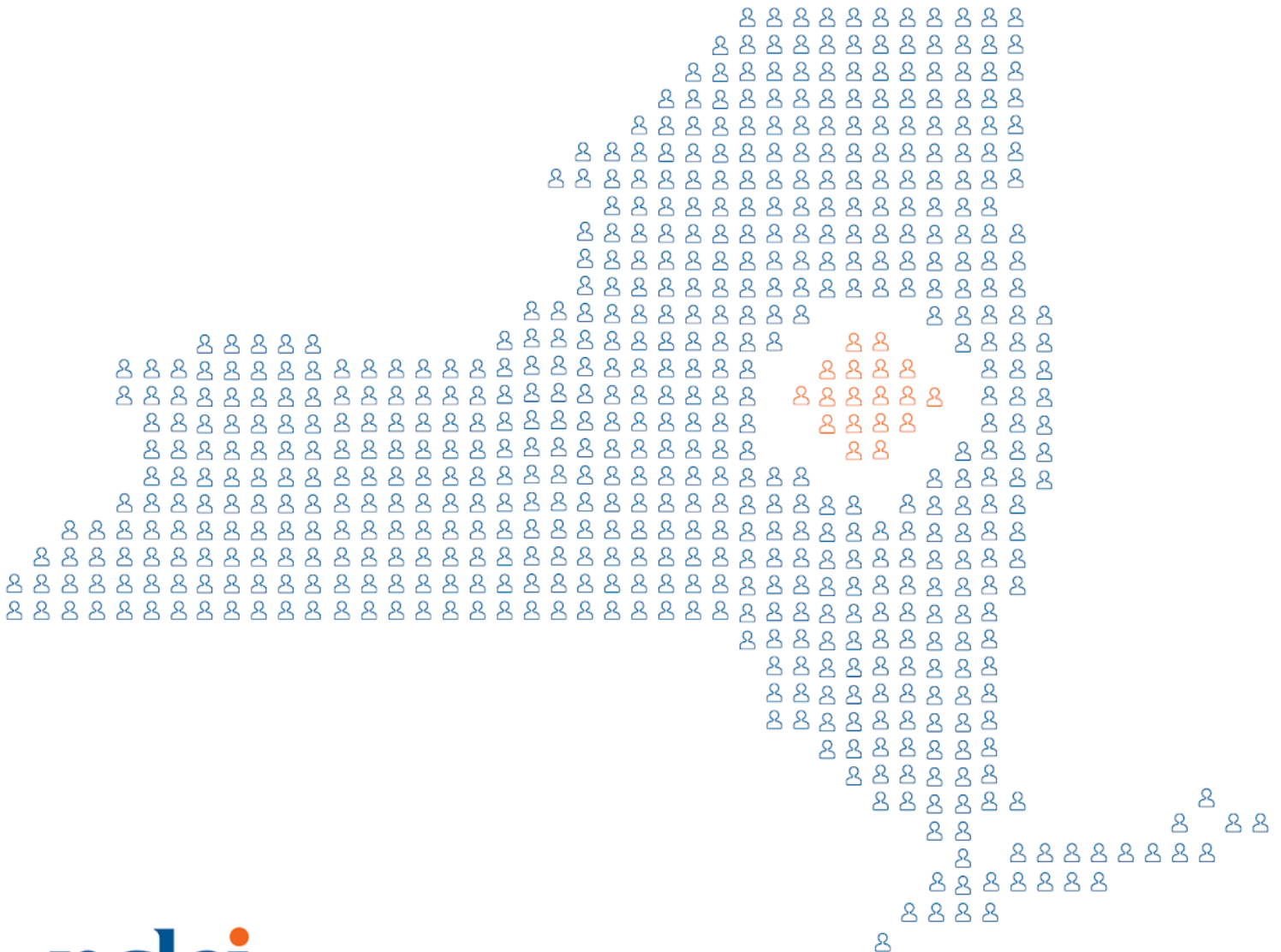


DESIGNED TO EXCLUDE:

New York's Failure to Provide
Compensation and Language
Access to Unemployed Workers



About this Report

This report was only made possible by the courage of workers who came forward to share their stories and the contributions of the incredibly vibrant community organizations and legal service providers who have been on the front lines ensuring Limited English Proficiency workers have access to vital unemployment insurance benefits, given the tremendous gaps left by the New York State Department of Labor. The National Center for Law and Economic Justice thanks the following organizations and individuals for their support and participation in this report.

Adhikaar · Adhikaar, meaning “rights” in Nepali, is a women-led community and workers’ center that provides direct services to the Nepali-speaking* community and organizes low-income workers and impacted community members to promote social justice and human rights. We create access to information, build community leadership, and grow collective power to win rights for our communities, and dignity and equity for all. *At Adhikaar, we define the Nepali-speaking community as descendants of Nepal, Bhutan, India, Burma, and Tibet that speak Nepali.

Flushing Workers Center · Flushing Workers Center was founded in 2014 by immigrant and young workers to unite workers to fight for better conditions at our workplaces, our homes, and in our communities. It is a membership organization open to workers of all trades, ethnicities, and backgrounds.

The Legal Aid Society · The Legal Aid Society is built upon one simple but powerful belief: that no New Yorker should be denied the right to equal justice.

Legal Services NYC · The nation’s largest provider of free civil legal services, Legal Services NYC fights poverty and seeks racial, social, and economic justice for low-income New Yorkers, including language access for immigrant and LEP families.

Make the Road New York · Make the Road New York builds the power of immigrant and working-class communities to achieve dignity and justice.

MinKwon Center for Community Action · Organizing, educating, and serving low-income Korean and Asian immigrant communities since 1984.

New York Legal Assistance Group · Founded in 1990, NYLAG is a leading civil legal services organization combatting economic, racial, and social injustice by advocating for people experiencing poverty or in crisis.

Queen City Workers Center · The Queen City Workers’ Center brings together workers of all backgrounds to fight for better working and living conditions in our communities.

Volunteers of Legal Service · VOLS harnesses the power of New York City’s legal community and neighborhood-based groups to provide free, civil legal services when and where they are needed most.

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Introduction

"It would be maybe one hour [or] two hours waiting to connect, and then they would either cut me off, or when I would connect, I would say, 'Please in Spanish,' they would either cut me off, or they would put me on hold again. And then even when they put me on hold, after another hour or two, they would cut off the call anyway, and that made me feel hopeless."¹

As COVID-19 devastated communities around the world, it laid bare the structural racism and economic inequality across the nation and in New York State. Unemployment skyrocketed, with immigrants, workers of color, and women bearing the brunt of the crisis.² Not only do these workers face higher mortality rates, but they disproportionately comprise the "essential workers" who put their health at risk in low-paying jobs.³

The New York State Department of Labor ("NYSDOL") created prohibitive barriers to Unemployment Insurance ("UI") for low-wage workers—and especially for the 2.5 million New Yorkers with Limited English Proficiency.⁴ This report—based on interviews with workers, leaders of more than a dozen immigrant-serving organizations in New York State, and a review of relevant literature and data—documents the extreme language access barriers NYSDOL imposed on LEP and immigrant communities and the severe financial and material hardship that resulted. The report also provides specific recommendations to policymakers on the state and federal level.

During the height of the pandemic, it was near-impossible for *anyone* to get through to

NYSDOL by phone, with LEP workers experiencing particularly profound barriers to this day. Would-be claimants called dozens of times a day for weeks at a time, hoping to apply over the phone or to address wrongful delays or denials, only to receive a message that NYSDOL could not accept their calls. Those who managed to get through—after days to months of effort—waited on hold for hours, often getting disconnected without ever speaking to anyone. And if LEP applicants ever got through, they discovered that NYSDOL provided incoherent and inconsistent interpretation services, if any at all.

Because of the collapse of NYSDOL's phone system, most UI claimants had to apply for benefits online and address any wrongful delays or denial through the online system. But here, again, low-wage workers—and especially immigrant workers—lacked the computers, internet access, and technical savvy necessary to complete the online application and certification process.

For nearly a year after the pandemic began, despite clear state and federal laws prohibiting discrimination on the basis of language,

¹ NCLEJ Interview with Worker 4 (May 13, 2021).

² See RANDY CAPPS, JEANNE BATALOVA & JULIA GELATT, MIGRATION POL'Y INST., COVID-19 AND UNEMPLOYMENT: ASSESSING THE EARLY FALLOUT FOR IMMIGRANTS AND OTHER U.S. WORKERS 13 (June 2020), <https://www.migrationpolicy.org/research/covid-19-unemployment-immigrants-other-us-workers>.

³ For COVID-19 mortality rates by race and/or ethnicity, see KFF, *COVID-19 Deaths by Race/Ethnicity*,

<https://www.kff.org/other/state-indicator/covid-19-deaths-by-race-ethnicity/?currentTimeframe=0&selectedDistributions=white-percent-of-deaths--white-percent-of-total-population--black-percent-of-deaths--black-percent-of-total-population--hispanic-percent-of-deaths--hispanic-percent-of-total-population--asian-percent-of-deaths--asian-percent-of-total-population&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>; ELISABETH GAWTHROP, APM Research, THE COLOR OF CORONAVIRUS: COVID-19 DEATHS BY RACE AND ETHNICITY IN THE U.S. (May 10, 2022), <https://www.apmresearchlab.org/covid/deaths-by-race>; Elise Gould & Valerie Wilson, *Black Workers Face Two of the Most Lethal Preexisting Conditions for Coronavirus – Racism and Economic Inequality*, Economic Policy Institute (June 1, 2020).

⁴ New York State, *Language Access Policy*, <https://www.ny.gov/language-access-policy>.

NYSDOL did not translate key UI documents—including the application, instructions, and its website—to any of New York's top six languages. And while NYSDOL eventually translated some documents into Spanish and other languages, the poor quality of the translations severely limited their utility. To this day NYSDOL has still failed to translate numerous vital documents, and NYSDOL still sends critical, time-sensitive notices only in English. These practices severely limit eligible LEP workers' ability to access or maintain UI benefits.⁵

"It felt like the government is really ailing people, failing workers, on multiple levels. Fine, [the state] can't do anything about the pandemic, but it can ensure that the health and well-being of people is [its] primary concern. We all felt like that was clearly not the case."⁶

Further, New York State's private identity verification system, ID.me, creates additional barriers for LEP and other claimants. All workers now must pass through ID.me—an electronic process requiring technological and, many report, English language literacy—in order to receive benefits. LEP and tech-challenged workers, among others, commonly experience severe delays or give up their claims entirely because they cannot access or navigate the system. After the system was implemented in February 2021, workers who were already receiving benefits reported being wrongfully flagged for potential fraud by ID.me. They immediately lost their benefits without warning and had to comply with onerous proof requirements and long delays

to regain access to their benefits – if they could at all. New York's use of ID.me caused deep economic pain and suffering for eligible claimants who were cut off with no ability to navigate the system.

Faced with overwhelming access problems, some LEP claimants sought help from community-based organizations and the nonprofit legal community. These organizations—genuine heroes of the pandemic—poured thousands of hours into assisting LEP claimants.

They produced their own translations and instructional manuals and videos and served as interpreters—labor that NYSDOL had a legal mandate to perform. However, LEP New Yorkers who did not know about or have access to these organizations could not navigate the UI process when they needed help the most. Even those who did find help were often unjustly and unlawfully delayed and denied unemployment benefits.

NYSDOL's systemic barriers illegally blocked LEP New Yorkers from receiving critical UI benefits. New York State's profound gaps in language access services have caused and continue to cause severe financial hardship and economic instability for countless LEP workers. Without access to UI, LEP workers could not pay bills or feed their families. They turned to food banks, they resorted to homeless shelters, and they went hungry. Many LEP workers deprived of UI benefits had no choice but to take high risk, unsafe jobs on the front line of the pandemic. There are countless workers who were due benefits but never received them, with the NYSDOL simply responding with inhumane

⁵ New York's Executive Order 26, issued on October 6, 2011, established the first statewide language access plan and mandated language access for the top six most commonly-spoken languages. State of N.Y., Exec. Order 26 "Statewide Language Access Policy" (2011). Executive Order 26.1, issued on March 23, 2021, expanded this order to translation and interpretation services for the top ten most commonly spoken languages but gave agencies until August 1, 2022 to come into compliance. State of N.Y., Executive Order 26.1 "Statewide Language Access Policy" (2021). In 2022, the New York State legislature passed a new law, N.Y. Exec. Law § 202-a, effective July 1, 2022, requiring state agencies to translate vital documents into the 12 most common non-English languages spoken by LEP individuals in the state and to publish their language access plans on their websites.

⁶ NCLEJ Interview with Flushing Workers Center Organizer Sarah Ahn (May 16, 2022).

positions such as “mistakes were made.”⁷ Throughout this crisis, NYSDOL has persistently and seriously failed people who speak and read limited English.

“I’m kind of powerless in front of the DOL because I just have to do what they ask me to do to get the benefits. I don’t have a right because I’m in a foreign land, so whatever they demand ... Well I wasn’t born here; the benefits don’t come to me easily.”⁸

As set out in detail in the Appendix, NYSDOL’s actions violate state language access law, Title VI of the Civil Rights Act of 1964, the Social Security Act, and United States Department of Labor (“U.S. DOL”) guidance and regulations.

- Under New York State Executive Orders (“EO”) 26 and 26.1, all state agencies that interact with the public must now translate key documents into the ten most common languages spoken by LEP individuals and provide interpretation services in the six most common languages.⁹ As of July 1, 2022, New York State agencies must translate documents into the 12 most common languages in New York State under N.Y. Exec. Law § 202-a.¹⁰
- Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color, or national origin by any federally funded agency or program.¹¹ The United States Supreme Court has held that Title VI mandates meaningful language access to government services for non-English speakers.¹²
- The Social Security Act of 1935 requires prompt payment of UI benefits to all eligible applicants “when due.” U.S. DOL regulations and guidance require equal access to benefits for workers who do not speak English as their primary language.¹³

Produced in collaboration with community groups and legal services organizations on the front lines, this report documents the severe and systemic language access barriers and hardship that NYSDOL imposed on immigrant communities, as well as broader problems with the New York unemployment compensation system and the severe financial and material hardship that resulted. This report also provides specific recommendations to policymakers based on interviews with workers, interviews with leaders of more than a dozen immigrant-serving organizations in New York State, documents received through a Freedom of Information Law (“FOIL”) Request to NYSDOL, and a review of relevant literature and data.

