very different programs across the country.[108] Because of this federal-state divide of the program, many of the states' decisions regarding whom to cover stem from who was considered the "deserving poor."[109] Nicole Huberfeld's enlightening analysis of the deserving poor highlights the role of federalism and discusses how these programs purposely limited public assistance out of hostility for the nonworking poor.[110] "The prevailing belief was that working poor deserved assistance[.]"[111] Having a disability not only makes a person fighting joblessness less likely to receive unemployment benefits, but these workers are also more likely to be out of work.

This section reviews three areas in unemployment laws that disproportionately affect workers with medical conditions. Many people with disabilities are able to and want to work, which tends to be a common misconception based on stereotyping.[112] In fact, about 4% of the working population identifies as having a disability, which amounts to over 6 million workers.[113] While about 15 million people between 16 and 64 report having a disability in 2020, only about 19% of them were employed, compared to 66% for those without a disability.[114] The pandemic made these numbers worse, causing about 1 in 5 workers with a disability to lose their job, compared to 1 in 7 people without a disability.[115]

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106 *See id.*

107 *See* Pilaar, *supra* note 9, at 331.

108 *See* Christopher J. O'Leary & Stephen A. Wandner, *An Illustrated Case for Unemployment Insurance Reform* 1, 10–11 (W.E. Upjohn Inst. for Emp. Res., Working Paper No. 19-317, 2020), https://doi.org/10.17848/wp19-317.

109 *See* Huberfeld, *supra* note 44, at 339–40 (discussing the "deserving poor.").

110 *See id.*

111 *See id.*; *see also* Nicole Huberfeld & Jessica L. Roberts, *Health Care and the Myth of Self-Reliance*, 57 B.C. L. REV. 1, 37 (2016) ("The promise of self-reliance that permeates American cultural life is both impossible—because of the universality of dependency and vulnerability—and undesirable—because such a worldview excludes anyone who is not a fully functioning, unencumbered adult.").

112 *See* Mohammad Ali, Lisa Schur & Peter Blanck, *What Types of Jobs Do People with Disabilities Want?*, 21 J. OCCUPATIONAL REHABILITATION 199, 202 (2011).

113 *See* Economic News Release, U.S. Bureau of Labor Statistics, Persons with a Disability: Labor Force Characteristics Summary, USDL-21-0316, at 4 (Feb. 24, 2021), https://www.bls.gov/news.release/pdf/disabl.pdf.

114 *See id.*

115 *See nTIDE April 2020 Jobs Report: COVID Recession Hits Workers with Disabilities Harder*, KESSLER FOUNDATION (May 8, 2021), https://kesslerfoundation.org/press-release/

Workers with disabilities may require some accommodations, whether they address the hours worked, the position itself, or the supplies from the employer needed to help them succeed. Sometimes, these workers require more flexibility in their job assignments, which may mean that they have non-traditional employment—either part-time, self-employment, or gig work.

Workers with disabilities have additional barriers to attaining stable employment. These same barriers also make it harder for them to access unemployment benefits when they lose their job. Recall the examples of Sam, Jamie, and Charlie, who personify the three main barriers to unemployment benefits. First, workers with disabilities are forced into non-traditional employment, which often does not qualify them for unemployment insurance (Jamie's example).[116] Second, a worker's change in medical condition could prevent them from working in their current job, causing them to need to quit (Charlie's example). Depending on the state's requirements, this could lead to a disqualification.[117] Finally, some states require that people be able to work full-time, be available for full-time work, or both, which may prevent workers with medical conditions who can work part-time from accessing the unemployment program (Sam's example).[118]

A. How Medical Conditions Can Affect the Type of Employment Relationship

When a medical condition affects a person's daily life, it often has consequences that extend to the person's employment relationship. Health conditions can prevent people from full-time employment. At the inception of the New Deal, workers with disabilities were seen as unemployable and therefore not worthy of social welfare policies like unemployment benefits.[119] Upset that "their government would aid unemployed 'able-bodied' Americans while classifying out-of-work handicapped persons as unemployable[,]" some took to activism using

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ntide-april-2020-jobs-report-covid-recession-hits-workers-disabilities-harder ("[the] number of working-age people with disabilities who were employed decreased by 950,000 between March and April (from 4,772,000 to 3,827,000), a 20 percent reduction. In comparison, the number of working-age people without disabilities who were employed decreased by 14 percent (from 140,135,000 to 120,804,000)"); *see also* Gina Livermore & Jody Schimmel Hyde, *Workers with Disabilities Face Unique Challenges in Weathering the COVID-19 Pandemic*, MATHEMATICA (May 28, 2020), https://www.mathematica.org/blogs/workers-with-disabilities-face-unique-challenges-in-weathering-the-covid-19-pandemic ("Since March, workers with disabilities have lost nearly one million jobs, representing a 20 percent decline compared with the 14-percent decline experienced by workers without disabilities.").

116 *See* discussion *infra* Part II.A.

117 *See* discussion *infra* Part II.B.

118 *See* discussion *infra* Part II.C.

119 *See* Longmore & Goldberger, *supra* note 30, at 899–904.

slogans like "We Don't Want Tin Cups. We Want Jobs" and "We Are Lame But We Can Work[.]"[120]

It has historically been true that workers with medical conditions have a harder time finding traditional employment options.[121] In 2019, about 19% of people with disabilities were employed compared to the 66% employment rate of those without disabilities.[122] Further, workers with a disability are more likely to be employed part-time—about 32% of part-time workers have a disability compared to 17% for those without.[123] Workers with disabilities are also more likely to be self-employed.[124] Employer attitudes towards workers with disabilities prevent access to traditional employment.[125] A 2011 study found that the low employment rate among people with disabilities is not due to their reluctance to work or different job preferences, but rather due to barriers to employment.[126]

Workers with disabilities have been relegated to more non-traditional employment options.[127] "For people with disabilities, the enduring lack of traditional employment opportunity had already contributed to interest in non-standard, independent contracting work relationships[.]"[128] Compared to workers without medical limitations, workers with disabilities are twice as likely to be self-employed contract work-

120 *Id.* at 904.

121 *See id.* at 897–98.

122 Data from the Bureau of Labor Statistics suggests that PUA recipiency is vital for workers with disabilities. *See* News Release, Bureau of Labor Statistics, Persons With a Disability: Labor Force Characteristics—2020 1 (Feb. 24, 2021), https://www.bls.gov/news.release/pdf/disabl.pdf; *see also* U.S. BUREAU OF LABOR STATISTICS, *Persons with a Disability, 2019, Current Population Survey* (Mar. 9, 2020), https://www.dol.gov/sites/dolgov/files/odep/pdf/dol-odep-2019-briefing-appended-submission.pdf.

123 *See* U.S. BUREAU OF LABOR STATISTICS, *supra* note 122, at 2.

124 *See id.*

125 *See generally* PETER BLANCK, DISABILITY LAW AND POLICY (2020).

126 *See* Ali, Schur & Blanck, *supra* note 112, at 199.

127 *See* Michael Carlin, *Discrimination Against Disabled Contractors Under the Rehabilitation Act*, 34 WHITTIER L. REV. 283, 293 (2013) ("[I]ndependent contractors are currently more likely to be disabled than other types of workers. The troubling aspect of this is that disabled individuals still experience a tremendous deal of discrimination in the hiring process, and in society generally. . . . Twenty percent of private employers admit that prejudice, fear of hiring, and negative perception were major reasons why disabled individuals were not hired.").

128 Paul Harpur & Peter Blanck, *Gig Workers with Disabilities: Opportunities, Challenges, and Regulatory Response*, 30 J. OCCUPATIONAL REHABILITATION 511, 512 (2020) ("Self-employment arrangements and entrepreneurial activities have been areas of enduring interest for people with disabilities.").

ers.[129] Because of this, workers with disabilities earn about 64% as much as those without disabilities.[130]

When workers are in non-traditional employment relationships, they are often left uncovered by state unemployment insurance programs. Wages from contracting jobs do not count toward the monetary amount needed to qualify for unemployment programs.[131] Some employers misclassify workers as contractors to avoid tax liabilities like unemployment insurance.[132] Further, workers in non-traditional positions that earn qualifying (taxed) earnings still may not earn enough to qualify in some states.[133] This is because non-traditional workers can have varying hours, be part-time, have schedules that fluctuate each week or based on season, or receive low or irregular pay. Without set hours or control of their schedules, these workers "suffer frequent job interruptions . . . . [E]ven when they put in a high number of hours, those in the most insecure non-standard arrangements, like on-call work, risk earning too little to meet their states' minimum requirements."[134] Some states have high monetary earning thresholds in order to qualify, which acts as another barrier to access unemployment benefits for low-income workers.[135] Chart II.A below highlights the states that cut out the most people with their monetary eligibility formulas.[136]

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129 *See* Lisa A. Schur, *Barriers or Opportunities? The Causes of Contingent and Part-Time Work Among People with Disabilities*, 42 INDUS. REL. 589, 597 (2003); *see also* Peter David Blanck, Leonard A. Sandler, James L. Schmeling & Helen A. Schartz, *The Emerging Workforce of Entrepreneurs with Disabilities: Preliminary Study of Entrepreneurship in Iowa*, 85 IOWA L. REV. 1583, 1596 (2000); Carlin, *supra* note 127, at 283.

130 *See* Michelle Yin, Dahlia Shaewitz & Mahlet Megra, *An Uneven Playing Field: The Lack of Equal Pay for People With Disabilities*, AM. INST. RES. (Dec. 2014), www.air.org/sites/default/files/Lack%20of%20Equal%20Pay%20for%20People%20with%20Disabilities_Dec%2014.pdf.

131 *See* DEP'T OF LABOR, Office of Unemployment Ins., Division of Fiscal and Actuarial Servs., STATE UNEMPLOYMENT INSURANCE TRUST FUND SOLVENCY REPORT (2020), https://oui.doleta.gov/unemploy/docs/trustFundSolvReport2020.pdf; News Release, Internal Rev. Serv., Employment Taxes and Classifying Workers (Dec. 2007), https://www.irs.gov/pub/irs-news/fs-07-27.pdf.

132 *See Independent Contractor Misclassification*, *supra* note 83, at 1.

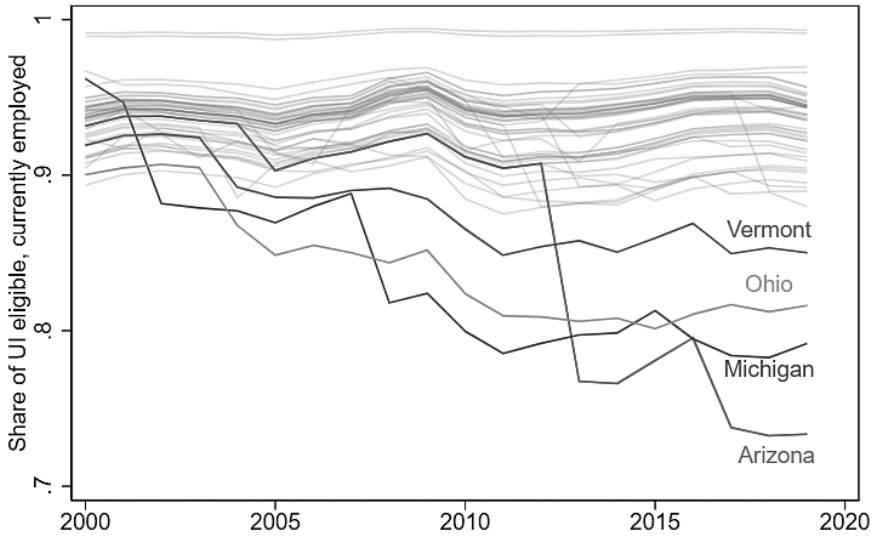
133 *See* Pilaar, *supra* note 9, at 345–46.

134 *Id.* at 345.

135 *See id.*

136 The calculation of monetary eligibility requirements across states is an extension of Leung & O'Leary (2020) and performed by an outstanding student, Ben Pyle, who is obtaining a doctoral degree in Economics while completing his law degree. *See generally* Pauline Leung & Christopher O'Leary, *Unemployment Insurance and Means-Tested Program Interactions: Evidence from Administrative Data*, 12 AM. ECON. J. 159 (2020). The procedure used is as follows. First, each state's eligibility requirements were generated based on minimum earnings levels and sufficient earnings spread through the base period. Information for this calculation is based on data from the DOL's "Comparison of State Unemployment Laws" which is published annually. Next, a nationally representative set was constructed using the annual American Community data from 2000-2019. This data is publicly available from the Census and IPUMS. The sample is then restricted to workers between the ages of 19 and 65 who are not in

Without sufficient wages, workers with disabilities in non-traditional employment will not be able to access unemployment programs. In fact, "low-wage workers are twice as likely as higher-wage workers to become unemployed, but they are only one-third as likely to collect jobless benefits."[137] As such, these workers may not be able to access benefits, even if they involuntarily lose their jobs.



school, who are not self-employed or unpaid family workers, who worked in the past year, and who are in the labor force. This data set is used to predict the probability an individual will be unemployed based on their demographics. This is done with a simple linear probability model controlling for standard demographic information such as sex, age categories, marital status, race, ethnicity, and educational information as well as industry information, keeping only employed workers who are most at risk of becoming unemployed (defined as the top 25% of unemployment risk). Workers in this sample are the most likely to become unemployed and are thus the most relevant for policy analysis. Among the likely unemployed workers, 65% have a high school diploma or less, 19% are Black, 61% are under 35. Of those "likely unemployed," a random 100,000 was sampled for each year. The percentage eligible for each state is the proportion of the sample who would satisfy the monetary eligibility requirements in a given state. Thus, the measure provides a summary of the eligibility rules that is only driven by state policy. As with Leung & O'Leary (2020), only earnings over the past 12 months and quarter worked—that is, binned weeks worked—was observed, so it was assumed that the earnings are evenly distributed in the observed quarters that the worker reported having worked. When there is a minimum weekly wage requirement, the number of weeks worked is assumed to be the midpoint of the weeks worked interval. All code and data to replicate this analysis is freely available upon request. *See also Comparison of State Unemployment Insurance Laws*, *supra* note 2, at tbl.3-3.

137 *Modernizing Unemployment Insurance: Federal Incentives Pave the Way for State Reforms,* NAT'L EMP. LAW PROJECT 1 (May 2012), https://www.nelp.org/wp-content/uploads/2015/03/ARRA_UI_Modernization_Report.pdf?nocdn=1 [hereinafter *Modernizing Unemployment Insurance*].

B. Your Job or Your Health? How Unemployment Programs Consider "Medical Quits"

It is far too common that workers fall ill, suffer an injury, or develop a disability that forces them to choose between continuing to work at a specific job or protecting their health.[138] Some workers are forced to leave their jobs unwillingly because their health prevents them from continuing in those particular positions.[139] Depending on the state, one such worker will face additional hurdles just to show that their medical condition forced them to become jobless involuntarily.

In all jurisdictions, individuals who quit their jobs must have "good cause" in order to not be disqualified from receiving benefits.[140] Forty-five of the fifty-three states and territories have recognized in some form that when a person leaves their job due to illness or out of medical necessity, they have left their employment for "good cause" and should still remain qualified for unemployment insurance.[141]

Good cause varies widely across states, and certain requirements about medical leave make benefits harder to access even when workers become involuntarily unemployed due to their medical condition. These conditions range from any mix of the following: the illness must be related to work, claimants must have a doctor's note or physician recommendation for work change before leaving the job, there must be failure of the employer to provide accommodations, the claimant must attempt to secure alternative work with the employer before leaving, or another specific limitation.[142] When a state's unemployment insurance statute does not recognize medical necessity as "good cause" for leaving a job, it forces workers to sacrifice their health for a paycheck.[143] Moreover, the pandemic has demonstrated how the economy and health of a local community will suffer when workers are forced to make this choice.[144]

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138 *See* Rebecca Vallas, Shawn Fremstad & Lisa Ekman, *A Fair Shot for Workers with Disabilities*, CTR. FOR AM. PROGRESS 1 (Jan. 28, 2015), https://cdn.americanprogress.org/wp-content/uploads/2015/01/WorkersDisabilities.pdf?_ga=2.11250359.2043973997.1617809653-572970310.1617653372.

139 While these workers may be entitled to SSI or SSDI, this is not always a given, especially if they are able to work but are just limited medically from performing some job duties.

140 *See Comparison of State Unemployment Insurance Laws*, *supra* note 2, at tbl.5-2.

141 *Id.*

142 *See id.*

143 *See* Annie Lowrey, *America Chose Sickness, and Lost the Economy*, ATLANTIC (Nov. 2, 2020), https://www.theatlantic.com/ideas/archive/2020/11/the-economy-cant-recover-with-sick-workers/616947/.

144 *See id.* ("Research from the Integrated Benefits Institute shows that the coronavirus quintupled the number of workers claiming short-term disability benefits due to respiratory conditions from February to March; many employers are seeing significantly more disability and leave claims, costing them something like $20 billion and counting. . . . Research suggests that the thin, limited emergency sick-leave provisions passed by Congress this spring nevertheless prevented more than 400 infections a day.").

If a worker is forced to leave work due to their health, unemployment insurance should be there to support them at a time of heightened financial insecurity and unanticipated medical costs. Despite this, only twenty-nine jurisdictions (or just over half of the 53 jurisdictions) cover these workers forced to leave because of medical conditions.[145] Three states do not consider illness a good cause reason to leave work at all, rendering those workers disqualified from benefits.[146] Fourteen jurisdictions place these additional burdens on workers forced to leave work due to a medical necessity in order to qualify for benefits.[147] Failing to meet any of these conditions renders them disqualified.

The impact of these additional conditions creates a substantial barrier for those with medical conditions to qualify for unemployment benefits. Some of the conditions require workers to provide medical documentation of the medical condition,[148] seek alternative work with their employer,[149] or request a leave of absence.[150] Failure to meet these

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145 *See Comparison of State Unemployment Insurance Laws*, *supra* note 2, at tbl.5-2.

146 *See id.*

147 *See id.* (The following states have additional requirements to prove an involuntary medical quit: Michigan, Washington, Virginia, Tennessee, Pennsylvania, Oregon, New Hampshire, Maryland, Maine, Kentucky, Illinois, Georgia, DC, and Connecticut).

148 Tennessee, Oregon, New Hampshire, Michigan, Maryland, Maine, Kentucky, Illinois, Georgia, Washington, D.C., and Connecticut require medical documentation jusitifying the quit to prevent disqualification from benefits. *See* TENN. CODE ANN. § 50-7-303 (West 2016); Goin v. Emp. Dep't, 126 P.3d 734, 735 (Or. Ct. App. 2006); N.H. REV. STAT. ANN. § 282-A:32 (2020); MICH. COMP. LAWS ANN. 421.29(1)(a) (West 2020); *see also* Md. Code. Ann., Lab. & Empl. § 8-1001 (West 2016); ME. REV. STAT. ANN. tit. 26, § 1193 (Westlaw through Chapters 2 to 20 of 2021 First Legis. Sess.); Burch v. Taylor Drug Store, Inc., 965 S.W.2d 830, 835 (Ky. Ct. App. 1998), *abrogated by* Ky. Unemployment Ins. Comm'n v. Cecil, 381 S.W.3d 238 (Ky. 2012); 820 ILL. COMP. STAT. ANN. 405/601 (West 2015); Holstein v. N. Chem. Co., 390 S.E.2d 910, 913 (Ga. Ct. App. 1990); D.C. Mun. Regs. tit. 7, § 311 (LexisNexis 2021); CONN. GEN. STAT. ANN. § 31-236 (West 2021); *see also Comparison of State Unemployment Insurance Laws*, *supra* note 2, at tbl.5-16.

149 Michigan, Maine, Virginia, and Washington jurisdictions place the burden on the claimant to seek alternative work with the employer before they quit, which the employer must deny to prevent disqualification from benefits. *See* MICH. COMP. LAWS § 421.29(1)(a); *see also* ME. REV. STAT. tit. 26, § 1193; *see also* Battle v. Virginia Employment Comm'n, No. CL13-8291, 88 Va. Cir. 116 (Va. Cir. 2014); *see also* 2021 Wash. Legis. Serv. Ch. 2 (S.S.B. 5061) (West). Importantly, in unemployment settings, the burden of requesting this alternative work often falls on the worker rather than the employer. This is in direct opposition to the burden the ADA places on employers who have a duty to provide reasonable accommodations to accommodate disabling medical conditions or disabilities. 42 U.S.C. §§ 12101-12117, 12201-12213 (2009). The ADA's requirements regarding reasonable accommodation and undue hardship supersede any state or local disability antidiscrimination laws to the extent that they offer less protection than the ADA. *See* 29 C.F.R. § 1630.1(c)(2) (1998). In addition to employers, the ADA requires employment agencies, labor organizations, and joint labor-management committees to provide reasonable accommodations. *See* 42 U.S.C. § 12112(a), (b)(5)(A) (1994).

150 Washington, Michigan, Maine, and Connecticut require workers to request a leave of absence prior to quitting in order to prevent disqualification from unemployment benefits. *See* 2021 Wash. Legis. Serv. Ch. 2 (S.S.B. 5061) (West), MICH. COMP. LAWS 421.29(1)(a); *see*

conditions will result in a disqualification from any benefits. Even more difficult, most workers are not aware of the state's unemployment laws and what's required of them before they leave work due to their medical conditions.

Requiring medical documentation not only means that the worker must know that they need to go to the doctor before leaving work due to their medical condition, but also that they have the financial means to be able to obtain medical help. A 2019 Gallup poll found "25% of Americans say they or a family member have delayed medical treatment for a serious illness due to the costs of care, and an additional 8% report delaying medical treatment for less serious illnesses."[151] Furthermore, the American Cancer Society conducted a study in May 2019 that "found 56% of adults in America report having at least one medical financial hardship."[152]

Michigan's statute, in particular, places one of the highest burdens on workers with medical conditions because it is the only state to require that all three conditions be met before leaving work. In addition to what a few other states require (a medical statement and attempting to obtain alternative work with the employer before leaving), Michigan also requires that the claimant "unsuccessfully attempted to be placed on a leave of absence with the employer to last until the individual's mental or physical health would no longer be harmed by the current job."[153] In other words, before leaving, the claimant has to exhaust all available leave—paid or unpaid—if they cannot do the job they used to perform. Notably, employers do not need to provide paid leave.[154] Therefore, many workers are forced to take unpaid leave and they also will not be able to qualify for unemployment benefits, which only exacerbates the economic vulnerability they are experiencing. If the worker fails to leave the job before the leave is over, Michigan's agency will disqualify them. But if they are unable to earn wages at their job and want to find new work that will pay them, aren't they effectively unemployed?

Because these statutory requirements are often only discovered after a worker has been forced to leave their job and has been denied unemployment benefits, only a small fraction of these workers may have taken

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also ME. REV. STAT. tit. 26, §1193; CONN. GEN. STAT. ANN. §31-236 (2009). See the next paragraph regarding the impact of Michigan's program on those with medical conditions.

151 Robin Weinick, Sepheen Byron & Arlene Bierman, *Who Can't Pay for Health Care?*, 20 J. GEN. INTERNAL MED. 504, 504–09 (2005); *see also* Helaine Olen, *Even the Insured Often Can't Afford Their Medical Bills*, ATLANTIC (June 18, 2017), https://www.theatlantic.com/business/archive/2017/06/medical-bills/530679/.

152 Michael Sainato, *The Americans Dying Because They Can't Afford Medical Care*, GUARDIAN (Jan. 7, 2020), https://www.theguardian.com/us-news/2020/jan/07/americans-healthcare-medical-costs.

153 MICH. COMP. LAWS 421.29(1)(a) (2020).

154 *See id.*

the necessary unknown steps to receive benefits. Even though Michigan's law recognizes that a worker is still qualified for benefits when they leave a job as the result of medical necessity, the actual conditions of the law continue to prevent access.[155] States that prevent or limit access to benefits for involuntary "medical quits" leave a sizable gap in unemployment insurance coverage for workers who develop chronic health conditions and have to leave their job. These workers are likely to be denied unemployment benefits, even if they have the ability to work in other capacities because they "quit."

C. Able and Available for Work: How Do Part-Time Workers Fit In?

As of early 2020, nearly 30 million people work part-time.[156] That is 14% of the country's workforce between the ages of 14 and 64.[157] Despite making up a significant part of the workforce, part-time workers are more likely to be rejected from state unemployment programs.[158] State unemployment systems often do not cover part-time workers, even though many part-time workers' wages pay into unemployment taxes at a higher rate than those with one full-time job. Just because a worker is only looking for part-time work does not always mean that they do not work as many or more hours compared to full-time workers. For example, a working parent could be unable to show up to any particular job full-time and meet their childcare needs but nevertheless work forty or more hours at multiple part-time jobs. If that parent loses one or multiple jobs, they will not receive unemployment benefits in some states because

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155 This statutory limitation on who can receive benefits when they leave work due to medical necessity disproportionately affects older workers because the likelihood of developing a chronic medical condition increases with age. In 2019, the Bureau of Labor Statistics reported that "half of all persons with a disability were age 65 and over, about three times larger than the share of those with no disability." *See* Novello, *supra* note 27; *see also* Mitra Toossi & Elka Torpey, *Older Workers: Labor Force Trends And Career Options,* BUREAU LAB. STAT. (May 2017), https://www.bls.gov/careeroutlook/2017/article/older-workers.htm; Richard W. Johnson & Barbara A. Butrica, *Age Disparities in Unemployment and Reemployment During the Great Recession and Recovery*, URB. INST. (May 2012), https://www.urban.org/sites/default/files/alfresco/publication-pdfs/412574-Age-Disparities-in-Unemployment-and-Reemployment-During-the-Great-Recession-and-Recovery.PDF; Mich. Comp. Laws 421.29(1)(a).

156 *See* Statista Research Department, *Part-Time Employees - Number in the U.S. January 2021*, STATISTA (Feb. 9, 2021), https://www.statista.com/statistics/192342/unadjusted-monthly-number-of-part-time-employees-in-the-us/#statisticContainer (In January 2021, around 24.67 million people were employed on a part-time basis in the United States. This value is not seasonally adjusted. In line with the definition of the BLS, part-time workers are persons who usually work less than 35 hours per week).

157 Calculations are based on the working age population from the Organization for Economic Co-operation and Development. *See Working Age Population: Aged 15-64: All Persons for the United States*, FED. RES. BANK ST. LOUIS (Feb. 20, 2021), https://fred.stlouisfed.org/series/LFWA64TTUSM647S.

158 *See id.*

they will not be seeking full-time work. Even worse, if that parent made at least $7,000 at each of their part-time jobs, their wages would have paid the full federal unemployment benefit tax multiple times (as well as the applicable state unemployment taxes), but they are still less likely to be able to access unemployment benefits.[159]

Part-time workers receive unemployment benefits at much lower rates than full-time workers.[160] Over time, part-time work has become more common in the United States.[161] While the number of part-time workers fluctuates greatly between good and bad economic times, a significant portion of workers report working part-time for "non-economic" reasons.[162] One "non-economic" reason is a worker's medical condition rendering them unable to work full time.[163]

In order for workers who lose their job to be eligible for any week of unemployment benefits, the workers need to attest they are able to work and are available for work.[164] Notably, the DOL created no federal requirement for how many hours the worker must be available in order to have access to unemployment benefits.[165] The DOL has instructed that all workers need to do to show they are available is prove their connection to the labor market.[166] Instead, states have added additional requirements to what "able" and "available" means. Interestingly, workers with

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159 *See* Carl E. Van Horn & Maria Heidkamp, *Older Workers, Precarious Jobs, and Unemployment: Challenges and Policy Recommendations,* 43 GENERATIONS 21, 23 (2019) ("38 percent of involuntary part-timers were working two or more jobs.").

160 *See* Pilaar, *supra* note 9, at 340 ("A 2007 GAO study found that unemployed workers who were part-time at their last job were significantly less likely to receive UI benefits than those who were full-time."); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-1147, *Low-Wage and Part-Time Workers Continue to Experience Low Rates of Receipt* 1, 19 (2007), https://www.gao.gov/assets/270/266500.pdf.

161 *See* Lonnie Golden, *Still Falling Short on Hours and Pay: Part-Time Work Becoming New Normal*, ECON. POL'Y INST. 1, 3 (Dec. 5, 2016), https://www.epi.org/publication/still-falling-short-on-hours-and-pay-part-time-work-becoming-new-normal/ ("In fact, data from 2007 to 2015 show that involuntary part-time work is increasing almost five times faster than part-time work and about 18 times faster than all work . . . the share of the workforce working part time voluntarily has been stable since 2007.").

162 *Id.* at 9.

163 *See* Megan Dunn, *Who Chooses Part-Time Work and Why?,* MONTHLY LAB. REV. (Mar. 2018), https://doi.org/10.21916/mlr.2018.8 ("Person's own illness, injury, or disability prevents him or her from working more than 35 hours.").

164 *See* Walter Nicholson & Karen Needels, *Unemployment Insurance: Strengthening the Relationship Between Theory and Policy*, 20, J. ECON. PERSP. 47, 52 (2006) ("Some states require availability for 'any work,' whereas others require availability for 'suitable' work or work in the claimant's 'usual occupation.' Other issues include geographic definitions of availability, availability during pregnancy, and availability if the claimant has a disability."); *see also* Kovalski & Sheiner, *supra* note 99 ("States have extensive flexibility in determining benefits. . . . There is considerable variation in how states run this program.").