In New York, COVID-19 exacerbated deeply rooted disparities that society has chosen to ignore, taking a heavy toll on LEP workers, immigrants, and people of color. To work towards equity, New York must make fundamental changes, not only to bring the UI system into legal compliance with federal and state law but also to ensure a more humane system that works for all New Yorkers.

“Th[e][Unemployment Insurance statute] is a remedial statute, a humanitarian statute, and should be construed accordingly. It is the general rule that a liberal construction is accorded statutes which are regarded by courts as humanitarian and which are grounded on a humane public policy.”¹⁴

⁷ NYSDOL Representative Phone Conversation with NCLEJ Senior Attorney Anjana Malhotra (April 2022).

⁸ NCLEJ Interview with Worker 1 (June 26, 2021).

⁹ N.Y. Exec. Orders No. 26 and 26.1, *supra* note 8.

¹⁰ N.Y. Exec. Law § 202-a.

¹¹ 42 U.S.C. § 2000d. Executive Order 13166, issued by President Clinton in 2000, further clarifies the language access obligation of federally funded agencies, including state agencies receiving pass through dollars, under Title VI. See Exec. Order No. 13,166, 65 Fed. Reg. 50121 (Aug. 16, 2000).

¹² *Lau v. Nichols* held that discrimination on the basis of limited English proficiency constitutes national origin discrimination under the Civil Rights Act, including Title VI.

¹³ 414 U.S. 563, 568 (1974).

¹⁴ See discussion and notes *infra* § X(A).

¹⁵ *Machcinski v. Ford Motor Co.*, 277 A.D. 634, 639–640, 102 N.Y.S.2d 208, 213 (App. Div. 1951).

Key Findings

Language access barriers have caused unjustified, profound economic hardship to people who speak languages other than English. We found specifically:

- Thousands of LEP applicants faced prolonged delays and wrongful denials in receiving benefits, causing deep economic hardship, pain, hunger, and homelessness;
- Applicants had serious problems reaching NYSDOL and report having made hundreds to thousands of unsuccessful phone calls to NYSDOL over the course of weeks to months to apply for unemployment or resolve problems. If a LEP worker did eventually connect to a person, NYSDOL frequently provided inadequate or no interpretation;
- Low-wage workers—especially LEP workers—could not effectively apply for benefits online because of technological and language barriers;
- The NYSDOL failed to make services available in languages other than English, resulting in delays and wrongful denials of benefits to eligible LEP applicants in violation of federal and state laws;
 - o For the first year of the pandemic, NYSDOL failed to translate its website and the federal unemployment application—including key applications and instructions—into languages other than English, preventing LEP workers from filing claims;
 - o Few vital documents have been translated into New York's six most frequently spoken languages, resulting in prolonged delays, inability to access benefits, and wrongful denials;
 - o LEP workers faced wrongful denials because they had difficulty completing English-only forms, and faced language barriers in contesting their employer's objections to their eligibility and NYSDOL ineligibility determinations;
- NYSDOL's use of a private contractor, ID.me, led to workers being illegally cut off and created barriers to benefits for eligible LEP claimants. According to workers and advocates, ID.me did not always translate their notifications of failed verifications or did not notify them at all;
- Due to NYSDOL internal errors, NYSDOL overpaid thousands of claimants and now seeks to recoup money already spent—even though the federal government has made clear in guidance that states should waive broad categories of non-fraudulent overpayments;
- Community and legal organizations had to fill the gap caused by NYSDOL's failures and helped fill out and translate vital documents and applications for thousands of workers.
- In 2021, NYSDOL disproportionately denied unemployment benefits to applicants with Limited English Proficiency at higher rates than English speakers. NYSDOL also denied Hispanic and African American, Native American, and Hawaiian claimants unemployment benefits at higher rates compared to non-Hispanics and Whites, respectively.

Key Recommendations

New York State must take immediate action to address the debilitating, harmful, and illegal language access barriers identified in this report, and the U.S. DOL must ensure that New York is complying with its Title VI obligations. Failure to do so will continue to cause deep and unnecessary pain and hardship for LEP communities and impose an unfair burden on nonprofit and community organizations serving immigrants across the state.

- NYSDOL must prioritize meaningful language access by translating all vital documents and instructions necessary to obtain unemployment into the top 12 languages in New York with non-machine-based translations that are reviewed and approved by certified translators.
- NYSDOL must revamp its telephone system to provide prompt and accurate interpretation to allow LEP applicants to access unemployment.
- NYSDOL must end its contract with ID.me. The New York State Legislature must prohibit all New York State agencies from contracting with private, for-profit companies as the sole mechanism for core government functions.
- NYSDOL must cease targeting eligible immigrants and LEP applicants for fraud investigations.
- NYSDOL must set up a system to identify and compensate all eligible LEP beneficiaries who attempted to apply for unemployment but never received benefits due to language access barriers, including allowing LEP applicants who were eligible but unable to access UI benefits to apply for retroactive unemployment.
- NYSDOL must set up a task force to engage with and listen to community-based organizations to improve language access and respond to claimants' needs in a timely manner in accordance with federal law.
- NYSDOL must cease all overpayment collections and apply broad waivers to the fullest extent permitted under federal law and guidance. NYSDOL must also translate all overpayment notices into claimants' stated preferred language.
- NYSDOL must be transparent with the public about the functioning of the UI system by making data and reporting publicly available.
- NYSDOL must redress gross failures of the last two years by proactively providing benefits to claimants still waiting on applications during the last two years.
- U.S. DOL must open a Title VI investigation to bring NYSDOL into compliance with its language access obligations.







I. Background

“Economic insecurity due to unemployment is a serious menace to the health, welfare, and morale of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden, which now so often falls with crushing force upon the unemployed worker and his family.” - N.Y. Lab. Law § 501.¹⁵

Since its inception during the Great Depression, the unemployment system has been a lifeline for workers in the United States, preventing their fall into poverty due to job loss.¹⁶ This should have been true when emergency public health measures forced many businesses to close their doors at the onset of the COVID-19 pandemic.¹⁷ For many of New York’s most vulnerable workers—low-wage, immigrant, and/or LEP workers—New York’s unemployment system failed them when they needed it most.

Within days of the pandemic-related economic shutdown, hundreds of thousands of New Yorkers suddenly found themselves out of work.¹⁸ In the first two months of the pandemic, New York State lost twenty percent of its jobs.¹⁹ Workers in every sector, and particularly the service sector, began filing unemployment claims at unprecedented levels.²⁰

It was a deeply stressful time for all workers—when the fear and uncertainty as the pandemic set in, combined with a complete loss of income for workers and their families that threatened to plunge millions of people into poverty.²¹

The federal government responded by expanding UI benefits in an unprecedented way: both increasing the amount and duration of UI benefits per worker and extending benefits to workers who are typically excluded, such as independent contractors.²² Congress enacted the largest expansion of unemployment benefits in U.S. history, eventually creating four new categories of benefits that operated alongside traditional state UI.²³ In New York, the NYSDOL administered both these expanded benefits and traditional UI pursuant to a longstanding federal-state unemployment system.²⁴

¹⁵ N.Y. Lab. Law § 501 (“[T]he legislature therefore declares that in its considered judgment the public good and the well-being of the wage earners of this state require the enactment of this measure for the compulsory setting aside of financial reserves for the benefit of persons unemployed through no fault of their own.”).

¹⁶ Gabriel Chodorow-Reich & John Coganese, *Unemployment Insurance and Macroeconomic Stabilization*, in *RECESSION READY: FISCAL POLICIES TO STABILIZE THE AMERICAN ECONOMY* 154 (Heather Boushey et al. eds., 2019).

¹⁷ David Greg, *NYC Lost a Record 631,000 Jobs to the Pandemic in 2020. So What's Next?*, THE CITY (Mar. 14, 2021),

<https://www.thecity.nyc/economy/2021/3/14/22326414/nyc-lost-record-jobs-to-pandemic-unemployment>; N.Y. State Comptroller, *New York's Economy and Finances in the COVID-19 Era* (Mar. 30, 2021), <https://www.osc.state.ny.us/reports/new-yorks-economy-and-finances-covid-19-era-march-30-2021>. In March 2020, former Governor Cuomo used his emergency powers to shut down businesses and directed New York residents to stay home to the greatest extent possible to stem the transmission of COVID-19. N.Y. Exec. Order No. 202 (Mar. 7, 2020), https://www.governor.ny.gov/sites/default/files/atoms/files/EO_202.pdf.

¹⁸ *Id.*

¹⁹ James Parrott, CTR. FOR N.Y.C. AFFAIRS, *NEW YORK STATE'S LAGGING RECOVERY FROM THE COVID-19 PANDEMIC 1* (Dec. 14, 2021),

<http://www.centrernyc.org/reports-briefs/new-york-states-lagging-recovery-from-the-covid-19-pandemic-tkndj>.

²⁰ Ben Casselman et al., *It's a Wreck: 3.3 Million File Unemployment Claims as Economy Comes Apart*, N.Y. TIMES (Apr. 3, 2020),

<https://www.nytimes.com/2020/03/26/business/economy/coronavirus-unemployment-claims.html>.

²¹ See Zachary Parolin et al., *Monthly Poverty Rates in the United States during the COVID-19 Pandemic: Poverty & Social Policy Discussion Paper*, CTR. ON POVERTY & SOCIAL POL'Y (2020); Lauren Aratani, *Coronavirus*

Pandemic Plunges Millions of Americans into Poverty, GUARDIAN U.S. (October 15, 2020),

<https://www.theguardian.com/us-news/2020/oct/15/coronavirus-pandemic-plunges-millions-of-americans-into-poverty>.

²² See Frances Chen & Em Shridder, *Expanded Unemployment Insurance Benefits During Pandemic Lowered Poverty Rates Across All Racial Groups*, U.S. CENSUS BUREAU

(Sept. 14, 2021), <https://www.census.gov/library/stories/2021/09/did-unemployment-insurance-lower-official-poverty-rates-in-2020.html>; U.S. Dep't of Labor,

Unemployment Insurance Relief During COVID-19 Outbreak, <https://www.dol.gov/coronavirus/unemployment-insurance>.

²³ These include Pandemic Unemployment Assistance (“PUA”), Pandemic Emergency Unemployment Compensation (“PEUC”), Federal Pandemic Unemployment

Compensation (“FPUC”), and Mixed Earners Unemployment Compensation (“MEUC”). See U.S. Dep't of Labor, *supra* note 22; Nat'l Emp't L. Project, *Unemployment*

Insurance Provisions in Coronavirus Aid, Relief, and Economic Security (CARES) Act (Mar. 27, 2020),

<https://www.nelp.org/publication/unemployment-insurance-provisions-coronavirus-aid-relief-economic-security-cares-act/>.

²⁴ See Peter Kramer & Sarah Taddeo, *Off the Unemployment Backlog: Patience, and Plenty of It, Paid Off*, LOHUD.COM (June 12, 2020),

<https://www.lohud.com/story/news/coronavirus/2020/06/12/unemployment-new-york-claims-backlog/3134454001/> (reporting that as of June 2020, the NYSDOL processed about 800,000 applications for PUA).

PANDEMIC UNEMPLOYMENT EXPANSION

Pandemic Unemployment Assistance

("PUA"): provided financial assistance to people who did not qualify for regular UI but were unemployed as a result of the pandemic, such as self-employed, part-time, and gig workers; independent contractors; farmers; and high-school students. The program ran from January 27, 2020 to September 4, 2021.²⁵

Pandemic Emergency Unemployment Compensation ("PEUC"):

provided an additional 13 or 20 weeks of unemployment benefits for those who had exhausted unemployment benefits available under state law. The program ran from January 27, 2020 to September 4, 2021.²⁶

Federal Pandemic Unemployment Compensation ("FPUC"):

added \$600 per week to the amount an individual would otherwise be qualified to receive under their state UI program.²⁷ This provision expired on July 31, 2020, and was revived as of December 26, 2020, as a \$300 supplement, until September 4, 2021.

Mixed Earners Unemployment Compensation ("MEUC"):

provided an additional \$100 a week to workers with \$5,000 or more a year in net earnings from self-employment. This program ran from December 26, 2020 until September 4, 2021.²⁸

But far too many out-of-work New Yorkers, particularly LEP workers, could not access unemployment benefits of any kind. New York fell to the bottom third of the country in the length of delays in processing applications, well below the federally required processing times.²⁹

While many workers struggled to make ends meet, New York's failure to get benefits to workers affected some communities more acutely than others: namely, people of color, immigrants, and low-wage workers. Workers of color accounted for nearly half of all job losses in New York State³⁰ and nearly 70% in New York City.³¹

More than two-thirds of UI recipients worked in low- and moderate-income industries, led by restaurants, hotels, health care, social assistance, and retail.³² A month into the pandemic, nearly two-thirds of jobs lost were held by workers paid less than \$40,000 annually.³³

In particular, immigrants and LEP workers suffered harshly from pandemic-related job losses. For example, the jobless rate for Asian Americans in New York City increased from 3.6% in February 2019 to 25.6% in May 2020, the largest increase among all major racial groups.³⁴ Chinese Americans in New York City reported significant job loss in mid-March 2020, after

²⁵ See 15 U.S.C. § 9021 *et seq.*

²⁶ 15 U.S.C. § 9025 *et seq.*

²⁷ 15 U.S.C. § 9023 *et seq.*

²⁸ 15 U.S.C. § 9023 *et seq.*

²⁹ Megan Cassella & Katy Murphy, *States Overwhelmed by Previously Unimaginable Layoff Numbers*, POLITICO (Apr. 1, 2020), <https://www.politico.com/news/2020/04/01/unemployed-workers-benefits-coronavirus-159192>.