165 *See* 20 C.F.R. § 604.5 (2007); *see also Unemployment Insurance Relief During COVID-19 Outbreak*, DEP'T OF LAB., https://www.dol.gov/coronavirus/unemployment-insurance (last visited Feb. 24, 2021).

166 *See* 20 C.F.R. § 604.5 (2007).

medical conditions or disabilities may still be "able" to work under state laws but will be rendered ineligible under the "available" provision. The DOL has cautioned that states should be flexible in reviewing these requirements, especially in light of any outside circumstances like illness, COVID-19, etc.[167]

Being "able" to work provisions are generally more consistent across state programs. A worker need only provide evidence that they could do jobs that they are qualified to do or have performed in the past.[168] However, workers who are unable to perform this kind of work due to their medical condition will be rendered ineligible under the "able" provision.[169] In fact, only a select few states have added statutory provisions to ensure workers with medical conditions are not considered unable or unavailable from work.[170] The rest of the state programs render the worker with the medical condition ineligible for benefits even if they find themselves involuntarily unemployed.[171]

The "available" provision of state statutes has significantly more variation across state unemployment programs.[172] Even so, at least 39 jurisdictions explicitly permit by statute that part-time workers can be deemed "available" for work.[173] That leaves 14 jurisdictions that either do not explicitly provide coverage or actively require only full-time availability.[174] Michigan and West Virginia both specifically require that workers must be available for "full-time work" in order to remain eligible for unemployment benefits—even when these workers were always part-time workers and now find themselves involuntarily unemployed.[175] These workers could be completely entitled to unemployment benefits under every other part of the state's statute but will be unable to collect due to their part-time availability.

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167 *See* U.S. Dep't of Labor, Emp. & Training Admin., Off. of Unemployment Ins., Unemployment Ins. Program Letter No. 10-20 (Mar. 12, 2020) [hereinafter Unemployment Program Letter No. 10-20].

168 *See* 20 C.F.R. § 604.4(b) (2007).

169 *Id.*

170 Delaware has this provision. DEL. CODE ANN. tit. 19, § 3315 (West 2017) ("[N]o claimant shall be considered ineligible in any week of unemployment for failure to comply . . . if such failure is due to an illness or disability which occurs after the claimant has registered for work and no work which would have been considered suitable at the time of the claimant's initial registration has been offered after the beginning of such illness or disability."); *see also* IDAHO CODE ANN. § 72-1366 (West 2017); MASS. GEN. LAWS ANN. ch. 151A, § 24 (West 2021).

171 *See Comparison of State Unemployment Insurance Laws*, *supra* note 2, at tbl.5-2.

172 *See id.* at 5-25. ("The availability-for-work provisions are more varied than the ability-to-work provisions. Some states provide that an individual must be available for work; some for suitable work; and others for work in the individual's usual occupation or for which the individual is reasonably fitted by training and experience.").

173 *See id.* at tbl.5-15.

174 *See id.*

175 *Id.*

According to a nationwide survey comparing the unemployment insurance laws of 53 states and territories published by the U.S. DOL, 39 states provide unemployment benefits to at least some individuals who are available for only part-time employment, but only 33 states permit workers to search for part-time work.[176] These states impose varied conditions on part-time job seekers via statutes and regulations. Examples include: requiring that a claimant is willing to work at least 20 hours a week; requiring that a claimant worked at least 20 hours per week in a majority of the weeks in their base period; or some combination or slight variation of these conditions.[177] Certain states permit part-time job seekers who have disability-based restrictions to be eligible for benefits.[178] For a majority of states, the worker can collect unemployment while only being available for part-time work if their work history shows that they were already a part-time worker.[179] While this is an improvement over not allowing a worker's part-time availability to count at all (like in Michigan and West Virginia), it still leaves out workers whose life situations have changed. For example, if the worker's health no longer allows for full-time work but their history before their current job separation was only full-time work, they may not necessarily be eligible for benefits in these states.[180]

In jurisdictions that only cover full-time workers, workers whose disabilities prevent them from working full time are automatically disqualified from receiving unemployment benefits by virtue of their disability.[181] By definition, they cannot meet the requirement that they be available for full-time work. This is true even if these workers are able to hold, and have a history of holding, part-time employment, qualify under every other requirement in the statute, and are involuntarily out of work.

III. CONGRESSIONAL ATTEMPTS TO ENCOURAGE STATES TO MODERNIZE UNEMPLOYMENT LAWS HAVE FAILED

As the workforce evolved for nearly a century, neither state nor federal legislatures did much to respond to the 1935 unemployment pro-

176 *See id.* at tbl.5-16.

177 *See id.*

178 *See id.* at tbl.5-25. Specifically, there are nine states that have specific provisions that prevent a worker from becoming ineligible for benefits due to illness or disability - Alaska, Delaware, Hawaii, Idaho, Massachusetts, Nevada, North Dakota, Tennessee, and Vermont.

179 *See id.* at tbl.5-16.

180 The full-time work requirement may render the state liable under Title II of the Americans with Disabilities Act, as there is a colorable claim that the state is discriminating on the basis of disability in its provision of unemployment insurance. See Part V, for a further discussion of how the ADA interacts with state unemployment programs.

181 *See Comparison of State Unemployment Insurance Laws*, *supra* note 2, at tbl.5-16.

grams.[182] The only major reform effort took place in 1976 to expand coverage to agricultural and domestic workers.[183] The 1976 Congress could not agree on further expansions and referred further reform efforts to a commission to study.[184] Congress did nothing for nearly 20 more years but then authorized another commission in 1991.[185] Despite two reports from these commissions explaining in great detail how the program should be improved to cover the modern workforce, Congress has not made any efforts to enact permanent national reform.[186]

Instead of any substantial federal reform, Congress has instead limited its intervention to extensions during economic downturns and one incentive program.[187] In times of crisis, Congress has enacted legislation to extend and expand unemployment coverage with federal dollars. As part of its response to the Great Recession, Congress recognized that state systems failed to cover the workforce and passed incentive legislation, the American Recovery and Reinvestment Act, to encourage states to modernize their laws.[188] In response to COVID-19, Congress passed the CARES Act which included a federal program to intentionally cover anyone that state laws excluded.[189] While states eagerly took the federal funds to promote broader coverage, states made no real effort to increase the workers it deemed "worthy."[190]

A. The ARRA: Congress Tries an Incentive for States

After the Great Recession, Congress attempted to delegate permanent reform by passing an incentive program for states to enact laws to fill the gaps in their unemployment programs. In February of 2009, Congress enacted the American Recovery and Reinvestment Act (ARRA).[191]

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182 This is not to say that the federal government was completely hands-off. Typically, the federal government has responded to supplement states' unemployment programs in times of economic decline through passing stimulus packages, many of which have extended, and, at times, expanded unemployment benefits. *See* Stephen A. Wandner, *Options for Unemployment Insurance Structural and Administrative Reform: Proposals and Analysis*, NAT'L ACAD. SOC. INS. & WANDNER ASSOCIATES, INC. 1, 4 (Apr. 30, 2020) [hereinafter Wandner, *Options for Unemployment Insurance*]; *see also* 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.

183 *See* Wandner, *Options for Unemployment Insurance*, *supra* note 182, at 4.

184 *See id.*

185 *See id.*

186 *See id.*

187 *See id.*

188 *See* American Recovery & Reinvestment Act of 2009, Pub. L. No. 111–5, 123 Stat. 115, 115–116 (2009).

189 *See* U.S. Dep't of Labor, Unemployment Insurance Relief During COVID-19 Outbreak, https://www.dol.gov/coronavirus/unemployment-insurance.

190 Huberfeld, *supra* note 44, at 442.

191 *See* American Recovery & Reinvestment Act of 2009, Pub. L. No. 111–5, 123 Stat. 115, 115–116 (2009).

This $7 billion act presented incentives for states to update their unemployment systems.[192] In particular, it encouraged states to modernize their unemployment laws to cover part-time and low-wage workers[193] and workers who leave work for compelling family reasons.[194]

The ARRA incentivized states to update their unemployment laws within three years, particularly focusing on bringing more low-wage workers into the benefit programs, along with part-time workers and those who leave work for good reason.[195] If the states adopted an "alternative base period" to help more low-wage workers to qualify, they could receive one-third of the incentive funding.[196] States would receive full federal funding if they incorporated changes in two of four categories to add laws to 1) include part-time workers, 2) include workers who leave a job for compelling family reasons (domestic violence, caring for a family member, moving with a spouse who relocated for new employment); 3) include the dependent allowance; and 4) allow training for permanently laid-off workers.[197] States were mixed—some did nothing, some added partial changes, some did all. Some states already had these laws on the books.[198] Some states received $0 while others received hundreds of millions of dollars.[199] Despite substantial money being offered to the states, many states did not make any changes. In sum, twelve states made no efforts to procure the incentive money, five states received partial funding (some because they already had the desired changes in their laws), and the rest received full incentive funding.[200]

On the political front, the ARRA seemed to have significant bipartisan support.[201] State legislatures with both Republican majorities and Democratic majorities were able to pass legislation to receive some of this extra funding. Even still, while about half the country updated its unemployment laws, the rest did not.

As far as including part-time workers and workers leaving work due to illness or disability, the ARRA was quite successful. Before the ARRA, only 15 states had any laws that allowed part-time workers to

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192 *See Modernizing Unemployment Insurance*, *supra* note 137, at 1.

193 *See id.* ("Of special significance, the ARRA targeted low-wage workers, who are unfairly denied benefits in large numbers, not because they failed to work enough to qualify but simply because of the antiquated eligibility rules that ignore their most recent earnings.").

194 *See id.* at 2.

195 *See id.* at 1–2.

196 *See id.* at 2.

197 *See id.*

198 *See id.* at 2–3.

199 *See id.*

200 *See id.* at 2–4; *see* chart, App. p. 1.

201 *See Modernizing Unemployment Insurance*, *supra* note 137, at 2–3; *see also* CHRISTOPHER J. O'LEARY & STEPHEN A. WANDNER, *Unemployment Insurance Reform: Evidence-Based Policy Recommendations, in* UNEMPLOYMENT INSURANCE REFORM 131, 149 (Stephen A. Wandner ed., 2018).

collect unemployment benefits.[202] After the ARRA, that number nearly doubled to 29 states. And that number continued to rise to 39, leaving all but 14 jurisdictions by 2019.[203] As for workers with disabilities, only 8 states allowed workers to receive benefits if they left due to disability or illness before the incentive legislation.[204] Because of the ARRA, that number rose to 24 states giving these workers access to the program.[205] Today, all but 3 states have some law or regulation that considers it good cause to leave a job for medical reasons.[206]

Even with these positive forward movements for some states, the federal government's incentive program with ARRA to modernize unemployment had mixed success. While some state programs modernized from 2009-2011, many states then chose to enact austerity measures after 2011.[207] The effect of these austerity cuts to the state programs significantly lowered how many people had access to unemployment benefits.

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202 *See Modernizing Unemployment Insurance*, *supra* note 137, at 2–4; *see also* Unemployment Ins. Program Letter No. 10-20, *supra* note 167.

203 *See Comparison of State Unemployment Insurance Laws*, *supra* note 2, at tbl.5-2.

204 *See Modernizing Unemployment Insurance*, *supra* note 137, at 4.

205 *See id.*

206 Despite this addition, many of these states still place significant hurdles on claimants to meet the requirement despite their involuntary medical basis for leaving work. *See Comparison of State Unemployment Insurance Laws*, *supra* note 2, at tbl.5-2.

207 *See* McHugh & Kimball, *supra* note 6, at 5.

In looking at the Chart III.A[208] above, unemployment recipiency[209] was increasing, likely as a result of ARRA implementation efforts to cover the workforce from 2009-2011. Then, throughout the country, unemployment recipiency rates took a steep dive after 2011.

The Great Recession caused states to have to borrow significantly in order to pay out benefits.[210] Because state budgets were severely overdrawn, states began to look for ways to reduce benefit payout. Michigan was the first state that chose to reduce what was offered to jobless workers in a series of rollbacks in 2011, and many states then followed suit.[211] The cuts to Michigan's unemployment program included reducing the number of weeks claimants were entitled to receive benefits from 26 to 20,[212] adding additional eligibility requirements,[213] and adding additional disqualification provisions.[214] And, as one might expect, these measures primarily hurt vulnerable workers with less traditional employment and

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208 *See* UI Data Summary, 1990-2019 Q3, DEP'T OF LAB., https://oui.doleta.gov/unemploy/data_summary/DataSum.asp (Notes: Gray lines represent recessions. Recipiency rates are calculated as the average number of people claiming at least one week of UI over the average unemployment rate, averaged over the trailing year).

209 A state's UI system's coverage of unemployed workers is known as that state's "recipiency rate." *See* McHugh & Kimball, *supra* note 6, at 3 ("One important performance indicator for state UI programs is the proportion of unemployed individuals who get UI benefits, or the benefit recipiency rate.").

210 *See* Mike Evangelist & Rick McHugh, *Can't Get There From Here: Facing Reality in Financing Michigan's Unemployment Insurance Program*, NAT'L EMP. L. PROJECT 1, 2 (Aug. 2011), https://s27147.pcdn.co/wp-content/uploads/2015/03/MI_UI_Report_Cant_Get_There_From_Here.pdf.

211 *See id.* at 1.

212 Michigan was the first state to approve a reduction in the duration of benefits from 26 to 20 weeks, effective with new claims filed on or after January 15, 2012. *See* Claire McKenna & George Wentworth, *Unraveling the Unemployment Insurance Lifeline: Responding to Insolvency, States Begin Reducing Benefits and Restricting Eligibility in 2011*, NAT'L EMP. L. PROJECT (Aug. 2011), https://s27147.pcdn.co/wp-content/uploads/2015/03/Unraveling_UI_Lifeline_Report.pdf.

213 *See* Evangelist & McHugh, *supra* note 209, at 2–5 ("Even though these tax breaks came at the expense of UI benefits and the long-term stability of trust fund finances, employer groups are once again calling for more worker sacrifices in 2011. The recently enacted reduction in benefit weeks and proposed legislation to reduce weekly benefit amounts and to deny workers eligibility for UI are not surprising in light of Michigan's history of unequal sacrifice when financing UI.").