³⁰ Parrott, *supra* note 19, at 2.

³¹ JAMES PARROTT & LINA MOE, CTR. FOR N.Y.C. AFFAIRS, *THE NEW STRAIN OF INEQUALITY: THE ECONOMIC IMPACT OF COVID-19 IN NEW YORK CITY* 3 (Apr. 15, 2020), <http://www.centrernyc.org/reports-briefs/2020/4/15/the-new-strain-of-inequality-the-economic-impact-of-covid-19-in-new-york-city>.

³² James Parrott, *N.Y. Needs Better Unemployment Benefits Now*, N.Y. DAILY NEWS (Feb. 2, 2021), <https://www.nydailynews.com/opinion/ny-oped-better-unemployment-benefits-now-20210202-kunxrqf6zd4rkuvjdneaczi-story.html>.

³³ PARROTT & MOE, *supra* note 31, at 2.

³⁴ Kimmy Yam, *Asian American New Yorkers Experienced Highest Surge in Unemployment During Pandemic*, NBC NEWS (Oct. 21, 2020), <https://www.nbcnews.com/news/asian-america/asian-american-new-yorkers-experienced-highest-surge-unemployment-during-pandemic-n1243894>.

restaurants shut down or offered limited takeout.³⁵ And more than half of Nepali Americans in New York City worked in industries with severe pandemic-related job losses, such as the transit and ground passenger transportation industry, which lost 42.7% of its jobs in May 2020.³⁶ According to Adhikaar, a Queens-based nonprofit, all of the roughly 2,000 Nepali-speaking nail salon workers it serves lost their jobs “without any certainty whether they would get their jobs back.”³⁷

These statistics represent only a fraction of the outsized economic impact of the pandemic on New York's immigrant communities. Undocumented workers were completely shut out of government programs yet were displaced at a rate *twice* that of the overall displacement rate.³⁸ According to one report, leading nonprofits serving immigrant communities reported that 75% of their clients had lost their jobs, including domestic workers, nail salon workers, and 95% of day laborers.³⁹ And, as documented in this report, immigrant workers who were eligible faced systemic language access barriers to benefits.

While the employment crisis of the initial pandemic has abated, high unemployment rates and the problems covered in this report have persisted. New York has regained only 71% of its COVID-19-related job loss.⁴⁰ And the racial disparities continue: in the first quarter of 2022, while White workers were unemployed at 3.6%, workers of color were unemployed at higher rates: 6.3% for Latinx workers; 9.1% for Black workers; and 3.8% for Asian workers.⁴¹

Since the onset of the pandemic, Hispanic workers have had higher rates of denials of UI benefits than non-Hispanic workers; 7.5% of all Hispanic claimants were denied UI, while only 6.5% of non-Hispanics were denied.⁴² Similarly, there were racial disparities in denials: 9.3% of all Black claimants were denied unemployment, compared to only 6.4% of White claimants. American Indians/Native Americans (7.7%) and Hawaiian/Pacific Islander (8.3%) claimants also experienced a higher rate of denials than whites (6.4%).⁴³ In 2021, non-English speakers were denied at higher rates (13.3%) compared to English speakers (9.8%).⁴⁴

³⁵ ASIAN AM. FED'N, IMPACT OF COVID-19 ON ASIAN EMPLOYMENT IN NEW YORK CITY 11 (Oct. 2021), <https://aafcovid19resourcecenter.org/unemployment-report/>.

³⁶ *Id.* at 21.

³⁷ SARAH AMANDOLARE ET AL., CTR. FOR AN URBAN FUTURE, UNDER THREAT & LEFT OUT: NYC'S IMMIGRANTS AND THE CORONAVIRUS CRISIS (June 2020), <https://nycfuture.org/research/under-threat-and-left-out>.

³⁸ PARROTT & MOE, *supra* note 31, at 3.

³⁹ AMANDOLARE ET AL., *supra* note 37.

⁴⁰ Suhail Bhat & Greg David, *Modest Job Gains in March as New York City Still Struggles to Regain pre-COVID Footing* (April 14, 2022), <https://www.thecitynyc/economy/2022/4/14/23026163/nyc-march-2022-jobs-numbers>.

⁴¹ Kyle K. Moore, *State Unemployment by Race and Ethnicity*, ECONOMIC POLICY INSTITUTE (May 2022), <https://www.epi.org/indicators/state-unemployment-race-ethnicity/>.

⁴² New York State Attorney General and Department of Labor Response to NCLEJ FOIL request, June 7, 2022 (on file with author).

⁴³ *Id.*

⁴⁴ *Id.* Notably, the response of NYSDOL and the New York State Office of the Attorney General (“NYOAG”) to NCLEJ’s FOIL request for basic UI data broken out by race, ethnicity, and language itself mirrored these disparities in violation of FOIL and Title VI of the Civil Rights Act. NYSDOL provided largely comprehensive data for Whites and English speakers but withheld significant data relating to non-Whites, Hispanics, and non-English speakers. NYSDOL and NYOAG insisted on providing data broken out by month even though NCLEJ’s request specified to provide the data quarterly or annually if necessary for completeness. NYSDOL and NYOAG then refused to provide specific data for any monthly category that contained less than 10 responses. This resulted in missing data for 125 categories of non-White groups, 24 categories of non-English speakers, and 16 categories of Hispanics. Comparatively, the data omitted only 13 categories of Whites and 3 categories for non-Hispanics and English speakers. As a result, NCLEJ could not fully examine the extent of racial, ethnic and language-based disparities in access to UI benefits. The data included in this report is a conservative estimate; a complete response would likely have revealed even larger disparities. NCLEJ Emails with New York Attorney General Labor Bureau Attorney Richard Balletta (July 2022).

NEW YORK STATE UI DENIAL RATE BY RACE AND ETHNICITY: MARCH 2020 - FEBRUARY 2022⁴⁵

ETHNICITY	CLAIMANTS	DENIED	DENIAL RATE
Hispanic	1,032,204	13,204	7.5 %
Non-Hispanic	3,505,722	242,219	6.9 %

RACE	CLAIMANTS	DENIED	DENIAL RATE
Black	889,064	82,901	9.3 %
American Indian / Alaskan Native	44,501	3,425	7.7 %
Pacific Islander	19,404	1,602	8.3 %
White	2,705,726	173,152	6.4 %

*Includes unknown race/ethnicity
Source: NYSDOL



⁴⁵ New York State Attorney General and Department of Labor Response to NCLEJ FOIL request, June 7, 2022 (on file with author). Notably, as described above, NYSDOL and NYOAG failed to provide comprehensive data for numerous and a disproportionate number of categories of data or non-English speakers, Hispanics, and Blacks and other minority groups.



A close-up photograph of a computer keyboard. The focus is on a white key labeled 'translate' in a sans-serif font. Above it is another white key labeled 'fn'. The keyboard is set against a light gray background. A large, solid blue curved shape covers the right side of the image, serving as a background for the title text.

translate

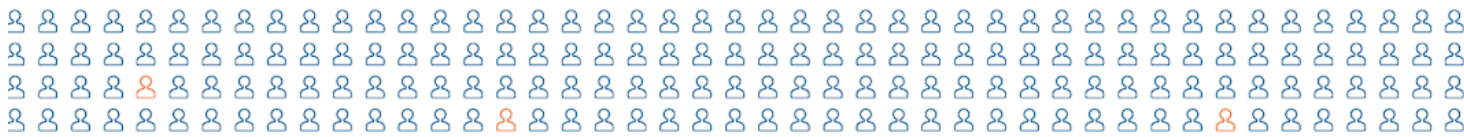
II. Language Access Barriers

The NYSDOL has failed countless New Yorkers, particularly those who do not speak English as their primary language. NYSDOL's failure to implement basic language access measures—which are required by state and federal law—has prevented thousands of LEP claimants from receiving UI benefits.

Under state and federal law, NYSDOL must provide a means for LEP individuals to apply for, obtain, and maintain UI benefits in their

primary language. NYSDOL's Language Access Plan states that the agency provides oral interpretation services, either in person or via telephone, and written translation of some website portions and paper documents.⁴⁶

However, our investigation exposed a shocking lack of translation at every stage of the process, even according to NYSDOL's own Language Access Plan, causing unacceptable delays and wrongful denials to LEP workers.



A. Communication Breakdown

“[W]hen the pandemic hit, the problem was, traditionally if you didn’t speak English or Spanish you had to use the phone. And of course, a million people were calling into those phones. They didn’t have staff to handle this volume of calls. While it was extremely difficult for everybody, it was especially difficult for people who didn’t speak English or Spanish and then when they came out with new application forms, they were only in English, so even the Spanish speakers of whom they are quite a few in New York, had to get through on the phone. Forcing people into the phone system at that moment was crazy, and a complete log jam. Especially since we’re talking about a system where you not only have to apply [but] keep certifying, what are you supposed to do?”⁴⁷

Prior to the pandemic, workers could choose to apply for UI benefits in person, by telephone, or on the NYSDOL website. The telephone and in-person options provided critical pathways for many low-wage, elderly, and LEP workers who lacked the technological skills and equipment to navigate the online application process.

During the pandemic, however, offices closed, and workers simply could not get through to NYSDOL by phone. Mary Lister, an organizer with the Queen City Worker Center in Buffalo, summarized: “Even though there was technically an option to call, there was not an option to call.”⁴⁸

⁴⁶ See N.Y. DEP’T OF LABOR, LANGUAGE ACCESS PLAN FOR LIMITED ENGLISH PROFICIENT INDIVIDUALS (Aug. 1, 2021) [hereinafter N.Y. DEP’T OF LABOR, LANGUAGE ACCESS PLAN], <https://dol.ny.gov/system/files/documents/2022/02/dol-lap-2021.pdf>

⁴⁷ NCLEJ Interview with The Legal Aid Society Staff Attorney Richard Blum (Aug. 31, 2021).

⁴⁸ NCLEJ Interview Queen City Worker Center Organizer Mary Lister (May 28, 2021).

Advocates and workers consistently confirmed the lack of telephone access, with workers calling for weeks and months without ever reaching an agent. Sunny Lee, Human Resources & Operations Specialist at MinKwon Center for Community Action, reported that her clients typically tried to call NYSDOL for six weeks or more before reaching out to her for help.⁴⁹ Victor Brito, a Senior Paralegal at Legal Services NYC (“LSNYC”), stated that his clients would call three to five times a day for weeks and still not get through.⁵⁰ Amanda Bransford, a Staff Attorney at Make the Road New York, explained:

“[T]he advice we were giving people at a certain point was start calling at 8AM, expect it to take the entire day, and expect it to possibly take more than the entire day.”⁵¹ Ciara Farrell, a Volunteer Attorney with New York Legal Assistance Group (“NYLAG”), reported that workers would call “many times and leave a message, and call again and if they got through, they would leave a second message.”⁵² Every advocate and worker we spoke to reported long wait times to speak with NYSDOL. Ms. Lister described waiting on the phone for “hours on end, and then... hours would become weeks would become months.”⁵³

Telephone access was “virtually impossible for some people and especially for people who don’t speak English.”⁵⁴ LEP workers faced particularly high barriers because if they finally reached someone at NYSDOL, they frequently could not speak to anyone in their own language.⁵⁵ In many cases, the NYSDOL representative would just hang up,⁵⁶ and the workers would have to repeat the process of calling for weeks and waiting on hold for hours.⁵⁷ In other cases, LEP workers and advocates also described that when they did get through, they got unclear and inconsistent answers from various agents on how to resolve delays or wrongful denials of their benefits, which caused more confusion and barriers.⁵⁸

“A lot of people have issues with their online accounts. And it wasn’t just older people not knowing how to navigate it. Younger people would try to apply, and the system would kick them out, and it would just keep happening to them where they call and the phone line would just drop. [T]hat also bleeds into communication issues—just calling and never getting through—calling, getting through, and then not getting a clear answer or hearing different things from different agents.”⁵⁹

⁴⁹ NCLEJ Interview with MinKwon Center for Community Action Human Resources & Operations Specialist Sunny Lee (May 13, 2021).

⁵⁰ NCLEJ Interview with LSNYC Senior Paralegal Victor Brito.

⁵¹ NCLEJ Interview with Make the Road New York Staff Attorney Amanda Bransford (May 13, 2021) and email from Amanda Bransford to NCLEJ (May 17, 2022).

⁵² NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Ciara Farrell (July 26, 2021).

⁵³ NCLEJ Interview Queen City Worker Center Organizer Mary Lister (May 28, 2021).

⁵⁴ NCLEJ Interview with LSNYC Legal Assistant Newman.

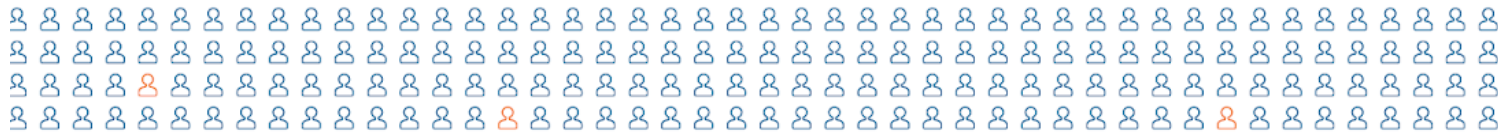
⁵⁵ NCLEJ Interview with Adhikaar Senior Organizer Megha Lama (June 29, 2021); NCLEJ Interview with MinKwon Specialist Lee.

⁵⁶ NCLEJ Interview with Flushing Workers Center Organizer Sarah Ahn (May 16, 2022).

⁵⁷ NCLEJ Interview with Worker 4 (May 13, 2021); NCLEJ Interview with The Legal Aid Society Staff Attorney Blum; NCLEJ Interview with Flushing Workers Center Organizer Ahn; NCLEJ Interview with Adhikaar Senior Organizer Lama; NCLEJ Interview with MinKwon Specialist Lee; Testimony of The Legal Aid Society Senior Attorney Richard Blum before the N.Y. S. Standing Comm. on Labor (Aug. 13, 2020), https://www.nysenate.gov/sites/default/files/legal_aid_testimony_8_13_20_state_legislative_hearing.pdf.

⁵⁸ NCLEJ Interview with Worker 3 (June 29, 2021); NCLEJ Interview with MinKwon Specialist Lee; NCLEJ Interview with LSNYC Legal Services Assistant Newman.

⁵⁹ NCLEJ Interview with LSNYC Legal Services Assistant Samantha Newman (July 2, 2021).



The Legal Aid Society Staff Attorney Richard Blum described the lack of interpretation as a widespread problem that caused serious impairment to LEP applicants: “[W]orker centers assisting workers speaking other languages have repeatedly complained about the difficulties in accessing an interpreter. Workers have complained about being disconnected after requesting an interpreter. All of these problems have fueled the massive delays in providing benefits.”⁶⁰

Multiple workers and their advocates described reaching someone who only spoke English, despite choosing the Spanish option, and never receiving a call back. One advocate described a Spanish-speaking client’s “typical” ordeal:

The first time he called the Department of Labor, he was on hold for over two hours. When he finally got through to a live person, they spoke to him in English, so he said “no English, Spanish,” after which he was put back on hold and made to wait for an hour longer. When he finally reached someone who spoke Spanish, the call dropped. So he called back, though this time instead of waiting, he requested a call back. Frustratingly, the person who called back spoke English. So he again said, “no English, Spanish,” and then they said, “okay, hold on, someone will call you back in Spanish.” Of course, he never got a call back. He would then have to do this whole song-and-dance all over again the next day, and the day after, until almost by random luck, he would [] successfully connect with someone who spoke in Spanish and could assist him with his question or issue. It was an incredibly painful back and forth to get to that point.”⁶¹

WORKER PERSPECTIVES

“I’m lucky enough to do this because I have the time, but there are folks who don’t even have the time who can’t even call the DOL and aren’t receiving benefits because everything is done through the phone ... So I call them the whole day and sometimes don’t get ahold of them. And sometimes I call for like six hours and then get ahold of them.”⁶²

“It would be maybe one hour [or] two hours waiting to connect, and then they would either cut me off, or when I would connect, I would say ‘Please in Spanish,’ they would either cut me off, or they would put me on hold again. And then even when they put me on hold, after another hour or two, they would cut off the call anyway, and that made me feel hopeless.”⁶³

“They spoke in English and when I asked to speak in Spanish, they would cut off the call. . . . So, the first person to answer would come out speaking English, and I would say, ‘Please speak in Spanish,’ and then they would cut off the call then, and then I would call back again....”

Sometimes I had been on the phone waiting two, three, or four hours, and then all of a sudden, they would cut off the call and not respond to me. . . . I think there needs to be better attention to us Hispanics and the situation that we’re going through. [T]here needs to be more attention and people who can speak to us in Spanish, and when we’re calling, we’re calling because we need help. We’re calling because we need it. And this situation is really difficult, and it frustrates you and makes you feel bad.”⁶⁴

“For some reason, without any notice [or] warnings, I was told (online) that I was not authorized to certify for my weekly benefits. I did not understand and was quite flustered by this. So I called [an immigrant advocacy center], who then told me to call the DOL. When I called the DOL regarding my issue, I had to explain to them multiple times what was going on. And this was tiring and difficult.”⁶⁵

⁶⁰ See Testimony of The Legal Aid Society Staff Attorney Blum, *supra* note 58.

⁶¹ NCLEJ Interview with Make the Road New York Staff Attorney Estee Ward (May 13, 2021) and email from Estee Ward to NCLEJ (May 14, 2022).

⁶² NCLEJ Interview with Worker 1 (June 21, 2021).

⁶³ NCLEJ Interview with Worker 6 (Aug. 4, 2021).

⁶⁴ NCLEJ Interview with Worker 4 (May 13, 2021).

⁶⁵ NCLEJ Interview with Worker 3.

B. FAILURE TO TRANSLATE THE WEBSITE AND INITIAL APPLICATION

With NYSDOL offices closed throughout the state and phone lines jammed, applicants had to use the website to apply for traditional UI and pandemic benefits and to resolve questions about wrongful denials and delays. But low-wage workers, including many LEP workers, ran into immediate technical difficulties. LEP applicants “would often face major roadblocks”⁶⁶ in the very first step of the application process: setting up an online account with NYSDOL. According to one advocate, “in the early days of the government shutdown, the biggest thing people were calling me about was just not even being able to [] start the application, just having no way of accessing it at all.”⁶⁷

Advocates from Chhaya CDC, a South Asian community development organization, noted that the absence of computer literacy and technological access made it difficult or impossible for workers to apply for UI without the assistance of an interpreter with technological savvy:

*You're talking about extremely marginalized people who may or may not have literacy, who may or may not have access to a computer. They might have access to a phone, but they don't have access to computers. How do you complete the unemployment application when you don't have access to a computer, and you're being forced to social distance?*⁶⁸

Adhikaar Senior Organizer Megha Lama noted: “Many of our members don’t have computer literacy.”⁶⁹

Legal Services NYC Staff Attorney Nicole Salk explained: “The system is so complicated that non-English speakers can't really navigate it without translation.”⁷⁰ Ms. Bransford from Make the Road New York summed up these challenges accordingly: “[I]t was hard to use the language or the online system on your phone. So, if you didn't have a computer, if you didn't have internet, and there was no way to get through on the phone, it was almost as if you had no way of applying.”⁷¹

People who could not understand the website application could not reach NYSDOL by phone because the lines were always busy. “[T]he big issue was a lot of people just couldn't do it online and tried to do it on the phone, which meant being on the phone for days and days, and sometimes not being able to get a translator and just being incredibly frustrated.”⁷² Advocates described working with hundreds of LEP applicants to set up their accounts, file for unemployment, and troubleshoot, by video, phone, and screenshots, the online application process.

Even if LEP workers could surmount the technological barriers, they could not complete the UI online application without assistance from English-proficient friends, family members, or community advocates.⁷³ NYSDOL did not translate the UI guidebook, FAQs, instructions, notifications, and news alerts about changes to the UI application procedures.⁷⁴

⁶⁶ NCLEJ Interview with Make the Road New York Staff Attorney Ward.

⁶⁷ NCLEJ Interview with Make the Road New York Staff Attorney Bransford.

⁶⁸ Annetta Seecharran, Chhaya CDC, quoted in AMANDOLARE ET AL., *supra* note 37.

⁶⁹ NCLEJ Interview with Adhikaar Senior Organizer Lama.

⁷⁰ NCLEJ Interview with LSNYC Senior Staff Attorney Nicole Salk (June 16, 2021).

⁷¹ NCLEJ Interview with Make the Road New York Staff Attorney Bransford.

⁷² *Id.*

⁷³ NCLEJ Interview with Minkwon Center for Community Action Human Resources & Operations Specialist Lee; NCLEJ Interview with NYLAG Volunteer Attorney Farrell;

⁷⁴ NCLEJ Interview with LSNYC Senior Staff Attorney Salk.

Id.; NCLEJ Interview with Minkwon Center for Community Action Human Resources & Operations Specialist Lee; NCLEJ Interview with NYLAG Attorney Farrell.

For at least a year after the pandemic began, NYSDOL maintained an English-only online application form that allowed people to apply simultaneously for both UI and PUA.⁷⁵ The Spanish application form, which predated the pandemic, did not include the eligibility questions required by the CARES Act. Thus, unlike English-speaking applicants, Spanish-speaking applicants had to apply for state UI benefits and get rejected before applying for federal PUA benefits, and could not apply for both together.⁷⁶

Not until around February 2021 did the NYSDOL update the Spanish application to include PUA eligibility questions.⁷⁷

Even then, NYSDOL failed to translate its online application to any other language, including the five other most commonly spoken languages in the state. This particularly harmed LEP workers because many were self-earners, classified as independent contractors by their employers, or faced a COVID-19-related situation in which they only qualified for PUA. One advocate recounted: “We felt like the easiest fix would have been, it seemed like somebody could have translated that form in a couple of hours. And we didn’t understand how it could possibly take a year.”⁷⁸

AN EXTRA STEP FOR SPANISH SPEAKERS

The state’s failure to translate the online application had a uniquely detrimental effect on Spanish speakers. Congress had specified that workers could not apply for PUA unless the state had already determined them ineligible for regular UI benefits. NYSDOL revamped its English online form so that English-speaking claimants could apply for regular UI and PUA benefits at the same time. Using that single application, NYSDOL would first evaluate the claimant’s eligibility for regular UI, and then—if rejected—for PUA. But NYSDOL did not make this joint UI and PUA application available in any language other than English.

Spanish speakers used an older application form, available in Spanish on the NYSDOL website, that did not include a PUA application. Spanish speakers had to “wait until [they] got rejected for traditional unemployment and then apply again. Whereas if you were applying with the updated English application online, you didn’t have to go through the whole process of getting rejected and then doing it again.”⁷⁹ Staff Attorney Richard Blum of The Legal Aid Society described this grossly disparate process as “[p]erhaps the most obvious DOL communications failure during the pandemic.”⁸⁰

Workers and advocates described the toll and confusion this created, and the sense that the system was not working for them. One worker stated: “Because of my limited English, this [] process from the start to the finish was extremely strenuous ... a city like New York, where there are so many different folks and immigrants living here, I believe it is right for the city to create a better system for the

immigrants who deserve and have the right to receive public benefits.”⁸¹

Ultimately, the failure to translate the application materials cut off countless LEP workers from accessing unemployment benefits and created significant burdens on family members and community and legal organizations.

⁷⁵ NCLEJ Interviews with Make the Road New York Staff Attorney Bransford and Staff Attorney Ward; NCLEJ Interview with LSNYC Legal Services Assistant Newman.

⁷⁶ *Id.*

⁷⁷ NCLEJ Interview with Make the Road New York Staff Attorney Ward (“[E]ventually, the NYSDOL at least partially translated the online application, but it took around a year for them to get around to it.”).

⁷⁸ NCLEJ Interview with Make the Road New York Staff Attorney Bransford.

⁷⁹ *Id.*

⁸⁰ NCLEJ Interview with The Legal Aid Society Staff Attorney Blum.

⁸¹ NCLEJ Interview with Worker 3.

WORKER STORY

An LEP asbestos worker who was laid off in March 2020 called NYSDOL for months, waiting on hold for multiple hours many days without success.

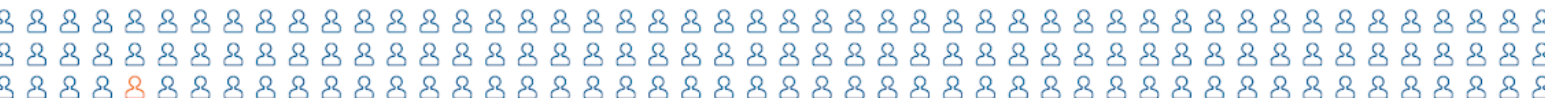
I was out of work for about three to four months and trying to call unemployment. They would have me on the phone for two to three hours and sometimes would just cut off or maybe hang up. Each time I called, I would ask for the names of the people I was talking to, and they would not give me the names. And I would be talking with them, and they would suddenly leave me on the phone and cut off the conversation.⁸²

It wasn't until he went to a non-profit that he could even apply:

I actually couldn't [successfully file for benefits] on my own. I was never able to file.

I had to ask for help from my organization; my organization was able to communicate [for me], and I actually think that they got help from [N.Y. State Senator] Jessica Ramos and help from her office.⁸³

Even after he applied, he still had to wait three months before he received benefits, which came in a lump sum. Then, he waited another two months without receiving any more benefits. During those two months, he again called repeatedly and received no explanation other than high call volumes. "I got tired of having to keep fighting with unemployment and around that time, my job started calling again, that they needed people to work."⁸⁴ Even though he never received all the UI benefits he was owed, he gave up trying: "[O]nce I found work, I decided to stop calling to get paid...because I was tired of dealing with people who didn't want to help me."⁸⁵



C. FAILURE TO TRANSLATE WEEKLY CERTIFICATION FORMS

Claimants who apply for and receive benefits must certify their eligibility each week by answering questions about their work status and search for employment.⁸⁶ However, the web-based certification forms for UI and PUA, each of which asked different questions, were available only in English.⁸⁷ NYSDOL's failure to translate the certification forms imposed unjustified barriers on LEP claimants seeking to maintain their benefits.

Due to the failure to translate the website, LEP claimants sometimes misunderstood the certification questions and accidentally provided incorrect answers.⁸⁸ Several advocates described how NYSDOL denied benefits, and later sought to recoup overpayments, because of mistakes made by LEP claimants who did not understand the English-only certification forms.⁸⁹ Advocates "spent significant time working with claimants to correct or redo the certification questions.

⁸² NCLEJ Interview with Worker 4.

⁸³ NCLEJ Interview with Worker 4.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See discussion and notes, *infra* § X(D).

⁸⁷ NCLEJ Interview with Worker 2; NCLEJ Interview with The Legal Aid Society Paralegal Katherine Stanton (Aug. 31, 2021).

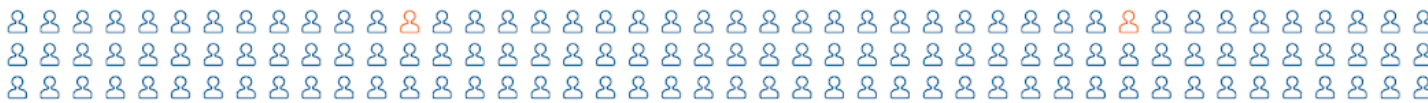
⁸⁸ NCLEJ Interview with The Legal Aid Society Paralegal Katherine Stanton (Aug. 31, 2021).

⁸⁹ *Id.*; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell.