214 *See* Luke Shaefer & Michael Evangelist, *Families at Risk, Report II*, REP. FOR MICH. UNEMPLOYMENT INS. PROJECT 1, 2 (Apr. 30, 2014), http://miuiconnect.weebly.com/uploads/1/6/9/3/16937150/families_at_risk_report_2_april_2014.pdf ("In 2011, the Michigan State Legislature made a series of changes to the state's UI program that took effect in 2012. Best known was the reduction in the maximum number of state benefit weeks available to new claimants to 20 weeks—6 weeks less than the standard used by most states. The Legislature also made a series of lesser-known changes to Michigan's UI program, the net effect of which was to reduce rates of program eligibility, increase burdens on claimants, and give Michigan's Unemployment Insurance Agency (UIA), the state department administering the program, more tools to contest claims."). One of these additional disqualification provisions was the additional requirements discussed in Part I.B regarding medical leaving.

employment patterns.[215] These austerity measures were put in place to purposely reduce the amount of workers covered due to most states having to borrow significantly in order to pay out benefits during the Recession. Notably, Michigan was in the worst financial position of any state going into the Great Recession. While most states had to borrow significantly in order to pay out benefits during the Great Recession, Michigan was the only state that was already insolvent before the economic downturn began.[216] The states that enacted austerity measures are currently among the lowest-performing states in the country.[217]

Due to these austerity measures, unemployment recipiency rates across the country have consistently been the lowest they have been in decades.[218] Given that these cuts happened immediately after the ARRA incentive program, it is unclear how effective Congress was in increasing the workforce covered by unemployment programs.[219] So, are federal incentives alone enough for states to genuinely improve their system?[220]

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215 *See* Michele Evermore, *Unemployment Insurance During Covid-19: The CARES Act and Role of UI During the Pandemic*, NAT'L EMP. L. PROJECT (June 9, 2020), https://www.nelp.org/publication/unemployment-insurance-covid-19-cares-act-role-ui-pandemic/#_edn4.

216 *See* Mike Evangelist & Rick McHugh, *Can't Get There From Here: Facing Reality in Financing Michigan's Unemployment Insurance Program*, NAT'L EMP. L. PROJECT 1, 2–3 (Aug. 2011), https://s27147.pcdn.co/wp-content/uploads/2015/03/MI_UI_Report_Cant_Get_There_From_Here.pdf ("Michigan's UI trust fund has not met generally accepted standards of UI solvency since the early 1970s . . . On the eve of the Great Recession in late 2007, Michigan would have required $3.8 billion in reserves to meet the federal solvency benchmark. Instead, the trust fund was already borrowing $134.6 million in federal loans to pay benefits. So, Michigan became the first state to borrow during the recession, and, depending upon future economic conditions, additional federal loans may be required to pay state UI benefits in coming years.").

217 *See* Drew Desilver, *Not All Unemployed People Get Unemployment Benefits; In Some States, Very Few Do*, PEW RES. CTR (Apr. 24, 2020), https://www.pewresearch.org/fact-tank/2020/04/24/not-all-unemployed-people-get-unemployment-benefits-in-some-states-very-few-do/ ("Largely because state rules vary so much, the share of people the government counts as unemployed who actually receive unemployment benefits varies too.").

218 *See id.*

219 *See generally* Annalisa Mastri, Wayne Vroman, Karen Needels & Walter Nicholson, *States' Decisions to Adopt Unemployment Compensation Provisions of the American Recovery and Reinvestment Act*, MATHEMATICA POL'Y RES. (Mar. 2, 2016), https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/UCP_State_Decisions_to_Adopt.pdf.

220 *See* Nicole Huberfeld, in reviewing Medicaid, a similarly structured federal-state program, argues that federal incentives fail to deliver better programs and the proper federal response is full federalization. *Cf.* Huberfeld, *supra* note 44, at 487–84 ("Nationalization could at least raise the minimum care for Medicaid enrollees. If states want to provide a kind of wraparound additional benefit, they could do so with their own funds. Federal incentives to the states to provide more should be avoided; that just reintroduces the cooperative federalism morass.").

B. The CARES Act: Congress Creates a New Federal Program to Cover All Workers Affected by the COVID-19 Pandemic

While state unemployment recipiency rates were at a record low for much of the country, the economic devastation brought about by COVID-19 caused unprecedented unemployment claims nearly overnight. State agencies were suddenly seeing more people filing each week for unemployment benefits than what they saw in an entire year. Because of this abrupt change in employment, COVID-19's recession was significantly worse than both the Great Recession of 2008 and the Great Depression of 1929.[221] The sudden appearance of COVID-19 turned the economy upside down more quickly than a normal recession.[222] In the first six months of the coronavirus pandemic, more than 18 million Americans were jobless, which is about one in every nine workers.[223]

Even before there was any Congressional legislation to aid people in the pandemic, the DOL issued a letter to states informing them that they should be even more flexible in their review of able, available, and actively seeking work during the pandemic.[224] The DOL's response gives states the ability to reduce or eliminate their own requirements in order to adapt to recessions – and in the case of this letter, a pandemic.[225]

1. The Purpose of the CARES Act

In response to COVID-19, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, a $2 trillion stimulus package that greatly expanded the workforce entitled to unemployment benefits.[226] The new law created three new federal unemployment programs meant to supplement and extend coverage to jobless workers, including

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221 Importantly, this does not mean that COVID-19's economic impact was worse than the Great Depression. The Great Depression lasted for years and had a steady stream of job losses throughout its duration. *See* Josh Bivens, Rev. Dr. William J. Barber II, Rev. Dr. Liz Theoharis & Shailly Gupta Barnes, *Moral Policy = Good Economic*s, ECON. POL'Y INST. (Oct. 30, 2020), https://www.epi.org/blog/moral-policy-good-economics-whats-needed-to-lift-up-140-million-poor-and-low-income-people-further-devastated-by-the-pandemic/.

222 *See Unemployment Insurance Data Dashboard*, CENTURY FOUND. (Oct. 20, 2020), https://tcf.org/content/data/unemployment-insurance-data-dashboard/; Novello, *supra* note 27.

223 *See Unemployment Insurance Data Dashboard*, *supra* note 221.

224 *See* U.S. Dep't of Labor, Emp. and Training Admin., Off. of Unemployment Ins., Unemployment Ins. Program Letter No. 10-20 (Mar. 12, 2020).

225 *See id.*

226 *See* Carl Hulse & Emily Cochrane, *As Coronavirus Spread, Largest Stimulus in History United a Polarized Senate*, N.Y. TIMES (Mar. 26, 2020), https://www.nytimes.com/2020/03/26/us/coronavirus-senate-stimulus-package.html ("As midnight was about to toll, lawmakers approved in an extraordinary 96-to-0 vote a $2 trillion package intended to get the nation through the crippling economic and health disruptions being inflicted on the world by the coronavirus.").

those that are not part of a state's current unemployment laws.[227] First, there was Pandemic Unemployment Compensation (PUC), which gave jobless workers entitled to either state or federal unemployment benefits an extra $600[228] a week on top of their weekly benefit amount for a number of weeks.[229] Pandemic Emergency Unemployment Compensation (PEUC) gave an additional thirteen weeks of benefits to jobless workers.[230] The biggest expansion was the development of Pandemic Unemployment Assistance (PUA), which covered workers generally excluded from state programs.[231]

Congress drafted PUA to cover all workers in the workforce affected by the pandemic, even if state programs do not have laws that cover those workers.[232] Unlike previous federal interventions during previous economic crises, this time Congress included gig workers, independent contractors, and self-employed workers as covered individuals of this federal program.[233] In addition to covering all employment relationships, PUA also specifically noted that it was meant to cover workers who did not earn enough money to qualify for state unemployment and

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227 *See* Coronavirus Aid, Relief, and Economic Security Act of 2020, 15 U.S.C. § 9021 (2020).

228 *See id.* § 9023 ("(i) For weeks of unemployment beginning after the date on which an agreement is entered into under this section and ending on or before July 31, 2020, $600."). This extra compensation, while controversial in the later extensions of the program, was necessary due to state unemployment programs having woefully low weekly benefit amounts. Many states have outdated amounts that have not been updated in years—and sometimes even decades to keep up with inflation. The 1995 Advisory Council on Unemployment Compensation, an independent, bipartisan group that reviews unemployment compensation has stated for decades that a state's weekly benefit amount should be between 50% and 66% of the state's average weekly wage. *See* ADVISORY COUNCIL ON UNEMPLOYMENT COMPENSATION, COLLECTED FINDINGS AND RECOMMENDATIONS: 1994-1996, ADVISORY COUNCIL ON UNEMPLOYMENT COMPENSATION (1996) ("1995-22. Recommendation: For eligible workers, each state should replace at least 50 percent of lost earnings over a six-month period, with a maximum weekly benefit amount equal to two-thirds of the state's average weekly wages"). Currently, states range between 35-66.67% of the average weekly wage. *See Policy Basics*, *supra* note 25. ("At the start of the recession in February 2020, average weekly benefits were about $387 nationwide but ranged from a low of $215 in Mississippi to $550 in Massachusetts, and they were only $161 in Puerto Rico.").

229 *See* 15 U.S.C. § 9025 (2020).

230 "Pandemic Emergency Unemployment Compensation (PEUC) is the current version of the extra weeks of emergency federal benefits policymakers have enacted in past recessions. It originally provided 13 weeks of federally funded UI to workers who exhaust their regular state benefits." *Policy Basics*, *supra* note 25.

231 Over half of all recipients on the total unemployment insurance aid were PUA recipients on Aug. 29, – one of the peak days of unemployment insurance coverage according to the Century Foundation. *See Unemployment Insurance Data Dashboard*, *supra* note 222.

232 *See* 15 U.S.C. § 9021 (2020); *see Policy Basics*, *supra* note 25.

233 *See* Bruce Brumberg, *Unemployment Benefits for the Self-Employed, Independent Contractors, and Gig-Economy Workers: Lawyer on the Front Lines Answers Common Questions*, Forbes (May 1, 2020, 6:30 AM), https://www.forbes.com/sites/brucebrumberg/2020/05/01/unemployment-benefits-for-the-self-employed-independent-contractors-and-gig-economy-workers-lawyer-on-the-front-lines-answers-common-questions/?sh=4efb1c19d7b6.

workers who were seeking part-time work.[234] The goal was to cover all workers affected by the pandemic.

PUA was incredibly needed. By December 2020, there were at least 19 million workers receiving unemployment benefits, and over 12 million of them were on PUA or PEUC.[235] That means that over half of the jobless workforce was only receiving benefits during the pandemic because of this extra federal program—state laws normally would have shut them out from benefits. The CARES Act was set to expire at the end of 2020, which would have meant that these 19 million workers would have been without any support, plus at least another 3 million more would have exhausted the available weeks, "altogether making this cliff the largest loss of unemployment insurance benefits in U.S. history by far."[236] Fortunately, the program was continued through September of 2021.[237]

Section 2102(a)(3)(A)(i) of the CARES Act defines a "covered individual" for PUA benefits as someone who "is not eligible for regular compensation or extended benefits under State or Federal law."[238] Congress further refined the coverage in Section 2102(a)(3)(A)(ii)(I) to specify that the eligible worker "is otherwise able to work and available for work within the meaning of applicable State law, except that individual" is unemployed, partially unemployed, or unable or unavailable to work for a designated COVID-19 related reason.[239]

Perhaps most importantly for workers normally cut from unemployment benefits, Congress added Section 2102(a)(3)(A)(ii)(II), intending to also cover a worker who "is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 9025 and meets the requirements of subclause (I)."[240] In the Act, Congress made a clear attempt to cover workers seeking part-time employment. However, in its haste to grant relief to workers, Congress also

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234 *See* 15 U.S.C. § 9021.

235 *See* Novello, *supra* note 27.

236 *Id.*

237 *See* American Rescue Plan Act of 2021, 15 U.S.C. § 9021(g) (known as "ARPA," this plan was an extensive economic relief bill signed into law on March 11, 2021 that extended the PUA program until September 6, 2021); the previous bill that extended the PUA was the Continued Assistance for Unemployed Workers Act of 2020, 15 U.S.C. § 9021(c)(1)(a)(ii) (2021) ("Except as provided in paragraphs (2) and (3), the assistance authorized under subsection (b) shall be available to a covered individual-(A) for weeks of unemployment, partial unemployment, or inability to work caused by COVID-19 . . . (ii) ending on or before March 14, 2021.").

238 *Id.* § 9021.

239 *Id.* § 9021(a)(3)(A)(ii)(I)(aa-kk).

240 *Id.* § 9021(a)(3)(A)(ii)(III).

wrote a potential conflict into the statute depending on what state law applies to the claimant.

2. How State Laws Conflict with the Federal CARES Act

The CARES Act states PUA claimants seeking part-time work are covered, as long as they are able and available based on their state's laws.[241] While the legislation was drafted and passed quickly to bring relief to the millions of displaced workers, Congress's focus on "able and available" laws shows how little it knows about how variant states are across the country. Recall that only 39 out of 53 jurisdictions explicitly allow part-time workers to be eligible for benefits.[242] For the jurisdictions[243] that require a claimant to be seeking full-time work in order to be considered "available" under the state's law, are they entitled to PUA benefits?

The requirements of Sections 2102(a)(3)(A)(i), 2102(a)(3)(A)(ii)(I), and 2102(a)(3)(A)(ii)(II) conflict. Reading these provisions together, an individual who is not "able and available for work" under state law is ineligible for PUA, despite being specifically recognized as someone to receive PUA and deemed a PUA-covered individual due to ineligibility for regular state unemployment benefits. To avoid a conflict between the federal law's explicit extended coverage to part-time workers and the state's "able and available" work standard, a state's "full-time" language cannot apply to PUA recipients. Otherwise, the CARES Act would deny the individuals it specifically intended to cover with PUA. It follows that the proper reading of these provisions requires that state eligibility requirements be inapplicable to the extent they conflict with PUA eligibility criteria.

Federal guidance supports this conflict-avoidant reading of the CARES Act.[244] The DOL has further expressed that the point of PUA is

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241 *See id.* § 9021.

242 *See Comparison of State Unemployment Insurance Laws, supra* note 2, at tbl.5-15.

243 *See id.* at tbl.5-29. Note that not all jurisdictions may require full-time, as some have statutes that are silent on this matter.