It often took a long time for the NYSDOL to review and approve those back certifications, which meant waiting on retroactive payments for an even longer period of time.”⁹⁰

One LEP claimant who worked as a teaching assistant and in a nail salon described how even after she eventually got benefits (relying on her son and a non-profit organization for translation)

she ran into problems with the certification process and could not obtain assistance from NYSDOL: “It’s difficult even for people who speak English to understand this concept of UIB, PUA, or the benefit process. So, when I was trying to certify my weekly benefits, it kept saying that the employer’s name and information does not match.”⁹¹



D. FAILURE TO TRANSLATE “VITAL” DOCUMENTS

“Sometimes the notices that are sent by the DOL are also randomly only in English ... [S]ometimes I’ll have a Spanish speaking client who says “I only received this in English” or “I never received this notice at all,” and that doesn’t work well because there are strict time limits with which you have to request a hearing for example once you receive a notice, but if you couldn’t read the notice, that’s kind-of vitiated.”⁹²

Federal regulations, as well as federal and state laws, require NYSDOL to provide “vital” documents, including time-sensitive notifications necessary to obtain or maintain benefits, to LEP workers in their primary language.⁹³ “Vital” documents include “information, whether written, oral, or electronic, that is necessary for an individual to understand how to obtain any aid [or] necessary for an individual to obtain any aid”⁹⁴

This also includes communications requiring a response from the beneficiary or applicant.⁹⁵ NYSDOL’s obligation to provide translations of vital documents arises as soon as NYSDOL has notice that the worker has limited English proficiency.⁹⁶ Despite this clear federal mandate, even when LEP workers identified their primary non-English language on their UI applications, NYSDOL often sent them notices only in English.⁹⁷

⁹⁰ NCLEJ Interview with Make the Road New York Staff Attorney Ward.

⁹¹ NCLEJ Interview with Worker 2.

⁹² NCLEJ Interview with LSNYC Legal Services Assistant Newman.

⁹³ See 29 C.F.R. § 38.9(h). Under 29 C.F.R. § 38.9(g)(1), the state agency “must translate vital information in written materials into these languages and make the translations readily available in hard copy, upon request, or electronically such as on a Web site.”

⁹⁴ 29 C.F.R. § 38.4(ttt).

⁹⁵ U.S. Dept of Labor, Emp’t. & Training Admin., *Unemployment Insurance Program Letter No. 02-16*, at 3, https://oui.doleta.gov/dmstree/uipl/uipl2k16/uipl_0216.pdf (Oct. 1, 2015); U.S. Dep’t of Labor, Emp’t. & Training Admin., *Unemployment Insurance Program Letter No. 02-16, Change 1* (May 11, 2020), https://wdr.doleta.gov/directives/attach/UIPL/UIPL_02-16_Change-1.pdf. In addition, pursuant to 29 C.F.R. § 38.9(g)(3), all communications containing vital information must contain a Babel notice, which is defined as a statement “in multiple languages informing the reader that the communication contains vital information, and explaining how to access language services to have the contents of the communication provided in other languages.” 29 C.F.R. § 38.4(i).

⁹⁶ 29 C.F.R. § 38.9(h) (“[O]nce [an agency] becomes aware of the non-English preferred language of an LEP [claimant] . . . the [agency] must convey vital information in that language.”).

⁹⁷ NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interview with LSNYC Legal Services Senior Paralegal Brito; NCLEJ Interview with Make the Road New York Staff Attorney Bransford.

For Spanish speakers, NYSDOL sent some select standard forms and correspondence, such as benefit determinations, in Spanish.⁹⁸ But even this was highly inconsistent. According to LSNYC Legal Services Assistant Samantha Newman, “[s]ometimes the notices that are sent by the DOL are also randomly only in English.”⁹⁹ Other advocates confirmed a “big issue was that people who are applying online in Spanish, are getting messages back in English.”¹⁰⁰ And VOLS Attorney Tori Roseman explained: “Even if you ask for them to be, they might not be, or it might only partially be translated.”¹⁰¹ One advocate estimated that only 40% of form notices that should have been in Spanish actually were.¹⁰²

The lack of translation impacted workers because “there are strict time limits with which you have to request a hearing ... once you receive a notice, but if you couldn’t read the notice, that’s kind-of vitiated.”¹⁰³ Even if a document was translated, workers and advocates stated that DOL often only translated one sentence, such as the determination, without translating the reasoning.¹⁰⁴ The Legal Aid Society Paralegal Jacalyn Goldzweig Panitz described how decisions were sent to Spanish-speaking claimants in English, with only one sentence in Spanish disclosing the right to appeal.¹⁰⁵ But “with the rest of the decision in English,” her clients “had no way of understanding the context or making a decision.”¹⁰⁶

As for non-Spanish speaking LEP claimants: “The less common languages are—there’s no translators for them.”¹⁰⁷ For example, Flushing Workers Center Organizer Sarah Ahn observed that NYSDOL did not translate into Korean letters regarding denials, employer contestation of benefits, and appeals.¹⁰⁸

NYSDOL’s Language Access Plan, required by state and federal law, confirms its failure to translate critical documents.¹⁰⁹ Although NYSDOL has long been required to translate vital documents into New York’s top six languages—Spanish, Chinese, Russian, Yiddish, Bengali, and Korean¹¹⁰—NYSDOL does not translate key notices critical to accessing benefits into any language. For example, NYSDOL does not translate the Notices of Determination to the Claimant and Claim for Benefits documents, impeding LEP workers from understanding the outcome of their applications, the basis for NYSDOL’s determinations, and how to appeal.¹¹¹ Nor does NYSDOL translate fraud and immigration notifications into any language other than Spanish.¹¹² DOL also fails to translate requests for secondary verification, identification, Alien Employment Verification, Social Security requests or requests for work verification or entitlements into any languages other than English and Spanish.¹¹³ Other key documents are not translated into New York’s six, let alone 12, most commonly spoken languages as required by state law, including eligibility instructions and

⁹⁸ *Id.*

⁹⁹ NCLEJ Interview with LSNYC Assistant Samantha Newman.

¹⁰⁰ NCLEJ Interviews with Make the Road New York Staff Attorneys Bransford and Ward.

¹⁰¹ NCLEJ Interview with Volunteers of Legal Service Staff Attorney Victoria Roseman (March 10, 2022).

¹⁰² NCLEJ Interview with Make the Road New York Staff Attorney Ward.

¹⁰³ NCLEJ Interview with LSNYC Assistant Newman.

¹⁰⁴ NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interview with LSNYC Senior Staff Attorney Salk.

¹⁰⁵ NCLEJ Interview with The Legal Aid Society Paralegal Jacalyn Goldzweig Panitz (Aug. 21, 2021).

¹⁰⁶ *Id.*

¹⁰⁷ NCLEJ Interview with LSNYC Senior Staff Attorney Salk; NCLEJ Interview with Flushing Workers Center Organizer Ahn.

¹⁰⁸ NCLEJ Interview with Flushing Workers Center Organizer Ahn.

¹⁰⁹ See N.Y. DEP’T OF LABOR, *supra* note 46.

¹¹⁰ *Id.* at 2. The number of languages was expanded from six to ten by Executive Order 26.1 in March of 2021; agencies have until August 1, 2022 to come into compliance. The expansion will add Haitian Creole, Italian, Arabic, and Polish. See State of N.Y., Executive Order 26.1 “Statewide Language Access Policy” (2021).

¹¹¹ N.Y. DEP’T OF LABOR, *supra* note 46, at 27, 29.

¹¹² *Id.* at 29–30.

¹¹³ *Id.*

the Monetary Benefit Form.¹¹⁴ Further, NYSDOL has openly admitted that it does not translate any notices to claimants eligible for overpayment recoupment waivers.¹¹⁵

In addition, NYSDOL sent important notices concerning benefit renewals and additional federal benefits only in English—which prevented claimants from receiving all the benefits to which they were entitled.¹¹⁶ An LEP worker described how he obtained PUA with the help of a nonprofit, after which NYSDOL contacted him and told him he was eligible for additional benefits.¹¹⁷ However, he could not understand the documentation requirements, so he did not apply.¹¹⁸

Some vital correspondence, including monetary determinations and appeals, required a response within 30 days, but workers would miss the deadline because the notice was issued only in English.¹¹⁹ By the time claimants found translators, they could not respond in time—especially if the request involved onerous requests for additional documentation. According to one advocate, NYSDOL's failure to translate requests for immigration verification was particularly harmful:

Non-citizen [applicants] who had some form of immigration status that afforded them a work permit, such as asylum... were regularly asked for documentation, [] proving they were authorized to work. And you have to turn in those documents within 21 calendar days.

That's a pretty tight window. If you get the notice in English, you have to schedule a call with one of us or find someone who can translate it and know what it means and know what documents you need to send in and how to send it in. There was also a lot of confusion around [], do I need to send in my originals? Is that safe? If I don't have to, what kind of copy does it need to be? So this was also something that created a lot of anxiety among claimants and significant delays in the application process.¹²⁰

NYSDOL's failure to translate vital notices and instructions directly impacted workers' ability to maintain their benefits.¹²¹ For example, when an applicants' UI claim is pending or delayed, NYSDOL still requires workers to continue to certify for weekly benefits. Failure to certify and comply during the set timeframe results in a denial of benefits.¹²² However, many LEP applicants did not understand this because NYSDOL failed to translate the certification questions and instructions.¹²³ As Ms. Goldzweig Panitz described: "[I]f you've never been on unemployment before, it seems like a pretty straightforward system. You apply, you're jobless, you get benefits weekly, but it's a really complicated system with lots and lots of rules. What I've seen is people who can't read in English assuming they were doing things right and then getting in trouble for violations of Rule 31 in a hundred-page handbook."¹²⁴

¹¹⁴ *Id.* at 17, 29–30.

¹¹⁵ UI Overpayment Coalition meeting with NYSDOL, May, 27, 2022.

¹¹⁶ NCLEJ Interview with VOLS Attorney Roseman; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell.

¹¹⁷ NCLEJ Interview with Worker 3.

¹¹⁸ *Id.*

¹¹⁹ NCLEJ Interview with Flushing Workers Center Organizer Ahn; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interview with LSNYC Attorney Salk; NCLEJ Interview with The Legal Aid Society Paralegal Goldzweig Panitz; NCLEJ Interviews with Make the Road Staff Attorney Bransford and Staff Attorney Ward.

¹²⁰ NCLEJ Interview with Make the Road New York Staff Attorney Ward.

¹²¹ *Id.*; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interview with LSNYC Legal Services Senior Paralegal Brito; NCLEJ

Interview with Minkwon Center for Community Action Human Resources & Operations Specialist Lee.

¹²² NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interview with LSNYC Legal Services Senior Paralegal Brito; NCLEJ Interview

with The Legal Aid Society Paralegal Goldzweig Panitz.

¹²³ NCLEJ Interview with The Legal Aid Society Paralegal Stanton.

¹²⁴ NCLEJ Interview with The Legal Aid Society Paralegal Goldzweig Panitz.

Finally, LEP workers reported that NYSDOL's online messaging system operated only in English, preventing them from following up on questions concerning eligibility, payment status, and other problems and delays with their benefits. Workers repeatedly described their difficulty using the messaging system to write to NYSDOL in their primary language—for starters, none of the mandatory

subject headings were translated, which meant that claimants more often than not selected a heading that did not correspond to their question or issue.¹²⁵ One advocate remarked: “[I]t didn’t really matter what language the text of the claimant’s message was in, the written response the claimant received was almost invariably in English.”¹²⁶

E. POOR QUALITY TRANSLATIONS

NYSDOL translated its website into Spanish and there is now a UI website that uses Google Translate for some languages.¹²⁷ However, the poor machine-based translation still renders the website incomprehensible for some workers.¹²⁸ Similar problems plague NYSDOL's translations of documents and instructional materials.¹²⁹ According to Minkwon Center's Specialist Sunny Lee, NYSDOL's translation of certain documents, including the UI guidebook, was incoherent.¹³⁰ With the terms, directions, and guidance for UI materials already highly technical, the poor quality of translation made it even harder for LEP speakers to navigate and access UI benefits.

A central reason for poor translations is NYSDOL's unlawful reliance on machine-based translation systems.¹³¹

According to Mr. Blum, “It seems like they’re using Google Translate. That can give you the general subject matter, but not much more.”¹³²

Ms. Roseman agreed: “Their ‘go-to’ translation service is to use Google Translate.”¹³³ The inferior translation violates Title VI and state laws requiring language access, as well as federal regulations and guidance, which limit machine translation and require good quality translations.¹³⁴

Compounding the problem, the agency outsources its quality assurance for translations to private companies and allows internal staff to act as translators based on their unchecked self-assessment of their proficiency in a particular language.¹³⁵

¹²⁵ NCLEJ Interview with Make the Road New York Staff Attorney Ward.

¹²⁶ *Id.*

¹²⁷ NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interview with LSNYC Legal Services Senior Paralegal Brito.

¹²⁸ *Id.*; NCLEJ Interview with LSNYC Senior Staff Attorney Salk.

¹²⁹ NCLEJ Interview with LSNYC Senior Staff Attorney Salk.; NCLEJ Interview with Make the Road New York Staff Attorney Bransford.

¹³⁰ NCLEJ Interview with Minkwon Center for Community Action Human Resources & Operations Specialist Lee.

¹³¹ U.S. Dep’t of Labor, Emp’t. & Training Admin., Unemployment Insurance Program Letter No. 02-16, at 3 (May 11, 2020),

https://wdrdoleta.gov/directives/attach/UIPL/UIPL_02-16_Change-1.pdf. The DOL explicitly provides that “[u]se of free, web-based translation services (also known as machine translation software) is not sufficient to ensure that the translation is appropriate and conveys the same meaning as the English version.”

¹³² NCLEJ Interview with The Legal Aid Society Staff Attorney Blum.

¹³³ NCLEJ Interview with VOLS Attorney Roseman.

¹³⁴ See discussion and notes, *infra* § X(A).