244 In addition to DOL guidance, on January 22, 2021, President Biden signed the Executive Order on Economic Relief Related to the COVID-19 Pandemic. The Order requires agencies funded by the federal government to "promptly identify actions they can take within existing authorities to address the current economic crisis resulting from the pandemic. Agencies should specifically consider actions that facilitate better use of data and other means to improve access to, reduce unnecessary barriers to, and improve coordination among programs funded in whole or in part by the Federal Government. (b) Agencies should take the actions identified in subsection (a) of this section, as appropriate and consistent with applicable law, and in doing so should prioritize actions that provide the greatest relief to individuals, families, and small businesses; and to State, local, Tribal, and territorial governments." Exec. Order No. 14002, 86 Fed. Reg. 7229 (Jan. 22, 2021).

to cover those who would otherwise not be covered.[245] Specifically, Program Letter 16-20 provides supplemental information that suggests that Section 2102(a)(3)(A)(ii)(II)'s reference back to subclause I relates to finding a COVID-related reason.[246] Also, recall that the DOL issued a letter to states before the pandemic that told them to be flexible for able and available standards—but in general, states often do not use that flexibility.[247]

In a letter to the Wisconsin Department of Workforce Development, the DOL further clarified these questions when it responded to Wisconsin's question of PUA eligibility for someone receiving Social Security Disability Insurance (SSDI).[248] By definition, SSDI recipients are unable to work full-time. To qualify for SSDI, an individual must not be able to engage in "substantial gainful activity" due to a physical or mental impairment.[249] SSDI guiding regulations state that even part-time work may constitute substantial gainful activity.[250] Wisconsin's law requires that workers be available for full-time work (defined at thirty-two or more hours per week), meaning that the state does not extend unemployment benefits to part-time workers.[251] The DOL's letter explains that a claimant receiving SSDI can still receive PUA.[252]

Further DOL guidance specifically states that federalism principles apply if there is a conflict between state and federal law:

> When determining the appropriate course of action in administering the PUA program, states should first consult section 2102 of the CARES Act and the subsequent operating instructions provided by the Department, including UIPL No. 16-20 and UIPL No. 16-20 Change 1.

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245 *See* U.S. Dep't of Labor, Emp. and Training Admin., Office of Unemployment Ins., Unemployment Ins. Program Letter No. 16-20, p. I-12 (Apr. 5, 2020).

246 *See id.* ("An individual satisfies the able and available provisions by certifying each week that he or she is not able or available to work because one of the COVID-19 related reasons . . . but he or she would otherwise be available."). *See also id.* at I-7 for the DOL's reference to a full-time student who lost part-time work: "Provided a full-time student who worked part-time is unemployed, partially unemployed, or unable or unavailable to work because of one of the COVID-19 related reasons. . .then he or she may be eligible for PUA."

247 *See* U.S. Dep't of Labor, Emp. and Training Admin., Off. of Unemployment Ins., Unemployment Ins. Program Letter No. 10-20 (Mar. 12, 2020).

248 *See* Letter from John Pallasch, Assistant S'ecy for Emp. and Training, U.S. Dep't of Labor, to Caleb Frostman, Sec'y of Wisc. Dep't of Workforce Dev. (July 27, 2020).

249 Social Security Act, 42 U.S.C. § 423(d)(1)(A).

250 *See* 20 C.F.R. § 404.1572(a) ("Substantial work activity is work activity that involves doing significant physical or mental activities. Your work may be substantial even if it is done on a part-time basis or if you do less, get paid less, or have less responsibility than when you worked before.").

251 *See* Wis. Stat. § 108.04(2)(a)(1) (2016); Wis. Stat. § 108.02(15s) (2016).

252 *See* Erik Gunn, *U.S. Okays Special Unemployment Pay for Disability Recipients*, WIS. EXAM. (July 28, 2020), https://wisconsinexaminer.com/2020/07/28/u-s-okays-special-unemployment-pay-for-disability-recipients/.

> Where the CARES Act and the operating instructions are silent, states should refer to DUA regulations at 20 C.F.R. Part 625. Where DUA regulations are silent, states should follow applicable state law for administering the regular UC program.[253]

Moreover, even before the CARES Act was enacted, the DOL's letter to the states directed them to use flexibility in their able and available provisions given the difficulties the pandemic presented to workers.[254] State agencies have great flexibility to construe the statutes, and they have the ability to waive requirements when it would be impractical to apply them.[255]

Despite significant federal guidance to grant benefits, state agencies are still finding that claimants are not entitled to PUA if they are not available for full-time work. At the time of this Article, there has been one case about this type of conflictual analysis between state programs and PUA at the Minnesota Court of Appeals.[256] The Court found that the state agency's interpretation denying PUA benefits to a high school student who lost a part-time job due to the pandemic was "inconsistent with the language and purpose of the CARES Act" and was "illogical," as eligibility for PUA benefits "requires a showing that the person is not eligible for regular unemployment-compensation benefits. If the very thing that makes the person eligible for PUA benefits is treated as a disqualification, no one would be eligible for PUA benefits."[257]

In my own practice in Michigan, I have witnessed multiple decisions against part-time workers seeking PUA both from the Unemployment Insurance Agency and the administrative courts. These cases are being litigated in the appellate courts, but in the meantime, my clients have been denied access to benefits during the pandemic when they need them most. There is no reason for states to set a restrictive reading of PUA benefits, especially because it is federally funded.[258] Unlike regular state benefits, this means that the PUA benefit money does not come from the state's budget or add any cost to employers. Employers' experience ratings are not affected by PUA claims nor are they charged any-

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253 *See* Unemployment Ins. Program Letter No. 16-20 Change 1, *supra* note 245, at 2.

254 *See* Unemployment Ins. Program Letter No. 10-20, *supra* note 247.

255 *See id.*

256 *See* Matter of Muse, 956 N.W.2d 1, 4 (Minn. Ct. App. Feb. 22, 2021).

257 *Id.*

258 *See* 15 U.S.C. § 9021 ("There shall be paid to each State which has entered into an agreement under this subsection an amount equal to 100 percent of— (A) the total amount of assistance provided by the State pursuant to such agreement; and (B) any additional administrative expenses incurred by the State by reason of such agreement (as determined by the Secretary), including any administrative expenses necessary to facilitate processing of applications for assistance under this section online or by telephone rather than in-person and expenses related to identity verification or validation and timely and accurate payment.").

thing. There is no economic effect on the state except to add money to its own consumer spending through the federal dollars coming in from the program. It is confusing why state agencies would fight claimants' receipt of PUA benefits through illogical and restrictive reading, especially when the money would directly support the local state's economy.[259] In fact, Congress intended this money to go into the states in order to stabilize the economy during the pandemic.[260] And the money did go to those states that chose to read the statute remedially to meet Congress's purpose. The states that choose restrictive and illogical readings end up leaving millions of dollars outside of their state's economy.

Even if this problem is corrected in the future, it came at a huge cost for the workers who were not provided these crucial funds during a pandemic. Moreover, given that workers with disabilities are more likely to be part-time workers and independent contractors, the PUA expansions to both of these classes show Congress's intent to ensure their access to benefits during the pandemic. The effect of this textual conflict, therefore, impacts workers with disabilities at a higher rate.

3. The Need for Permanent Federal Fixes to Unemployment Insurance

Congress failed to account for the vast differences across state programs when it created PUA. The impact of using state law, however, actively prevents even distribution of the federal funds. By linking PUA recipients to applicable state law, a claimant would be entitled in one state but not in another. As such, this federal program will be unevenly distributed across the country. While this was true, of course, for workers generally trying to access state unemployment benefits, the creation of PUA was to help stave off economic disaster across the country.[261] The distribution of federal benefits was intended to apply to all parts of the nation.

This presents two issues. First, PUA recipients must not be entitled to state benefits. For states that have generous unemployment programs, they will likely have fewer people receiving PUA since those workers will only be able to receive the state benefits.[262] These states will end up

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259 *See* Exec. Order No. 14002, *supra* note 244.

260 *See id.* After about a year into the pandemic, there has been some concern about benefits causing a worker shortage, which has been debunked many times over. *See* Adam Chandler, *No, Unemployment Benefits Don't Stop People from Returning to Work,* WASH. POST (last visited June 21, 2021).

261 *See* Exec. Order No. 14002, *supra* note 244.

262 *See* Unemployment Ins. Program Letter No. 16-20 Change 1, *supra* note 245, at I-8 ("PUA is a benefit of last resort for anyone who does not qualify for other UC programs and who would be able and available to work but for one or more of the COVID-19 related reasons listed in section 2102 of the CARES Act.").

having to spend more on pandemic benefits out of their own coffers, while other miserly state programs get to obtain more funds from the federal government. Second, this creates a perverse incentive for states to always maintain stingy programs because the federal government will step in with federal funds to provide coverage to the people that the states left out.[263] Historically, this is exactly what Congress has done—instead of working to pass unemployment reform to match the current workforce's needs, Congress simply passes temporary packages offering extensions or incentives.[264] Brian Galle reviews this conundrum through the lens of a carrot versus stick approach. "States that might be inclined to take sensible forward-looking approaches may hesitate, in the hopes that by dragging their feet they may trigger some federal reward. To the extent that the federal government can credibly threaten sticks in these cases, states would have the opposite set of incentives."[265] Unfortunately, Congress has generally failed to utilize "sticks" to curb states with delinquent programs.[266]

The delegation of power to the states leaves the UI program stronger in some states and weaker in others. A worker in one state might be denied, but if they lived in another, they could be granted benefits. With such varied workforce coverage across the country, the same federal UI program can become less effective depending on geography because of this federal-state partnership. Even though the positive economic effects of unemployment programs are well established, state legislatures often lack the political will to invest in their unemployment programs.[267] As such, some federal intervention is needed to push state programs to cover the workforce. Stephen Wandner discusses three ways the federal government could intervene to create a better unemployment

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263 *See generally* Brian Galle, *How to Save Unemployment Insurance*, 50 ARIZ. ST. L.J. 1009 (2019).

264 *See id.* at 1016.

265 *Id.* at 1047.

266 *See generally* Galle, *supra* note 263; *See* Wandner, *Options for Unemployment Insurance*, *supra* note 182, at 6–8 ("With little oversight by USDOL and limited federal standards, the state UI programs have weakened in their scope and adequacy of benefits as well as in their ability to adequately finance benefits . . . . These weaknesses of the UI system are largely attributable to the failure of USDOL and Congress to set nationwide standards with respect to benefit eligibility, maximum benefits, and duration, as well as financing standards that would increase the adequacy and equity of state UI benefits across the country. Altogether, the federal government has stepped back from its role in requiring the UI system to adapt to the needs of unemployed workers and the U.S. economy.").

267 Brian Galle discusses this problem as part of unemployment insurance's "'M' problems - moral hazard, mobility, and myopia." He explains that "state officials lack strong incentives to modernize their UI statutes and make sure that eligibility and other rules reflect the realities of the new workplaces. Typically, it is concentrated interest group activism that motivates lawmakers to overcome legislative inertia and attend to the interest group's policy area, but with the collapse of the American labor movement there are no coherent groups to play that role for the UI system." *See id.* at 1009–62.

system: 1) Keep the current federal-state partnership but require comprehensive federal floors for all states to meet (but they are welcome to exceed); 2) Create a new federal program with federal laws for states to administer (like PUAQ has done, albeit temporarily); or 3) Abandon the state partnership and fully federalize the program.[268]

Any level of federal response, however, has been contested. The best-of-all-worlds response is the federal floors. This would allow (the very few) states with more generous programs to keep the programs running, and it would bring up most of the states lagging behind to meet basic levels. There would also be more accountability for states failing to cover their workforce. However, both federal floors and Wandner's second option, the federal program with federal law administered by the states, are likely to have issues like the PUA conflicts we saw above. Any state partnership is likely to still create variation across programs based on the states' desires to be more or less generous. Full federalization would eliminate state generosity issues, but it would likely lower access for some states who have invested in their unemployment programs. States also argue that they know what their population needs.[269] These same states, however, are the ones that wait to act until there is federal funding.[270] States want the freedom to do as they please but also to submit to federal control if the federal government is going to pay for it.[271]

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268 *See generally* Wandner, *Options for Unemployment Insurance*, *supra* note 182; *see also* Galle, *supra* note 267 (calling also for increased federal involvement, including default federal benefit rules and federal adjudication for benefits).

269 *See id.* at 24–25. ("[A] federal-state program was enacted, encouraging states to experiment in developing their own UI programs. Most of those experiments have not succeeded."); *see also Labor Secretary Eugene Scalia on The Covid-19 Unemployment Crisis*, AM. ENTERPRISE INST. (Dec. 14, 2020), https://www.aei.org/wp-content/uploads/2020/12/201214-Labor-Secretary-Eugene-Scalia-on-the-COVID-19-unemployment-crisis.pdf?x91208 ("The sheer variety in states' views on UI benefits is one reason not to attempt to impose a uniform national program. As mentioned, Massachusetts, for example, has an average weekly benefit amount more than five times Mississippi's. Middle ground would be defined, and it would effectively result in some states sending money to other states to fund benefits larger than what they consider appropriate for their own residents. Perhaps more important, state governments are responsible for economic policies that can create or destroy jobs. States make their own economic beds to some extent. We must avoid an unemployment system in which residents of one state fund another state's improvident policies.").

270 *See generally* Wandner, *Options for Unemployment Insurance*, *supra* note 182; *see also* Galle, *supra* note 262.

271 *See* Huberfeld, *supra* note 44, at 480 ("So, states often seek additional funding from the federal government, and without these additional funds, many states would be unable to pay for their Medicaid programs. States seem to be aware of this economic quagmire and to resent it. On the one hand, they ask for additional funding for Medicaid, knowing that the program is necessary. On the other hand, they ask for more freedom in Medicaid, understanding that more federal funding generally leads to greater federal control of the program. This schizophrenic behavior is on display . . . . Federalizing Medicaid would end the economic fluctuations that have a direct effect on Medicaid enrollees' health.").

However, it is unclear how any of this would work in the long run due to the evolving nature of the workforce and the clear lack of political will to pay attention to unemployment programs except during times of crisis.[272] Regardless, any federal intervention requires political will, which Congress has not had since the program's creation. "The principal federal intervention has been to provide longer durations of emergency benefit payments during recessions. Otherwise, the federal partner has largely ignored the program during good times and failed to strengthen and modernize the program through needed reform."[273]

IV. THE AMERICANS WITH DISABILITIES ACT'S INTERSECTION WITH STATE UNEMPLOYMENT PROGRAMS

The workforce is radically different now than it was when unemployment insurance was enacted as part of the New Deal in 1935. As the previous sections outlined, there are many pitfalls for workers with disabilities who seek unemployment benefits. Outdated unemployment laws originally excluded them from the program and now able and availability provisions that require full-time work perpetuate this outdated notion of whose labor has value. Congress specifically created the ADA to prevent *both* private and public actors from discriminating based on an individual's actual disability, perceived disability, and/or, history of disability and to ensure that workers are protected from identity-based discrimination in both their employment and in their ability to access public benefits.[274]

Workers who face discrimination at work typically must show that they have been subject to an adverse employment action in order to qualify for the ADA's protections.[275] Often that adverse employment action is a job separation. Unemployment insurance is meant to support workers when they are involuntarily separated from a job. When workers are separated from their job because of disability discrimination, they should be entitled to unemployment benefits. Even if their separation from employment is not due to their medical condition, their disability should not then prevent them access to unemployment benefits.

In the context of unemployment insurance, states' failures to keep pace with other anti-discrimination laws have led to absurd results that

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272 *See generally* Wandner, *Options for Unemployment Insurance*, *supra* note 182; *contra Labor Secretary Eugene Scalia on The Covid-19 Unemployment Crisis*, AM. ENTERPRISE INST. (Dec. 14, 2020), https://www.aei.org/wp-content/uploads/2020/12/201214-Labor-Secretary-Eugene-Scalia-on-the-COVID-19-unemployment-crisis.pdf?x91208*; cf.* Huberfeld, *supra* note 44, at 480.

273 Wandner, *Options for Unemployment Insurance*, *supra* note 182, at 9.

274 *See* 42 U.S.C. § 2000e *et seq.*; 29 U.S.C. § 621; 29 U.S.C. § 2601; 42 U.S.C. § 12101; 29 U.S.C. § 794; 20 U.S.C. § 1400.

275 *See Disability Discrimination*, EEOC, https://www.eeoc.gov/disability-discrimination.

have serious economic consequences for workers with disabilities. A claimant may have a viable claim for a discriminatory discharge, but not a valid claim to access unemployment insurance coverage, a social safety net intended to remedy the economic harms of involuntary unemployment. Despite the enactment of legal protections in the formal workplace, the social safety net that is designed to catch workers when they are temporarily outside an employment relationship has left gaping holes in its coverage. These holes compound the harms workers with disabilities already have. While political will has prevented legislative updates to unemployment programs, there is another possibility to root out discrimination in unemployment programs—sue under Title II of the ADA.[276]

A. The ADA's Role

In response to insidious disability discrimination pervading private and public sectors, Congress passed the Americans with Disabilities Act in 1990.[277] Recognizing that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem,"[278] Congress's goal was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[279]

Title II of the ADA allows for plaintiffs to sue a state entity for denying the benefits of a state program, providing that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[280] The phrase "services, programs, or activities" "encompasses virtually everything that a public entity does."[281] Congress intended for this provision to apply broadly. There can be no question that

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276 *See* Department of Justice, *Americans with Disabilities Act Title II Regulations*, ADA (Sept. 15, 2020), https://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.pdf.

277 *See* Robert Burgdorf, *Why I Wrote the Americans with Disabilities Act*, WASH. POST (July 24, 2015), https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/.

278 42 U.S.C. § 12101(a)(2).

279 *Id.* § 12101(b)(1).

280 42 U.S.C. § 12132; As an entity receiving federal funding, a state's unemployment insurance agency is subject to Section 504 of the Rehabilitation Act. *See* 29 U.S.C. § 794 ("No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . .").

281 Johnson v. City of Saline, 151 F.3d 564, 570 (6th Cir. 1998). *See generally* 42 U.S.C. § 12201(a); *see also* Furgess v. Pennsylvania Dep't of Corrections, 933 F.3d 285 (3d Cir. 2019).

a state's unemployment insurance program that issues benefits to jobless workers, receives federal funding, and is overseen by a federal agency is subject to the federal prohibition against discriminating on the basis of ability.

State law is limited or invalid to the extent it conflicts with the ADA.[282] Congress wrote into the ADA a specific abrogation of the Eleventh Amendment, intending for the Act to have the ability to sue state entities in federal court.[283] If a law is facially discriminatory, the remedy is to remove the discriminatory language.[284] While it is unlikely that having a full-time requirement is facially discriminatory, the state's unemployment law would be rendered neutral if the reference to full-time work was struck from the statute.

Further, while the Supreme Court has held that Congress's abrogation clause is not enforceable under Title I claims, states can be sued under Title II.[285] However, the Supreme Court did limit the abrogation of sovereign immunity for compensatory damages for conduct that violates the Constitution.[286] The Supreme Court made it clear that states can be sued under Title II "insofar as it authorizes prospective injunctive relief against the State."[287]

Because the remedy for the claimants involved in any possible ADA lawsuit against a state unemployment agency is injunctive rather than compensatory, sovereign immunity likely does not apply. However, if

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282 *See* 29 C.F.R. § 1630.1(c)(2); *see also* 29 C.F.R. § Pt. 1630, App. (citing 1990 House Labor Report at 135; 1990 House Judiciary Report at 69–70); *see, e.g.*, Weaver v. N.M. Human Serv. Dep't, 123 N.M. 705, 945 P.2d 70, 76 (1997) (holding that a New Mexico administrative regulation was invalid because it limited the time in which individuals with disabilities could receive general assistance benefits and violated Title II of the ADA); *see also* Lovell v. Chandler, 303 F.3d 1039, 1052–55 (9th Cir. 2002) (holding that Hawaii state regulations violated the ADA because the regulations excluded otherwise qualified individuals with disabilities from the state healthcare program).

283 *See* 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.").

284 *See* New Directions Treatment Servs. v. City of Reading, 490 F.3d 293, 303 (3d Cir. 2007).

285 State actors are often found to be protected from ADA-liability when they are acting as an employer. For Title I of the ADA, which involves employment-based disability discrimination, the Supreme Court ruled that Congress does not have the power to make that abrogation for a case seeking compensatory damages. *See* Bd. of Trs. v. Garrett, 531 U.S. 356, 363 (2001).

286 *See* Tennessee v. Lane, 541 U.S. 509, 533 (2004) ("For these reasons, we conclude that Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress's § 5 authority to enforce the guarantees of the Fourteenth Amendment."); *see also* United States v. Georgia, 546 U.S. 151, 159 (2006) ("Thus, insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.").

287 *Georgia*, 546 U.S. at 160 (Stevens, J., concurring).

other damages were sought, states may still be able to be sued under Title II. The Supreme Court agreed that public assistance programs create a property right, recognizing that procedural due process is applicable to the termination of public assistance.[288] Such benefits are a matter of statutory entitlement for persons qualified to receive them.[289] States, moreover, are able to waive their Eleventh Amendment immunity.[290]

Regardless of whether sovereign immunity applies to a Title II claim, this lawsuit could also be brought under Section 504 of the Rehabilitation Act. The ADA was not the first Congressional Act designed to prevent disability discrimination–– the ADA built upon Congress's 1973 Rehabilitation Act.[291] The standards for both Title II and Section 504 are generally the same and the claims are often brought together.[292] The only major difference between the Acts is that Section 504 has a valid Eleventh Amendment abrogation clause if the state program has accepted federal funds.[293] Congress's abrogation language in Section 504 is deemed proper because it was enacted under its spending power; when states accepted the federal funds, they waived their sovereign immunity.[294] Most state governments receive at least some federal funding, so "Section 504 generally covers at least as much conduct as does Title II of the ADA."[295]

Without question, every state unemployment agency takes a significant sum from the federal government to administer their program.[296]

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288 *See* Goldberg v. Kelly, 397 U.S. 254, 397 (1970) (citing Sherbert v. Verner, 374 U.S. 398 (1963)).

289 *Id.* See *infra* Part V.B, for a further review. In the unemployment context, a possible ADA claim would be strongest for denial of a PUA benefit given the point of the program is to provide for all workers affected by the pandemic, including all part-time workers and those who do not earn enough for regular state benefits.

290 *See* Edelman v. Jordan, 415 U.S. 651, 686 (1974); Judith Olans Brown & Wendy E. Parmet, *The Imperial Sovereign: Sovereign Immunity & the ADA*, 35 U. MICH. J. L. REFORM 1, 6 (2001).

291 *See* 29 U.S.C. § 794 (2018).

292 *See* Armen H. Merjian, *AIDS, Welfare, and Title II of the Americans with Disabilities Act*, 16 YALE L. & POL'Y REV. 373, 384 (1998); James C. Harrington, *Overcoming Section 1983 Hurdles: Using the Americans with Disabilities Act to Re-open the Civil Rights Door and Hold Government and Police Accountable*, PRISON LEGAL NEWS 1, 7–8 (2007) ("However, to the extent that Title II is limited by state sovereign immunity in future cases, Section 504 will pick up the slack. Section 504 rests on the Spending Clause: accepting federal money has an agreed-upon *quid pro quo* obligation to implement disability law requirements that are virtually the same as those required by the ADA and vice versa.").

293 *See* 42 U.S.C. § 2000d–7(a)(1) (2014).

294 *See* Samuel R. Bagenstos, *The Anti-leveraging Principle and the Spending Clause After NFIB,* 101 GEO. L. J. 861, 912–16 (2013).

295 SAMUEL R. BAGENSTOS, *Coverage of the ADA, Rehabilitation Act, Fair Housing Act, and Affordable Care Act, in* DISABILITY RIGHTS LAW: CASES AND MATERIALS 1, 9, (3rd ed., 2020).

296 For unemployment insurance the DOL's regulations mandate state UI programs must "substantially comply" with Section 302 of the Social Security Act (42 U.S.C. 502), with

Moreover, states paying claimants under the PUA federal program are using federal funding exclusively.[297] As such, sovereign immunity is not a concern for a combined Title II and Section 504 claim.

With that lofty promise to eliminate disability discrimination, under the ADA, a plaintiff must prove 1) that they are a qualified individual with a disability, 2) that they were discriminated against by being excluded from or denied the benefits of a public entity's services, and 3) that they were discriminated against because of their disability. The following analysis shows how workers who have disabilities that prevent them from seeking full-time work are being denied unemployment benefits because of their disability.

B. Applying the ADA to Unemployment Program Violations

Recall, as outlined in Part II, the three ways state unemployment programs exclude workers because of their disability: 1) a worker with a disability is more likely to have insufficient wages because of non-traditional employment and/or because of a state's restrictive monetary qualification requirements (Jamie), 2) a worker with a disability is more likely to separate from work due to a medical reason (Charlie), which requires additional documentation and relies on an employer's willingness or unwillingness to provide a meaningful accommodation, and 3) a worker with a disability is more likely to be able and available for part-time work only (Sam).

Title II does not require that a qualified individual be able to perform the essential functions of a job. Under Title II, a "qualified individual with a disability" is defined as an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.[298] Therefore, the statutory bar to receive a state benefit under Title II is ostensibly lower than under Title I of the ADA, which defines a "qualified individual" as a person

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respect to whether a State is eligible to receive Federal grants for the administration of its unemployment insurance program. *See* 20 C.F.R. § 604.6 (2012).

[297] *See* Coronavirus Aid, Relief, and Economic Security Act of 2020, 15 U.S.C. § 9021(f)(2) ("Payments to States –There shall be paid to each State which has entered into an agreement under this subsection an amount equal to 100 percent of— (A) the total amount of assistance provided by the State pursuant to such agreement; and (B) any additional administrative expenses incurred by the State by reason of such agreement . . . including any administrative expenses necessary to facilitate processing of applications for assistance under this section online or by telephone rather than in-person and expenses related to identity verification or validation and timely and accurate payment.").

[298] 42 U.S.C. § 12131(2) (2018).

with a disability "who . . . can perform the essential functions" of their job "with reasonable accommodation."[299] Title I then goes on to list a number of "reasonable accommodations," which includes part-time work along with "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations."[300]

Since a listed reasonable accommodation under a Title I claim is to reduce to part-time work,[301] it does not follow that a state program can deny access under this same accommodation. It is illogical for state unemployment programs to prevent access to their programs for part-time workers by refusing to accommodate workers on a standard that is harsher and more stringent than would be permitted by an employer under Title I.

The purpose of unemployment insurance is to provide economic stability to workers when they are made vulnerable by unemployment but want to continue participating in the workforce.[302] Here, the worker with a disability is being denied access to a social safety net even though, with the accommodation of allowing a search for part-time work, they are able and available to work.[303] So, why have state unemployment programs not been subject to ADA liability?

Likely, the ADA has been underutilized because unemployment claims tend to be litigated *pro se* and fail to provide many incentives for lawyers to be involved. In my experience in Michigan and from discussions with my colleagues nationally, there are only a few private attorneys who handle unemployment cases given the lack of financial ability for unemployed workers to pay.[304] There are few avenues for private attorneys to be paid, and jobless workers often do not have spare funds to spend on hiring an attorney, especially if they have been denied benefits. Sometimes, legal services offices work in UI, but that varies across each

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299 42 U.S.C. § 12111(8) (2018).

300 *Id.* § 12111(9)(B).

301 *See id.* ("The term 'reasonable accommodation' may include . . . job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.").

302 *See* Evermore, *supra* note 215.

303 Or in the case of workers like Charlie, they had to quit their job due to their medical condition and that "quit" prevented access to benefits even though it was involuntarily.

304 This is because there is no way to obtain attorney fees for representation, and claimants often cannot afford an attorney due to being without a job. And if they need an attorney, that likely means that they were denied benefits—their only means of supporting themselves through their period of joblessness.

state and legal services depends on their funding. Generally, most claimants go without representation. Without many attorneys representing claimants in the administrative system, ADA and possibly other civil rights violations have easily gone unnoticed. Moreover, since the relief requested is generally injunctive, there is even less of a financial incentive for private attorneys to take the case.

This is not to say that there have not been any of these kinds of cases.[305] Most on point with an ADA violation is the Minnesota Court of Appeals' decision in *Huston*, which struck down the unemployment law preventing unemployment insurance to someone on Social Security Disability Insurance (SSDI) benefits.[306] The Court found that the law created an impermissible irrebuttable presumption that workers on SSDI are unable to work, which violated the Americans with Disabilities Act (ADA).[307] Citing the Supreme Court in *Cleveland v. Policy Mgmt. Sys. Corp.*,[308] the court held that someone with a disability receiving SSDI does not automatically mean that the individual is unable to work. This decision can be properly understood as "a brake on potential mischief by state legislatures so intent on budget-balancing that they try to do so on the backs of persons with limited income and serious physical or mental impairments, many of whom struggle to earn a living on the margins of the labor market."[309]

To properly analyze the possible claims for program access, the two major steps to consider are (1) showing that the person has a disability and (2) that the program does not have to be fundamentally altered to

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305 *See* Brunk v. State, Div. of Emp., 540 S.W.3d 917, 924 (Mo. Ct. App. 2018) (accepting claimant's challenge to Missouri's use of "available for full-time work" as an adequate proxy for full participation in the workforce); *see also* Huston v. Comm'r of Emp. & Econ. Dev., 672 N.W.2d 606 (Minn. Ct. App. 2003) (holding that the state's unemployment law violated the ADA). In *Huston*, Minnesota Court of Appeals held that Minnesota statutory provision creating irrebuttable presumption that individuals who file for or receive Social Security Disability Insurance (SSDI) benefits are unable to work, without an opportunity to rebut that presumption, violated the Americans with Disabilities Act (ADA).

306 *See Huston*, 672 N.W.2d at 612.

307 *See id.* at 610.