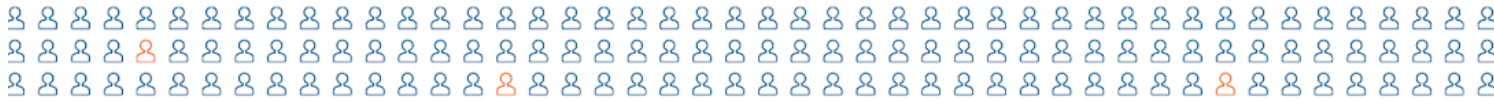
¹³⁵ N.Y. DEP’T OF LABOR, *supra* note 46, at 13 (authorizing the use, “occasionally and for routine matters,” of “multilingual staff volunteers who are self-assessed in their own language competency”) and 13–14 (listing vendors for translation services).

In addition, the NYSDOL's Language Access Plan does not require the agency to consult with community organizations,¹³⁶ despite the outsized and central role they play in ensuring LEP workers receive benefits.

Moreover, NYSDOL and its interpretation service Language Line lack a sufficient number of competent interpreters, especially for languages with multiple dialects or formal and colloquial distinctions.¹³⁷ As a result, "it wasn't really a great way to communicate, because the [interpreter] wasn't being understood by the applicant, and then wasn't properly translating what the applicant was saying to the DOL employee."¹³⁸ As Ms. Roseman explained: "To get anything translated, claimants must take a proactive approach, meaning they have to ask DOL to translate.

But the problem is there is no procedure or protocol or instructions on how to do this."

Legal Services NYC Senior Staff Attorney Nicole Salk described how "[f]or Bengali, a lot of people said that the translations were gobbledygook."¹³⁹ Ms. Ahn, who assisted workers who spoke Korean, Chinese, and other languages, said NYSDOL UI translations "always had issues. Sometimes they were very bad, sometimes okay, but there were always issues."¹⁴⁰ According to one LEP claimant who had to rely on her son and a non-profit to help translate and submit her application: "The biggest issue is that there is translated content out there, but the translation doesn't embody the full culture or the process. They try to make it sound like the American process, but it doesn't sound like the English."¹⁴¹



F. LANGUAGE-BASED DENIALS OF BENEFITS

Language access barriers resulted in wrongful denials for a number of reasons. First, some unscrupulous employers took advantage of language access gaps to contest workers' eligibility, falsely asserting that workers were fired for cause or refused to work, which are disqualifying grounds for UI, when in fact the employer let them go.¹⁴²

Second, LEP workers struggling to complete English-only forms often had to rely on English-speaking family members for help,

sometimes leading to mistakes because the person completing the form did not have full knowledge of the facts or understanding of the terminology.¹⁴³ Or LEP workers completed the forms themselves and made accidental mistakes due to poor comprehension.¹⁴⁴ For example, Ms. Roseman noted: "Something claimants are asked 'Are you ready able and willing to work' [and there is a] good chance that the question is lost in translation and therefore the answer is off."¹⁴⁵

¹³⁶ See *id.*

¹³⁷ NCLEJ Interview with Make the Road New York Staff Attorney Ward.

¹³⁸ *Id.*

¹³⁹ NCLEJ Interview with LSNYC Senior Staff Attorney Salk.

¹⁴⁰ NCLEJ Interview with Flushing Workers Center Organizer Ahn.

¹⁴¹ NCLEJ Interview with Worker 2.

¹⁴² NCLEJ Interview with Make the Road New York Staff Attorney Bransford; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interview with Worker 5.

¹⁴³ NCLEJ Interview with The Legal Aid Society Paralegal Goldzweig Panitz.

¹⁴⁴ NCLEJ Interview with Make the Road New York Staff Attorney Bransford; NCLEJ Interview with VOLS Attorney Roseman; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell.

¹⁴⁵ NCLEJ Interview with VOLS Attorney Roseman.

These kinds of errors led to wrongful denials and sometimes even fraud investigations. As one advocate described:

I've had problems with wrongful denials that were language-based, [] because the person, our clients often get fired, and the employer says to them, there's no more work for you. And so then maybe the person wouldn't write [] 'fired'; they would write 'no more work,' and then there would be like a fraud issue, and then we would have to do an appeal. So that was a language access issue.¹⁴⁶

Third, once NYSDOL made forms available in languages other than English, poor translation quality caused unwarranted denials and losses on appeal. With terms, directions, and guidance for UI materials already highly technical, according to Ms. Roseman, “the challenge is that people don’t know the translation quality is poor and it leads to wrong answers or misinformation.”¹⁴⁷ Often “the client does not even know it is poor translation until they get a negative determination later or run into problems.”¹⁴⁸

Advocates had to do a considerable amount of advocacy with NYSDOL to ensure eligible immigrants got their benefits, and some eligible immigrants never received the benefits they were due.¹⁴⁹ According to Ms. Lama, NYSDOL “[was] not taking work permits, so we had to educate the DOL that these were work permits that were automatically extended.”¹⁵⁰ Asylees were particularly hard hit. According to Ms. Lama, “asylum workers did not... get the eligibility and were waiting another seven months to see if they were eligible. A lot of students didn’t get [the benefits for which they

were eligible].”¹⁵¹

Advocates reported that domestic workers were also erroneously denied unemployment, even though they were fully eligible.¹⁵² The absence of translation and clear standards, as well as fear of retaliation, also led some eligible immigrant domestic workers to forego applying.¹⁵³ According to Ms. Lama: “[F]or a lot our members, they are domestic workers, so [] I think there was not a lot of clarity on how these folks will apply. So, a lot of domestic workers gave up on applying. . . . Many [were not found] eligible for unemployment even though they pay taxes and have a social security number, many were also scared whether their employer would say something to them. There was a question like. . . ‘During the pandemic did you leave or did your employer tell you not to come?’ . . . so those were very differently framed questions I would say.”¹⁵⁴

Finally, translation problems persisted at hearings. Advocates described multiple examples where Unemployment Administrative Law Judges (“ALJs”) upheld DOL’s denial of benefits because they viewed claimants as contradicting themselves when trying to correct an English-speaking family member’s translation error on their application and certification forms.¹⁵⁵ ALJs also assumed the application or recertification materials were available in other languages, when they were not, and issued denials on the basis that the claimants failed to fill out forms correctly or completely.¹⁵⁶

¹⁴⁶ NCLEJ Interview with Make the Road New York Staff Attorney Bransford.

¹⁴⁷ NCLEJ Interview with VOLS Attorney Roseman.

¹⁴⁸ *Id.*

¹⁴⁹ NCLEJ Interview with Adhikaar Senior Organizer Lama and Senior Case Coordinator Maya Gurung (June 29, 2021); NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interview with LSNYC Senior Paralegal Brito; NCLEJ Interviews with Make the Road New York Staff Attorney Ward and Staff Attorney Bransford; NCLEJ Interview with Minkwon Specialist Lee.

¹⁵⁰ NCLEJ Interview with Adhikaar Senior Organizer Lama and Senior Case Coordinator Gurung.

¹⁵¹ *Id.*

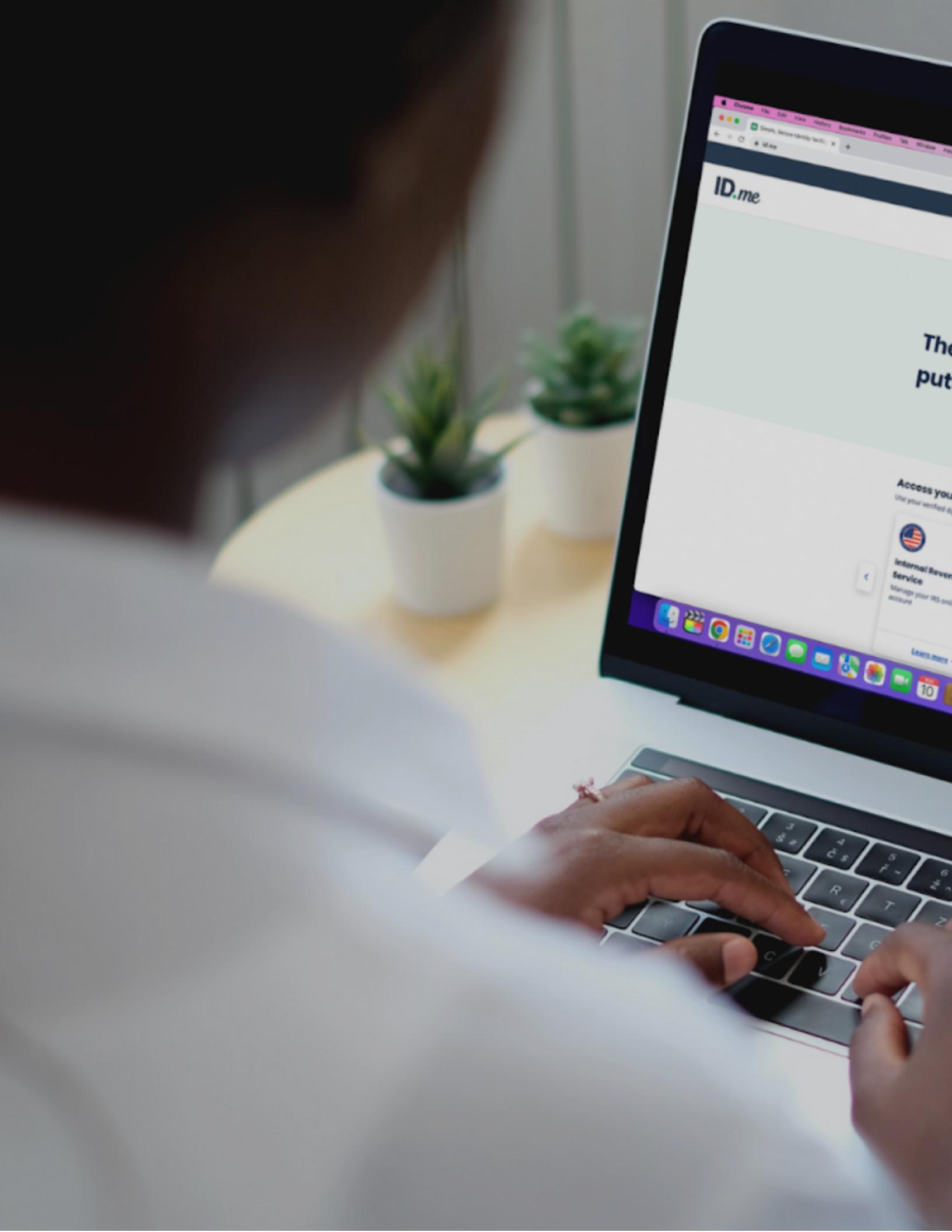
¹⁵² *Id.*; NCLEJ Interview with LSNYC Senior Staff Attorney Salk.

¹⁵³ NCLEJ Interview with Adhikaar Senior Organizer Lama.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*; NCLEJ Interview with The Legal Aid Society Paralegal Stanton.





III. Increasing the Burden on LEP Claimants with ID.me

In February 2021, New York State purchased and implemented a new identity verification system called ID.me, which, according to advocates relies on troubling facial recognition software and has introduced other barriers that have resulted in countless eligible immigrant and LEP workers being erroneously prevented from receiving benefits. According to workers and advocates, ID.me does not translate all notices and instructions in accordance with the requirements of New York and federal law, imposes onerous evidentiary burdens on those claimants flagged for alleged fraud, and significantly delays the resolution of fraud flags, leaving workers in extreme hardship without benefits for months.¹⁵⁷ Based on ID.me's verification process, NYSDOL has barred many eligible LEP workers from receiving UI, and many others abandoned their valid UI claims, because they could not navigate ID.me's system.¹⁵⁸ Even as the Internal Revenue Service and other states limited their use of ID.me because of concerns about privacy, racial bias in its facial recognition software, and privatization of core government functions,¹⁵⁹ and as New York

advocates have pressed similar concerns,¹⁶⁰ NYSDOL continues to rely on ID.me.

As reported by workers and advocates, every applicant has to register with the ID.me system. ID.me provides identity verification through a process that captures, stores, and uses biometric data.¹⁶¹ The primary identity verification process consists of "several automated checks to protect against identity fraud," but "some people—through no fault of their own—can't get past these checks."¹⁶² These claimants must undergo "secondary verification" with a video referee.¹⁶³ Advocates assert that LEP and immigrant workers are often flagged for secondary verification because of the spelling of their names,¹⁶⁴ immigration status, and low incomes.¹⁶⁵ Although NYSDOL claims that secondary verification "typically" takes less than 10 minutes, LEP workers and advocates described the process taking months.

For claims flagged by NYSDOL as potentially fraudulent, NYSDOL immediately bars or

¹⁵⁷ NCLEJ Interview with LSNYC Senior Paralegal Brito; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; Email from LSNYC Senior Advocate Paralegal Amanda Wilkins (Aug. 5, 2021); NCLEJ Interview with Worker 6.