308 *See* 526 U.S. 795, 797 (1999). Other cases have recognized blanket bars on eligibility serve as irrebuttable presumptions that violate the Due Process Clause when enacted by state actors. The Western District of Missouri found a municipal board of police commissioners violated the Due Process Clause when it enacted a blanket prohibition on one-handed license applicants acts as an irrebuttable presumption that provides for too little process. *See also* Stillwell v. Kansas City, Mo. Bd. of Police Comm'rs, 872 F. Supp. 682, 688 (W.D. Mo. 1995). A state's blanket prohibition that all those who are only available for part-time work are ineligible for unemployment benefits is just such an absolute bar because it forecloses the opportunity for an individual assessment where a worker can demonstrate their ability to meaningfully participate in the workforce.

309 Daniel B. Kohrman & Kimberly Berg, *Reconciling Definitions of "Disability:" Six Years Later, Has Cleveland v. Policy Management Systems Lived Up to Its Initial Reviews As a Boost for Workers' Rights?*, 7 MARQ. ELDER'S ADVISOR 29, 63 (2005).

accommodate the workers.[310] To illustrate how the ADA can be effectively used to protect workers with disabilities, like Sam, Charlie, and Jamie, I apply the pre-existing jurisprudence to each of their cases. I spend the most time reviewing Sam's case, arguing that state programs requiring full-time ability and availability violate Title II. But this is not to say that issues of involuntary job separation due to disability (Charlie) are not feasible as well. Meanwhile, claimants like Jamie, whose exclusion stems from the source and amount of their earned income may have trouble surviving a fundamental alteration defense. However, all three claims could be viable if the worker was denied PUA and they have a COVID-19 reason requiring unemployment benefits.

1. Qualified Individual Analysis for an Unemployed Worker

The ADA explicitly provides that disability "shall be construed broadly in favor of expansive coverage.[311] The ADA defines "disability" as: 1) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," 2) "a record of such an impairment," or 3) "being regarded as having such an impairment."[312] The ADA regulations provide a non-exhaustive list of both mental and physical impairments, as well as major life activities, including "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[313] A Title II violation under the ADA reviews "whether public entities have complied with their obligations and whether discrimination has occurred, not the extent to which an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis."[314]

One of the enumerated major life activities under the ADA is working, so a physical or mental impairment that limits a plaintiff's ability to work full-time squarely falls within the statutory definition of major life activity. Moreover, precedent makes clear that the term "major" in the statutory phrase "major life activities" "shall not be interpreted strictly to

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310 *See* Laurence Paradis, *Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act: Making Programs, Services, and Activities Accessible to All,* 14 STAN. L. & POL'Y REV. 389, 391 (2003).

311 28 C.F.R. § 35.108 (2017).

312 42 U.S.C. § 12102(1) (2018).

313 42 U.S.C. § 12102(2)(A) (2018).

314 28 C.F.R. § 35.108(d)(ii) (2017).

create a demanding standard," since the ADA is a remedial statute "construed in favor of broad coverage."[315]

Whether the inability to work full-time constitutes a "substantial limitation" on work is one question regarding the application of an ADA claim. In a recent Sixth Circuit decision, the court found that there was a genuine issue of material fact as to whether a plaintiff was "substantially limited" from working because she had previously received a doctor's note restricting heavy lifting at work because of her arthritis.[316] The court found that because the plaintiff testified that she told her boss that "she wanted part-time work because she was having issues with her medical condition," this was enough evidence of a substantial limitation on a major life activity (work) to give rise to a genuine issue of material fact as to whether she was "disabled" under the meaning of the Act.[317] This holding suggests that courts are open to finding that inability to work full-time is a substantial limitation under the ADA.

Of course, there would have to be some analysis into any hypothetical plaintiff for an ADA case against a state unemployment program. If the worker's disability is the basis of the state's exclusion from the unemployment program, the program discriminates based on their disability. There is, however, a weak argument that agencies deny most workers, so workers with disabilities are no different. This response has been struck down by the Second Circuit, which found that even if a program does not function well for everyone, denying access to those with disabilities is still a viable ADA violation.[318]

The Title II ADA claim against an unemployment program will usually take the form of a request for reasonable modifications to the ser-

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315 Harrison v. Soave Enterprises, LLC, 826 Fed. App'x 517, 523 (6th Cir. 2020) (quoting Hostettler v. Coll. of Wooster, 895 F.3d 844, 853 (6th Cir. 2018)); *see* also Summers v. Altarum Inst., Corp., 740 F.3d 325, 329 (4th Cir. 2014) ("the definition of disability "shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by [its] terms . . . and that the term is "not meant to be a demanding standard."); *see also* 29 C.F.R. § 1630.2(i)(2); 42 U.S.C. § 12102(4)(A); Adams v. Potter, 193 Fed. App'x 440, 444 (6th Cir. 2006) (While the ADA's coverage is intentionally broad, the breadth will not extend to "almost everyone" who suffers from a common/routine ailment, such as back problems, especially where a plaintiff can perform most activities).

316 *See* Thompson v. Fresh Products, LLC, 985 F.3d 509, 523 (6th Cir. 2021).

317 *See id.*

318 *See* Henrietta D. v. Bloomberg, 331 F.3d 261, 279–80 (2d Cir. 2003) ("Moreover, as we noted earlier, the fact that individuals other than the class members have been unable to obtain benefits does not of itself demonstrate that the plaintiffs do not face conditions that are more onerous for them because of their particular disabilities. The absence of disparate impact would not prove that DASIS is effective enough to provide benefits under a state of affairs where the social services system functioned smoothly. Where the District Court has clearly identified disability-related challenges that make access more difficult for the plaintiff class than for those without disabilities and has found the accommodative scheme to be 'broken,' we hold that the plaintiffs have demonstrated that their disabilities are a cause of the denial of access to benefits.").

vice, program, or activity at issue, arguing that such a modification is required in order for the claimant to secure meaningful access. A failure to make such modifications may be considered unreasonable and therefore discriminatory.[319] The reasonable modification for Sam would be to allow part-time workers with disabilities access to unemployment benefits. Since part-time work is a reasonable accommodation under Title I for private employment, the same logic could also be applied to unemployment programs. Otherwise, an employer could discharge a claimant rather than reasonably accommodate them in violation of Title I, but then that same claimant would face an insurmountable battle to receive unemployment benefits due to needing part-time work in certain states. The result of denying access to unemployment benefits for workers with disabilities in this situation should also violate Title II.[320]

For these workers, the reasonable accommodation sought here would be to pay out the benefits despite the state's ruling that their disability prevents the claim, as paying out benefits to disabled workers who are otherwise qualified individuals would constitute a change to the program that would be both reasonable and capable of providing meaningful access. Where a public entity provides benefits, the meaningful access to those benefits required by the ADA "cannot and does not require[ ] States to provide a certain level of benefits to individuals with disabilities."[321] All the ADA requires is that public entities do not discriminate "with regard to the services they in fact provide."[322] The touchstone for the level of participation required is meaningful access to the benefits of the services such entities provide.[323] Thus, a Title II claim would not require the state to designate a specific level of benefits to disabled claimants. Rather, all it would require is that the Agency pay out benefits in a way that does not discriminate solely on the basis of disability.

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319 *See* Bedford v. Michigan, 722 Fed. App'x. 515, 518 (6th Cir. 2018); *see also* Pottgen v. Mo. St. High Sch. Activities Ass'n, 40 F.3d 926, 930 (8th Cir. 1994).

320 This same analysis could apply to a worker like Charlie, who had to leave their job involuntarily because of their medical condition. The accommodation here would be to allow their involuntary quit to be non-disqualifying, which actually fits with the DOL's standard of law already. *See* 20 C.F.R. 604.4(b) ("If an individual has previously demonstrated his or her ability to work and availability for work following the most recent separation from employment, the State may consider the individual able to work during the week of unemployment claimed despite the individual's illness or injury, unless the individual has refused an offer of suitable work due to such illness or injury.").

321 Mitchell v. Cmty. Mental Health, 243 F. Supp. 3d 822, 841 (E.D. Mich. 2017) (quoting Davis v. Shah, 821 F.3d 231, 264 (2d Cir. 2016)) (internal quotation marks omitted).

322 *Id.*

323 *See id.*

2. Fundamental Alteration

In response to a reasonable modification request, a state is likely to invoke the fundamental alteration defense. A program eligibility requirement which could discriminate against people with disabilities may be deemed essential only if the program's purposes could not be achieved without the requirement.[324] "There is no precise reasonableness test, but an accommodation is unreasonable if it either imposes undue financial or administrative burdens, or requires a fundamental alteration in the nature of the program."[325]

However, a state does not escape liability if its statute is the basis of the discrimination—here, the statutory requirement being full-time work. If a requirement is not essential, the fact that it is embodied in a statute rather than a regulation makes no difference. "[I]n virtually all controversies involving the ADA and state policies that discriminate against disabled persons, courts will be faced with legislative (or executive agency) deliberation over relevant statutes, rules, and regulations."[326] The courts have a duty to see that "the mandate of federal law is achieved," and statutes are no more immune to judicial scrutiny for ADA compliance than are rules or regulations.[327] For cases involving waiver of rules and regulations, the court's overall focus should be on "whether waiver of the rule in the particular case would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change."[328]

Arguably, there could be a valid basis under all three scenarios depending on the circumstances: 1) insufficient monetary earnings/contract work (Jamie); 2) medical quits (Charlie); 3) full-time availability (Sam). Recall that the DOL, which oversees state unemployment programs, defined the three main criteria for state programs to have as 1) did the worker earn enough; 2) was the separation from work involuntary; and 3)

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324 *See* Alexander v. Choate, 469 U.S. 287, 300 (1985); *see also* Pandazides v. Va. Bd. of Educ., 946 F.2d 345, 349 (4th Cir. 1991); Strathie v. Dep't of Transp., 716 F.2d 227, 230–31 (3d Cir. 1983).

325 *See* DeBord v. Bd. of Educ. of Ferguson-Florissant Sch. Dist., 126 F.3d 1102, 1106 (8th Cir. 1997) ("There is no precise reasonableness test, but an accommodation is unreasonable if it either imposes undue financial or administrative burdens, or requires a fundamental alteration in the nature of the program."); *see also* Pottgen, 40 F.3d at 930 ("Reasonable accommodations do not require an institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."); Scheffler v. Minn. Dep't of Human Servs., No. A14-1939, 2015 WL 4508109, at *5 (Minn. Ct. App. July 27, 2015).

326 Crowder v. Kitagawa, 81 F.3d 1480, 1485 (9th Cir. 1996).

327 Fry v. Saenz, 120 Cal. Rptr. 2d 30, 35 (Ct. App. 2002).

328 Tri-Cities Holdings v. Tenn. Admin. Pro. Div., 726 F. App'x 298, 316 (6th Cir. 2018) ("[W]aiver is especially likely to impose a fundamental alteration when the question of whether to grant such a waiver would require a complex, 'case-by-case assessments.'"); *but see* Bombrys v. City of Toledo, 849 F. Supp. 1210, 1219 (N.D. Ohio 1993) ("An individualized assessment is absolutely necessary if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices.").

are they able, available, and actively seeking work.[329] For PUA, the CARES Act sought to cover all workers not able to get state benefits who have been affected by the pandemic, including those who work part-time, did not earn enough in their work history, and those who are gig workers/independent contractors.[330] Therefore, the strength of the fundamental alteration defense for any of these cases is severely weakened if the benefit denial is from the PUA program – especially given that PUA's purpose is to grant benefits even when states would have otherwise denied them. Due to the variant rules for earning thresholds and "medical quits," I focus the analysis below primarily on states that exclude part-time workers with disabilities in Part IV.B.2.c.

a. Workers excluded because their disability affected what kind of work they have in their history (Jamie)

Under this first scenario, a worker like Jamie who has not earned enough and/or has earnings in non-traditional employment would be able to satisfy this analysis for a PUA claim given that these workers are specifically identified as covered individuals.[331] But it is unlikely that a claim for state benefits would succeed. The state program is funded through taxes based on wages earned and paid into the state's system. Without funds, the state could not sustain the program, thus making this requirement more essential. Here, a worker whose wages have not paid into the system sufficiently, either due to having insufficient earnings in covered employment or due to working in non-traditional employment relationships, would likely be a valid fundamental defense to deny the ADA claim because the proposed accommodation is financially infeasible.[332]

Here, the worker could be cut out because of their inability to earn more due to their disability, causing the monetary threshold to be too high. It may also be difficult to prove a causal connection between the worker's earnings and type of employment to the disability itself. Given

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329 *See* 20 C.F.R. § 604.5; 20 C.F.R. § 604.4.

330 *See* Coronavirus Aid, Relief, and Economic Security Act of 2020 (CARES), 15 U.S.C. § 9001 *et seq.* (2020).

331 *See* 15 U.S.C. § 9021 (defining individuals covered by the program as "an individual who—(i) is not eligible for regular compensation or extended benefits under State or Federal law or pandemic emergency unemployment compensation" and including an individual who "is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation"); *see also* Unemployment Ins. Program Letter No. 16-20 Change 1 *supra* note 245, at I-8 ("PUA is a benefit of last resort for anyone who does not qualify for other UC programs and who would be able and available to work but for one or more of the COVID-19 related reasons listed in section 2102 of the CARES Act.").

332 *See* Waskul v. Washtenaw Cnty. Cmty. Mental Health, 979 F.3d 426, 436 (6th Cir. 2020).

that most states do have programs where part-time workers are monetarily eligible, this could be a viable claim because a majority of states have shown that the program works with a relaxed earning threshold. This ADA claim, however, depends on someone working in a traditional employment setting since the state's tax structure requires the taxes from the earnings to support the program. The state's "undue burden" or fundamental alteration defense would be stronger for workers who do not have taxed earnings since it would require the agency to find a new way to fund the program for the claimant with disabilities.

However, this analysis would be different for a low-wage earner with taxable earnings depending on the state's earning requirements. In other words, Jamie's earnings as a part-time employee could be enough for them to qualify in some states. Reviewing Chart II.A above in Section II, states that are out of line with the rest of the country with their monetary requirements, like Michigan and Arizona, might have a harder time showing that the stringent monetary threshold is essential. Further, the ARRA shows the federal government's incentive to allow low-wage earners to have access to unemployment benefits, suggesting that a worker's earnings, if under covered employment, may not be a fundamental alteration to the unemployment insurance program. There may be a disparate impact claim to show that the workers cut out based on the high-wage requirement disproportionately affects workers with disabilities. While the states dictate their own formulas, unemployment insurance is still a federal program. As such, a state that has a formula that is different than the rest of the country could create doubt about whether the state's law is actually essential to the federal program.

In *Waskul v. Washtenaw County Community Mental Health*, a group of disabled individuals brought suit under Title II, alleging that their Community Living Support (CLS) program had changed its method for calculating its budget, and this new method prevented them from receiving required services.[333] At the district court level, the court held that the plaintiff's relief sought—an overhaul of the budgeting method—would fundamentally alter the programs, and thus the defendants were not required to alter the budget even if it violated Title II.[334] The Sixth Circuit reversed, finding that the proposed modifications to the budget would not fundamentally alter the program.

The Sixth Circuit considered Supreme Court dicta that said "if in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsible the State has undertaken for the care and treatment of a large and diverse population of persons," then the state might be able to show that the relief would constitute a funda-

333 *See id.* at 436 (citing Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 584 (1999)).
334 *See id.* at 463.

mental alteration.[335] In *Waskul*, the court applied the Supreme Court's dicta and held that for the defendant to show that the "proposed alteration of the budget methodology" constituted a fundamental alteration, it needed to be *generally inequitable* to implement.[336] The Sixth Circuit found that the suggested change to the defendant's budget was "well within Defendants' capacity to provide" because the amount they were spending "under the current methodology is allegedly well below what the State had committed to spend under the [medicaid] Waiver."[337]

The relevance of *Waskul* depends on whether the state could make an argument that including part-time workers with disabilities in the program would make it "inequitable" because it would require them to dole out benefits to so many more individuals in the state that it would stretch its budget beyond its ceiling and cut off other eligible claimants. This argument would be compelling against workers in contracting positions given that it requires the state to finance the program completely differently. But if the worker has part-time taxable earnings as an employee and would be able to qualify for benefits in other states, the fundamental alternation defense would be weakened.

Finally, a PUA claim here would be much stronger since coverage for both contract workers and insufficient work history were both intended to be covered with PUA. The point of PUA was to cover all people that states excluded – including those who are part-time, low-wage earners, and those who are contract workers. Since the funding for PUA benefits comes from the federal government through the CARES Act, there is no fundamental alteration to the financing scheme, so the defense should fail.

b. Workers excluded because their medical condition forced them to quit (Charlie)

For scenario two, the various conditions that states place on a worker like Charlie who has to quit a job due to a medical condition could create a basis for an ADA claim. Due to the extensive variation across state programs for this requirement, I will skip a thorough analysis here. As a general rule, when the statutes follow what is also required for employers under Title I claims, there will likely not be an ADA violation. But some state requirements may leave a worker whose employer failed to reasonably accommodate them disqualified from benefits based on the extra conditions placed on people who leave work due to a medical condition. Michigan's statute, for example, creates a perverse incentive for employers to place the worker on an unpaid leave rather than

335 *Id.* (quoting Olmstead v. L.C. ex rel Zimring, 527 U.S. 581, 604 (1999)).
336 *Id.* at 464.
337 *Id.* at 463.

accommodate the medical restrictions. The state then disqualifies claimants who "quit" instead of being on an unpaid, indefinite leave of absence. This presents ripe fundamental alteration questions. The argument made in Part V.B.2.iii regarding fundamental alteration and the ARRA likely applies in this situation as well.

The DOL requires that a person should be entitled to benefits when they are separated from work involuntarily.[338] The definition of involuntary is when someone does not have a choice.[339] A worker does not choose to have a medical impairment that prevents them from doing their job, and thus this should be considered an involuntary separation. Because a worker like Charlie could be seen as the exact type of worker contemplated to be covered by unemployment benefits, it is unlikely that the state could establish a valid fundamental alteration defense.

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[338] *See Comparison of State Unemployment Insurance Laws*, tbl.5-15, U.S. DEP'T OF LAB., OFF. OF UNEMPLOYMENT INS. (2019) ("Since the UI program is designed to compensate wage loss due to lack of work, voluntarily leaving work without good cause is an obvious reason for disqualification from benefits. All states have such provisions.

In most states, disqualification is based on the circumstances of separation from the most recent employment. These disqualification provisions may be phrased in terms such as 'has left his most recent work voluntarily without good cause.' In a few states, the agency looks to the causes of all separations within a specified period. An individual who is not disqualified for leaving work voluntarily with good cause is not necessarily eligible to receive benefits. For example, if the individual left because of illness or to take care of a family member who is ill, the individual may not be able to work or available for work. This ineligibility would generally last only until the individual was again able and available.").

[339] *See* Warren v. Caro Cmty. Hosp., 579 N.W.2d 343, 346 (1998) ("[W]e will "not ascribe fault to" plaintiff simply because her medical condition rendered her temporarily unable to work. We agree with the board of review that clearly in the case before us claimant did not have a choice between reasonable alternatives. Claimant's separation from employment was imposed upon her by factors beyond her control. We therefore find that claimant did not voluntarily leave her employment. Claimant's leaving was involuntary as she had no choice given the employer's refusal to grant her request for a necessary leave of absence and the employer's refusal to reemploy her once she was physically able to return to work."); *see* Tomei v. Gen. Motors Corp., 486 N.W.2d 100, 104 (1992) ("[T]he Legislature's use of the word "voluntary" is clear. It connotes a choice between alternatives that ordinary people would find reasonable, and has been defined as unrestrained, volitional, freely chosen, or wilful action"); *see* Toothaker v. Maine Emp. Sec. Comm'n, 217 A.2d 203, 207 (Me. 1966) ("The Legislature contemplated that when an individual voluntarily leaves a job under the pressure of circumstances which may reasonably be viewed as having compelled him to do so, the termination of his employment is involuntary for the purposes of the act. In statutory contemplation he cannot then reasonably be judged as free to stay at the job. . . . When therefore the pressure of real not imaginary, substantial not trifling, reasonable not whimsical, circumstances compel the decision to leave employment, the decision is voluntary in the sense that the worker has willed it, but involuntary because outward pressures have compelled it. Or to state it differently, if a worker leaves his employment when he is compelled to do so by necessitous circumstances or because of legal or family obligations, his leaving is voluntary with good cause, and under the act he is entitled to benefits. The pressure of necessity, of legal duty, or family obligations, or other overpowering circumstances and his capitulation to them transform what is ostensibly voluntary unemployment into involuntary unemployment.").

Furthermore, the COVID-19 pandemic has exacerbated the need for people to leave work due to their medical conditions or their association with someone with a medical condition.[340] Many people were forced to leave work because either they were immunocompromised or they cared for someone who was. While there could be a basis for a claim for someone whose own health caused them to quit, there may also be an ADA association claim for those who leave because of their relationship with someone with a disability.[341] Under either of these cases, a claimant could establish an ADA claim if they are denied for quitting their job due to their medical condition or due to the condition of someone in their association. Congress passed the ARRA and the CARES Act, which explicitly told states that they should cover workers with disabilities and workers who have family care responsibilities.[342] Additionally, a majority of states find that medical reasons for leaving work amounts to good cause. Given this, it is unlikely that covering these workers would present any material change at all to a state's program. Therefore, the fundamental alteration defense would fail for both a state claim for benefits and a PUA claim under the CARES Act.

c. Workers excluded due to their disability preventing full-time work (Sam)

In this case, the state agency would make the argument that full-time work is integral to their program. An allegation of this affirmative defense is not enough; the government entity has the burden of proving the waiver would result in a fundamental alteration.[343] However, the ADA already recognizes that providing part-time work is a "reasonable" accommodation in Title I cases.[344] Moreover, federal law merely states that claimants have to show attachment to the workforce and makes no mention of how many hours a claimant must be able to work.[345] The eligibility requirement that workers be available for full-time work is demonstrably not essential as a great majority of the jurisdictions do not have this requirement yet still manage to have fully functional UI programs.[346]

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340 *See* Lowrey, *supra* note 143.

341 *See* 29 C.F.R. § 1630.8 ("It is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association.").

342 *See* Coronavirus Aid, Relief, and Economic Security Act of 2020, 15 U.S.C. § 9021.

343 *See* Hindel v. Husted, 875 F.3d 344, 348 (6th Cir. 2017).

344 *See* Schmidt v. Methodist Hosp., 89 F.3d 342, 344 (7th Cir. 1996).

345 *See* 20 C.F.R. § 604.5 (2007) ("The individual is available for any work for all or a portion of the week claimed, provided that any limitation placed by the individual on his or her availability does not constitute a withdrawal from the labor market.").

346 *See generally* Section II *infra*.

The purpose of unemployment insurance is to stabilize the economy and support workers until they find their next job. Further, a claimant who is available for part-time work is categorically still available for work.[347] Waiving the designation of "full time" does not render a claimant unavailable for work, and therefore there is no impact on the program's purpose. While it was arguably intentional in 1935 to leave out workers with disabilities, ADA liability does not require intent to discriminate.[348] The requirement for the program is that the worker must show attachment to the workforce.[349] Part-time work meets that condition.

Moreover, the federal-state nature of the program makes state programs reviewable on a national scale rather than a local one. First, Congress has made attempts to both incentivize and demand the program be extended to part-time workers. It was one of Congress's priorities with the ARRA in 2011,[350] and it was the explicit purpose of the creation of PUA.[351] Even before PUA, the DOL's guidance at the start of the pandemic indicated that state agencies should exercise their flexibility for

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347 The Supreme Court has long recognized that even individuals whose disabilities qualify them for SSDI benefits are still able to work in certain circumstances. In *Cleveland v. Policy Mgmt. Sys. Corp.*, the court emphasized that an inquiry into a specific individual's ability to work is necessary before a court considers that person unable to work by virtue of their receipt of SSDI ("[A]n ADA plaintiff's claim that she can perform her job with reasonable accommodation may well prove consistent with an SSDI claim that she could not perform her own job (or other jobs) without it. An individual might qualify for SSDI under SSA's administrative rules and yet, due to special individual circumstances, be capable of performing the essential functions of her job."). 526 U.S. 795, 796 (1999).

348 *See* 28 C.F.R. § 35.130 (b)(1) (2016) ("A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service; (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; (iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others; (iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others[.]").

349 *See* 20 C.F.R. § 604.5 (2007).

350 *See* Unemployment Insurance Relief During COVID-19 Outbreak, U.S. DEP'T OF LAB., https://www.dol.gov/coronavirus/unemployment-insurance.

351 *See* Coronavirus Aid, Relief, and Economic Security Act of 2020, 15 U.S.C.A § 9021 (West, Westlaw through Pub. L. No. 116-259); *see also* Letter from John Pallasch, Assistant Sec'y, U.S. Dep't of Labor, to State Workforce Agencies, Unemployment Ins. Program Letter No. 16-20 Change 1 (Apr. 27, 2020) (Attachment 1, Response to Question 33, "PUA is a benefit of last resort for anyone who does not qualify for other UC programs and who would be able and available to work but for one or more of the COVID-19 related reasons listed in section 2102 of the CARES Act.").

the able and available requirements to fit with the needs of the public-health crisis.

Agencies have discretion to enforce their requirements as needed, but this flexibility was so they could *meet* the realities of the workforce, not rigidly impose dated criteria that excludes most workers. Permitting access to part-time workers simply ensures coverage for a demographic in the modern workforce that has only continued to grow. A majority of states already permit part-time workers to participate and collect from the program.[352] Allowing workers seeking part-time work to qualify as "able and available" under state law is not a fundamental alteration to a state's unemployment insurance program; it is a reasonable modification that state programs are evidently capable of making. Since this is a federal program that is administered by the states, other states —in fact, a majority—granting claims for part-time availability is highly relevant to whether waiving that requirement would impact the program's purpose.

Importantly, the above analysis would be for a worker with a state unemployment claim, but the matter would be even clearer cut for a worker bringing an ADA violation based on a denial of PUA. Because Congress made it explicitly evident that the purpose of the PUA program was to cover workers, *"including part-time workers*,"[353] any fundamental defense argument here would be inapplicable. As the Minnesota Court of Appeals noted: "If the very thing that makes the person eligible for PUA benefits is treated as a disqualification, no one would be eligible for PUA benefits."[354]

State unemployment insurance regimes that fail to provide workers with disabilities equal access to that jurisdiction's unemployment insurance program are failing two of the ADA's goals, both of which were recognized by the Supreme Court in *Cleveland v. Policy Mgmt. Sys. Corp*.[355] The ADA "seeks to eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity."[356] Therefore, the ADA and state unemployment law both share the goal of supporting workers from employment-related insecurity. By not covering workers with disabilities who are able to work part-time productively and healthfully, state unemployment law stymies both this productivity goal of the ADA and its own goal of supporting workers who are involuntarily unemployed. Thus,

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352 *See Comparison of State Unemployment Insurance Laws*, *supra* note 2, at tbl.5-15.

353 15 U.S.C. § 9021.

354 Matter of Muse, 956 N.W.2d 1, 5 (Minn. Ct. App. Feb. 22, 2021).

355 526 U.S. 795, 801 (1999).

356 *Id.*

Sam may have a valid ADA claim if he was denied state benefits, and he should unquestionably have one if he was denied PUA.

CONCLUSION

While Congress has added new legislation to protect people from discrimination, specifically within the context of their participation in the labor force, this Article has shown how unemployment laws have not followed suit or kept up with civil rights laws.[357] While political will prevents legislative updates to unemployment programs, there is another possibility to root out discrimination in unemployment programs: sue under Title II of the ADA.

At its creation in 1935, unemployment insurance state systems deemed workers with disabilities as unworthy of benefits. In fact, unemployment insurance policies "sought to enforce an either/or definition of disability. While this uncomplicated formula had the advantages of simplifying welfare administration, restricting access to benefits, and limiting expenditures,"[358] Congress has since intervened by enacting the ADA to find and snuff out any lingering effects of disability discrimination in both private and public settings, including latent discriminatory policies of unemployment laws.[359] States have proven over and over again that they will not update their laws on their own. Congress, likewise, has not been able to pass substantial federal reform. While the most lasting solution to fixing unemployment insurance coverage rests with state and federal lawmakers, they lack the political will to make the needed changes.

The ADA is a vehicle for ensuring that people with disabilities are not forced out of participating in the workforce and are empowered to meaningfully contribute to their local communities and economies. The same deep-seated prejudices that necessitated the ADA's enactment in the first place are still actively harming workers with disabilities when they are unemployed because these programs are using dated criteria that has failed to keep pace with either the reality of the current workforce or

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357 *See* 42 U.S.C. § 12131 ("The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."); 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.").

358 Longmore & Goldberger, *supra* note 30, at 914.

359 *See* Ariana Cernius, *Enforcing the Americans with Disabilities Act for the "Invisibly Disabled": Not A Handout, Just A Hand,* 25 GEO. J. POVERTY L. & POL'Y 35, 48–49 (2017) ("Congress's intent to end discrimination against people with disabilities in all aspects of life, including the workplace and private and public settings.").

the demands of anti-discrimination law. This failure opens states up to liability. While the COVID-19 pandemic has highlighted that many areas of UI need reform, updating state unemployment insurance programs so they are compliant with Title II of the ADA is a reform that can be realized through litigation and is long overdue.