¹⁵⁸ *Id.*

¹⁵⁹ U.S. S. Comm. on Fin., *Memorandum: IRS Plans to Transition Away from ID.me Facial Recognition* (Feb. 7, 2022), <https://www.finance.senate.gov/record/committees/financial-operations-and-general-investigation/recordings/2022/02/07/122928082/id-me-irs>; Amy Sokolow, *Massachusetts Unemployment Office Plans to Drop Facial Recognition Technology in Coming Weeks*, BOSTON HERALD (Feb. 23, 2022), <https://www.bostonherald.com/2022/02/23/massachusetts-unemployment-office-plans-to-drop-facial-recognition-technology-in-coming-weeks/>; Natalie Alms, *IRS Backs Away from Facial Recognition Technology*, FCW (Feb. 7, 2022), <https://fcw.com/digital-government/2022/02/irs-backs-away-facial-recognition-technology/361674/>; Susan Miller, *States Reconsider Facial Recognition for ID Verification*, GCN (Feb. 24, 2022), <https://gcn.com/state-local/2022/02/states-reconsider-facial-recognition-id-verification/362418/>. See N.Y. Unemployment Ins. Coal., *Letter to NYSDOL Commissioner Roberta Reardon, NYS Department of Labor's Implementation of Claimant Identity Verification Through ID.me* (Dec. 3, 2021) (on file with author). While NCLEJ recognizes that UI fraud is an issue, we oppose the reliance on private companies to engage in this state function. ID.me has asserted that it uses facial recognition software that minimizes racial bias. However, policymakers and advocates throughout the country have raised concerns about the inherent racial bias of facial recognition software generally, as well as ID.me's facial recognition software in particular. Drew Harwell, *Private Contractor To Drop Facial Recognition Requirement for All State and Federal Agencies After Backlash over IRS Plan*, WASH. POST (Feb. 9, 2022 2:01 PM), <https://www.washingtonpost.com/technology/2022/02/09/irs-idme-facial-recognition-login/> ("Federal research has shown that facial recognition algorithms can show wildly different accuracy levels based on factors such as the quality of the camera or the color of the person's skin. And using it requires technical abilities — such as a smartphone or laptop camera — that millions of Americans can't access or afford.") (discussing the issues of racial and class bias in facial recognition programs like what ID.me uses); WFTS Tampa Bay (2/28/22) Kylie McGivern, Florida DEO stands by ID.me's Controversial Facial Recognition Technology To Verify IDs as the IRS Drops the Requirement, ABC ACTION NEWS: WFTS TAMPA BAY (Feb. 28, 2022 6:04 AM), <https://www.abcactionnews.com/news/full-circle/florida-deo-stands-by-controversial-facial-recognition-technology-to-verify-ids-as-the-irs-drops-id-me/> ("I waited and then the last half hour it said that something wasn't matching. They needed more proof or something, and I said to myself, oh my God, how much more do they need? I mean I gave them my license, I gave them my passport, I gave them my pay stubs, I mean what more could they want?") (describing how Floridians experienced significant difficulty and increased wait times when dealing with ID.me's facial recognition software); Corin Faife, *Feds Are Still Using ID.me to Scan Your Face — and its Human Reviewers Can't Keep Up*, THE VERGE (Feb. 11, 2022 9:53 AM), <https://www.theverge.com/2022/2/11/22928082/id-me-irs-facial-recognition-overworked-employees> (discussing issues with ID.me scaling up and how wait times for facial recognition users increased and instances of scrutiny of the use of facial recognition software from the ACLU and other journalists).

¹⁶¹ *Id.*; NYS DOL, *Information about ID.Me*, <https://dol.ny.gov/information-about-idme>.

¹⁶² N.Y. State & ID.me, *Verify Your Identity on a Video Call*, <https://dol.ny.gov/system/files/documents/2021/04/id-me-verify-your-identity-on-video-call.pdf>.

¹⁶³ *See id.*

¹⁶⁴ NCLEJ Interview with LSNYC Senior Paralegal Brito; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interview with LSNYC Assistant Newman; NCLEJ Interview with Minkwon Center for Community Action Human Resources & Operations Specialist Lee.

¹⁶⁵ NCLEJ Interview with Worker 6; NCLEJ Interview with LSNYC Senior Paralegal Brito; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; Jennifer Lewke, *News10NBC Investigates: Many Struggle to Get Through ID.me Process*, NEWS10NBC ROCHESTER (Sept. 16, 2021), <https://www.whcc.com/news/many-struggle-to-get-through-idme-process/6240392/> ("While 9 in 10 claimants can verify through our self-service flow in less than five minutes, those who need additional support are directed to an ID.me representative via video chat, typically in less than 10 minutes.").

freezes claimants' benefits and has refused to speak to claimants until they complete ID.me's identity verification process.¹⁶⁶ NYSDOL represents that individuals selected for identity verification will have their benefits reinstated within 10–14 days,¹⁶⁷ but LEP claimants and advocates report that it takes far longer after they submit their documents—if claimants have their benefits reinstated at all.¹⁶⁸

Federal guidance requires workers to receive notice of a fraud suspicion flag,¹⁶⁹ but according to advocates and workers, countless New Yorkers, and particularly LEP workers have received none.¹⁷⁰ The few workers who report receiving fraud notices also report that the notices they receive are in English only and sometimes Spanish, despite claimants' notification to DOL that they do not speak or understand English.¹⁷¹ In fact, the NYSDOL's Language Access Plan confirms that fraud-related forms are only available in English and Spanish.¹⁷² According to one advocate, "all [the notifications] came in English—even e-mail or text messages were all in English.

It's very strange because the application says "what is your preferred language" and every time I put Korean in, nothing comes in Korean, so why bother even asking about what

language my preference is, if you're not going to give that to my clients."¹⁷³ The English-only notices made it difficult for many to understand the problem, comply, and reinstate their benefits. In addition, several advocates and claimants reported that they did not receive a notice from ID.me that their account was inactive or suspended, or that their verification failed, in their indicated language of choice. According to advocates and workers, several other critical components of ID.me are not translated into six of New York's top ten languages - namely Russian, Yiddish, Bengali, Italian, Arabic, and Polish.¹⁷⁴

ID.me directs claimants to use its platform to verify their identity by submitting a photo of state-issued identification, taking a video selfie for facial recognition, and providing their social security number.¹⁷⁵ Workers who cannot complete the verification because of an issue with their documentation must have a smartphone or tablet and the ability to join a video call (with a computer or phone with a camera) so they can contact an ID.me "trusted referee" (not a NYSDOL representative) for a video call.¹⁷⁶ During this video call, claimants must present two primary government-issued identification documents or one primary and two secondary identification documents.¹⁷⁷

¹⁶⁶ N.Y. Dep't of Labor (@NYSLabor), TWITTER (Aug. 24, 2021, 12:01 PM), <https://twitter.com/nyslabor/status/1430198566035787784?lang=en> ("The @IDme process is not optional for claimants who are selected for identity verification. If selected for IDme, you will not receive benefits or be able to speak to an agent until your identity is verified & processed in 10–14 days.").

¹⁶⁷ *Id.*

¹⁶⁸ NCLEJ Interview with Worker 6; NCLEJ Interview with LSNYC Senior Paralegal Brito; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell.

¹⁶⁹ See U.S. Dep't of Labor, Emp. & Training Admin., Unemployment Insurance Program Letter No. 16-21 (Apr. 13, 2021), https://wdr.dola.gov/directives/corr_doc.cfm?docn=9141. Further, federal guidance is clear that workers must be fully notified and given a meaningful opportunity to contest any flag fraud.

¹⁷⁰ See, e.g., NCLEJ Interview with Worker 6; NCLEJ Interview with LSNYC Senior Paralegal Brito; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell.

¹⁷¹ NCLEJ Interview with Worker 6; NCLEJ Interview with LSNYC Senior Paralegal Brito; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interviews with Make the Road New York Staff Attorney Ward and Staff Attorney Bransford; NCLEJ Interview with Minkwon Center for Community Action Human Resources & Operations Specialist Lee; NCLEJ Interview with LSNYC Assistant Newman.

¹⁷² See N.Y. DEPT OF LABOR, LANGUAGE ACCESS PLAN, *supra* note 46, at 29–30.

¹⁷³ NCLEJ Interview with Minkwon Center for Community Action Human Resources & Operations Specialist Lee.

¹⁷⁴ E-MAIL ATTACHMENT FROM LORETTA HAMILTON, NYSDOL INTERIM DIRECTOR OF THE CLAIMANT ADVOCATE OFFICE, SUE FILBURN, NYSDOL UI DIVISION, AND LAURA CAMPION, NYSDOL GENERAL COUNSEL & #39;s OFFICE, UI COALITION ID.ME ISSUE AREAS, MARCH 15, 2022 (SENT MARCH 23, 2022) (ON FILE WITH AUTHOR). AS OF SEPTEMBER 2022, ID.ME'S PRODUCT IS AVAILABLE IN ENGLISH, SPANISH, SIMPLIFIED AND TRADITIONAL CHINESE, HAITIAN CREOLE, VIETNAMESE, KOREAN, TAGALOG, AND ARMENIAN. NYSDOL HAS REQUESTED THAT THE COMPANY ADD YIDDISH, BENGALI, ITALIAN, AND POLISH, BUT HAS NOT REQUESTED RUSSIAN OR YIDDISH. E-MAIL FROM TERRY NEAL, CHIEF COMMUNICATIONS OFFICER, ID.ME (SENT AUGUST 29, 2022) (ON FILE WITH AUTHOR).

¹⁷⁵ ID.me, *How to Set up and Protect Your ID.me Account*, <https://dol.ny.gov/system/files/documents/2021/04/id.me-how-to-set-up-and-protect-id.me-account.pdf>.

¹⁷⁶ ID.me, *New York State DOL - How do I verify my identity for a new claim with the New York State Department of Labor (NYS DOL)?*, <https://help.id.me/hc/en-us/articles/1500005486822-New-York-State-DOL-How-do-I-verify-my-identity-for-a-new-claim-with-the-New-York-State-Department-of-Labor-NYS-DOL->

¹⁷⁷ See ID.me, *What Is a Primary or Secondary Identification Document*, <https://help.id.me/hc/en-us/articles/360017833054-What-is-a-Primary-or-Secondary-Identification-Document>

The primary identification generally consists of government-issued photo identification or birth certificate, and must be an original,¹⁷⁸ while the secondary identification must be a Social Security Card or tax, immigration, insurance or other documentation.¹⁷⁹

The technological requirements pose serious barriers for low-income applicants. Legal Services NYC Senior Advocate Paralegal Amanda Wilkins described how her clients who “are not computer savvy face particular problems” and that it “takes very long to get help.”¹⁸⁰ One of her clients who had technical problems with ID.me went ten months without benefits.¹⁸¹ Many claimants simply could not get ID.me to verify them through the system despite trying multiple times for months.¹⁸²

According to Mr. Brito, the ID.me process, even in English, is complicated and confusing and

must be done precisely.¹⁸³ Workers and advocates also reported to NCLEJ that immigrant workers face additional barriers because of the lack of translation and because the system has difficulty processing foreign-issued documentation.¹⁸⁴

Advocates also reported that ID.me’s technology often did not accept or recognize photos of people with darker skin tones.¹⁸⁵

Ms. Wilkins from LSNYC described:

“I have so many cases regarding the issue of ID.me problems, it’s hard for me to count through all my cases. But, most of [my clients] are having technical issues or are waiting so long to get their benefits after completing their ID.me website [uploads] ... There are so many issues ... [e]specially the fact that there is a language barrier because ... everything they are doing with ID.me is all in English only.”¹⁸⁶

WORKER STORY

One French-speaking claimant we interviewed demonstrates the harsh consequences of New York’s use of ID.me. After losing his job as a cleaner at JFK Airport in March 2020, he eventually got UI benefits with the help of his roommate, who spoke English. However, in May 2021, NYSDOL suddenly cut off his benefits. He eventually received a letter in English explaining that he was under investigation for fraud, and his benefits would be withheld until he could establish his eligibility. The instructions for how to comply with the ID.me documentation requirements were all in English. He called the number on the letter multiple times but could not reach anyone. The worker eventually got help with translation from a non-profit and submitted multiple photos, his Social Security Card,

Permanent Resident Card (green card), and other documentation through the ID.me software.

Despite complying with the requirements, his benefits were delayed for months. He tried contacting ID.me through video and telephone calls, as well as NYSDOL multiple times for months. Because of his lack of UI and the financial instability that followed, he could not pay rent, was evicted from his apartment, had to sign up for food stamps, and could not pay for transportation or food. He was forced to move into a homeless shelter. Through the help of an advocate, his benefits were eventually reinstated, but due to the economic instability caused by this delay, he continues to reside in a shelter.”¹⁸⁷

¹⁷⁸ The list of primary identification documents includes: U.S. or Canadian Driver’s License; Permanent Government-issued Photo ID (paper documents are not accepted); State-issued ID; U.S. Passport or Passport Card; U.S. Permanent Resident Card, Employment Authorization Card or Certificate of Naturalization; Veteran Health ID Card, DHS Trusted Traveler Card; Tribal-issued Photo ID; and, for claimants living outside the U.S., a National ID card. *Id.*

The list of secondary identification documents—a claimant must provide two of these if they can only present one primary identification document—includes: Social Security Card; DoD or Consular Certificate of Birth Abroad; DoS Certification of Report of Birth; U.S. Voter or Health Insurance Card; U.S. Birth Certificate; College Certificate; Border Crossing Card; Native American or Canadian Indian tribal document or card; W-2, 1099, or 1098 Forms; Insurance Statement; and Auto Insurance Cards. *Id.*

¹⁷⁹ Email from LSNYC Senior Advocate Paralegal Wilkins (Aug. 5, 2021).

¹⁸⁰ *Id.*; NCLEJ Interview with The Legal Aid Society Paralegal Stanton; See N.Y. Unemployment Ins. Coal., *Letter to NYSDOL Commissioner Roberta Reardon, NYS Department of Labor’s Implementation of Claimant Identity Verification Through ID.me* (Dec. 3, 2021) (on file with author).

¹⁸¹ NCLEJ Interview with Worker 1; NCLEJ Interview with Worker 6; NCLEJ Interview with Worker 3; NCLEJ Interview with Minkwon Center for Community Action Human Resources & Operations Specialist Lee; NCLEJ Interview with LSNYC Senior Paralegal Brito; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell.

¹⁸² NCLEJ Interview with LSNYC Senior Paralegal Brito.

¹⁸³ *Id.*

¹⁸⁴ NCLEJ Interview with VOLS Staff Attorney Roseman; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell.

¹⁸⁵ See email from LSNYC Senior Advocate Paralegal Wilkins, *supra* note 180.

¹⁸⁶ NCLEJ Interview with Worker 6.

Workers described the serious toll on their lives when, after receiving UI benefits for months or even a year (after a struggle to access benefits to begin with), they were suddenly thrown off because of a fraud flag that forced them to go through ID.me. They often could not get through to NYSDOL or ID.me to ask questions, and when they did, they received conflicting instructions.¹⁸⁸

Because of the difficulties related to ID.me's document verification system and other processing problems, workers experienced unconscionable delays and denials. For example, Mr. Brito described one client who waited nine to ten weeks with no benefits because of a wrongful fraud flag.¹⁸⁹ After struggling with translation and obtaining the required documents, the worker submitted his birth certificate, Social Security Card, and state identification to ID.me. After three weeks with no response, he re-uploaded his documentation, yet six more weeks passed before his reinstatement. As a result of these delays, despite his full compliance, he lost months of UI benefits.¹⁹⁰

The Legal Aid Society Paralegal Katherine Stanton explained: "[O]ftentimes a claimant has already submitted [to] ID.me, and they think it's fine, but for some reason it hasn't gone through and the DOL hasn't followed up to ask them to submit another ID.me or to ask them for further information. They're not communicating with the claimants about why their benefits have been cut off and there's no way for the claimants to really get in touch

with them because the phone lines are always tied up."¹⁹¹ Ms. Ahn from Flushing Workers Center reported that eligible LEP workers simply gave up on the process. For these applicants, facing the barriers first with NYSDOL and then with ID.me was "hurdle hurdle hurdle – and not worth it." Members of the Workers Center "eventually went back to work" without ever collecting the UI benefits due them.¹⁹²

Steve Gray, Senior Counsel for the National Employment Law Project, publicly described how the insurmountable barriers have had a chilling impact on workers, reporting stories of people "who just threw their hands up and gave up due to problems with the ID.me verification process ranging from long waits for video chats to issues accessing the technology needed to sign up[.]"¹⁹³ According to Mr. Gray, ID.me "has a serious chilling effect on the application process . . . [w]hich means people just leave and walk away.

And we don't have a good way of telling right now why they're not completing the application."¹⁹⁴ Notably, multiple advocates reported that, in their experience, English-speaking claimants were far less likely to get flagged, and when they did, resolved their problems much quicker.¹⁹⁵ One advocate estimated based on her caseload that seven out of ten applicants flagged for fraud were non-English speakers.¹⁹⁶ The impact was devastating: critical UI benefits would simply stop, often for those who needed it most.

¹⁸⁸ *Id.*; NCLEJ Interview with Worker 1; NCLEJ Interview with Worker 3; NCLEJ Interview with MinKwon Center for Community Action Human Resources & Operations Specialist Lee; NCLEJ Interview with LSNYC Senior Paralegal Brito; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interview with The Legal Aid Society Paralegal Stanton.

¹⁸⁹ NCLEJ Interview with LSNYC Senior Paralegal Brito.

¹⁹⁰ *Id.*

¹⁹¹ NCLEJ Interview with The Legal Aid Society Paralegal Stanton.

¹⁹² NCLEJ Interview with Flushing Workers Center Organizer Ahn.

¹⁹³ Rachel Metz, *Want Your Unemployment Benefits? You May Have to Submit to Facial Recognition First*, CNN (July 23, 2021), <https://www.cnn.com/2021/07/23/tech/idme-unemployment-facial-recognition/index.html>.

¹⁹⁴ *Id.*

¹⁹⁵ NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interview with LSNYC Senior Paralegal Brito

¹⁹⁶

WORKER STORY

One worker lost benefits for months after failing to get through verification by ID.me. He had not received any fraud notice and only found out he had been flagged when he called NYSDOL to ask about his missing benefits. Working with an advocate, he found and sent four documents to prove his identity: his "Green Card, passport, Social [Security] Card, and driver's license or NYS ID card."¹⁹⁷

While waiting, he called NYSDOL and ID.me dozens of times but rarely got through. When he reached someone, different agents gave him different explanations. According to the applicant, every agent "was different, interpretations are different[. . . I understand that everyone interprets things differently, but because interpretations are different, obviously the solutions were all different."¹⁹⁸

As he described:

I called and said, "Well, the [representative] said this was incorrect," and so we called again and we sent it again and the last straw was "oh your social security number is not valid" because it was an H1B instead of a regular one I guess. But then [DOL/ID.me] called last week and she was like, "Oh, this was a valid social security card."¹⁹⁹

The worker was never informed why his claim had been flagged for fraud, and his benefits were held up for months before being reinstated.

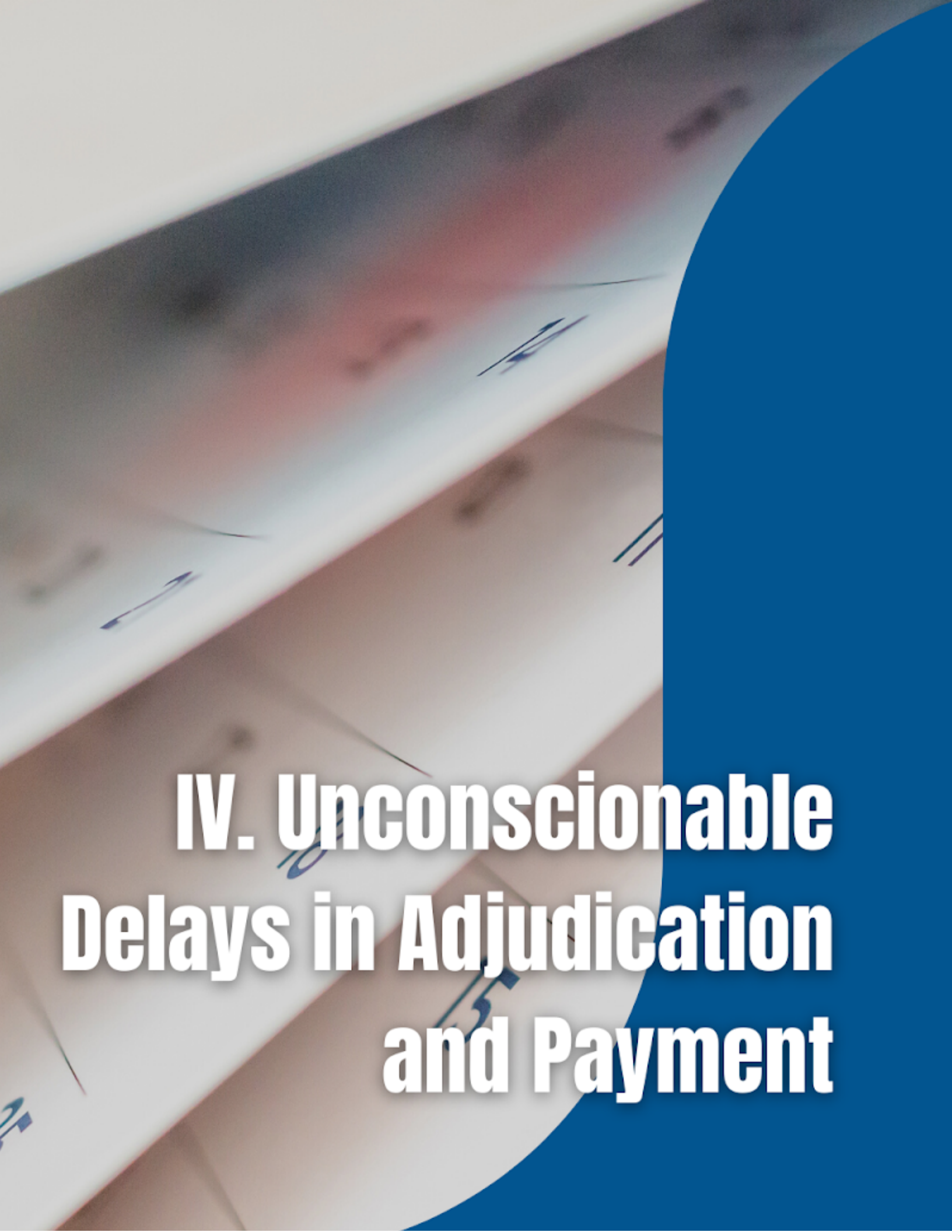


¹⁹⁷ NCLEJ Interview with Worker 1.

¹⁹⁸ *Id.*

¹⁹⁹ NCLEJ Interview with Worker 1.





IV. Unconscionable Delays in Adjudication and Payment

"Hours would become weeks would become months."²⁰⁰

In addition to the federal statutory mandate that states pay claimants their benefits "when due," federal regulations set clear time limits for processing and payment.²⁰¹ Under 20 C.F.R. § 640.5, the United States Department of Labor requires that 87% of initial payments be made within 21 days, and 93% of all initial payments within 35 days of the end of the first compensable week. Similarly, federal regulations for PUA benefits required states to pay 87% percent of eligible individuals within 14 to 21 days of their application.²⁰² In compliance with these regulations, NYSDOL's website represents that the "first payment will generally be made in two to three weeks from the time [a] claim is completed and processed[.]"²⁰³

Nevertheless, workers report—and NYSDOL

data confirm—serious payment delays. From April 2020 to December 31, 2021, NYSDOL paid only 58.5% of claimants within 14 or 21 days of the submission of their claims.²⁰⁴ NYSDOL has attributed these delays to its antiquated main frame computer problem resulting from the long-term disinvestment for 50 years in the UI system.²⁰⁵ The software programs that run the systems were "written in the 1970s and 1980s and remain constrained by the technology of that era."²⁰⁶ These issues lead to serious delays in UI benefits, and onerous burdens on claimants, including the need to find a fax machine to submit required paperwork. Notably, while the pandemic temporarily increased UI applications to unprecedented levels, these delays have persisted into the present – and NYS still falls well below federal mandatory standards for processing UI claims.



²⁰⁰ NCLEJ Interview Queen City Worker Center Organizer Mary Lister (May 28, 2021).

²⁰¹ See 20 C.F.R. § 640.3(a) (regulation interpreting the "when due" requirement of 42 U.S.C. § 503).

²⁰² Andrew Stettner & Elizabeth Pancotti, *1 in 4 Workers Relied on Unemployment Aid During the Pandemic*, CENTURY FOUND. (March 17, 2021), <https://tcf.org/content/commentary/1-in-4-workers-relied-on-unemployment-aid-during-the-pandemic/>; U.S. Dep't of Labor, *UI PERFORMS Core Measures*, https://oui.doleta.gov/unemploy/pdf/Core_Measures.pdf.

²⁰³ N.Y. Dep't of Labor, *File Your First Claim for Benefits*, <https://dol.ny.gov/unemployment/file-your-first-claim-benefits> (last visited May 16, 2022).

²⁰⁴ U.S. Dep't of Labor, *State Ranking of Core Measures for the Period: 04/01/2020 to 12/31/2021*, <https://oui.doleta.gov/unemploy/ranking.asp> (run date Feb. 12, 2022).

²⁰⁵ Patrick McGeehan, *He Needs Jobless Benefits. He Was Told to Find a Fax Machine*, THE NEW YORK TIMES (April 4, 2020),

<https://www.nytimes.com/2020/04/04/nyregion/coronavirus-ny-unemployment-benefits.html>.

²⁰⁶ *Id.*

For LEP workers, these delays could be especially severe. Ms. Newman, from LSNYC, estimated that 90% of their requests for assistance concerned delays.²⁰⁷ The Legal Aid Society Paralegal Ms. Stanton identified delays and “timely receipt of benefits” as one of the primary problems LEP and other applicants faced: “I’ve had clients apply and months later, haven’t received an approval or a denial. Radio silence.”²⁰⁸ Workers waited up to five months for benefits to be issued from the point when they applied.²⁰⁹

UI claimants generally faced delays. According to one investigative report:

“[UI Claimants] have endured dozens of website attempts, getting oh-so-close to completion only to have their session time out and send them back to the beginning.”

They’ve heard hours of busy signals. If their call goes through, they’ve navigated a phone tree to get oh-so-close to the end, only to have the system tell them it is too busy and drop the call. Too many have their application go into the ether, with no word from Albany on their status. They keep calling, clogging the phone lines with worry. Some have waited months, depleting their savings. And still no check[.]”²¹⁰

Every advocate and worker we spoke to reported long wait times to speak with NYSDOL agents and delays in processing claims and receiving benefit payments. One advocate described waiting on the phone for “hours on end, and then often times [we] would get frustrated, and [the U.S. DOL agent would] tell them to try calling back a different time. And so ... hours would become weeks would become months.”²¹¹

WORKER STORY

Omar Ramos, a school bus dispatcher in Rockland County, and his wife Angelina, an administrative assistant, waited six weeks for unemployment after losing their jobs in March 2020, and only received their checks through constant persistence.²¹²

Mr. Ramos called NYSDOL more than 200 times a day [sic.] without getting through.²¹³ According to Mr. Ramos: “Until you have done it yourself, you don’t know what people are going through.” He described the UI system as “chaotic, buggy, and full of useless information.”²¹⁴

²⁰⁷ NCLEJ Interview with LSNYC Assistant Newman.

²⁰⁸ NCLEJ Interview with The Legal Aid Society Paralegal Stanton.

²⁰⁹ *Id.*

²¹⁰ Kramer & Taddeo, *supra* note 24.

²¹¹ NCLEJ Interview Queen City Worker Center Organizer Lister.

²¹² Kramer & Taddeo, *supra* note 24.

²¹³ *Id.*

²¹⁴ *Id.*





V. Overpayments and Punitive Clawbacks

In another blow to UI claimants, NYSDOL overpaid benefits to thousands of workers—through its own errors and confusing instructions—and now demands repayment even as the federal government has made clear that states should not recoup such overpayments. Some of the overpayments have been “enormous” — “tens of thousands of dollars.”²¹⁵ For example, in April 2021, NYSDOL began collecting overpayments it made in April and May 2020. According to U.S. DOL statistics, between April 2020 and April 2021, New York State issued \$69 billion in UI benefits, of which nearly \$115 million was overpaid.²¹⁶

Even though the federal government has issued guidance requiring states to refund certain federal overpayment collections it has obtained from workers and recommending states implement several broad categories of overpayment waivers—and does not seek return of these overpayments,²¹⁷ —NYSDOL subjects workers to debilitating repayment plans, interest, and fines.²¹⁸ Many workers already spent the money on essentials, including rent and food, and now face large debt burdens through no fault of their own.²¹⁹ When claimants cannot repay the debts, NYSDOL seizes a portion of their remaining benefits or takes other punitive measures against workers still struggling to achieve economic security.²²⁰

The overpayments stemmed from NYSDOL's processing and substantive errors, conflicting U.S. DOL regulations, language barriers, and other issues—and frequently not the fault of the claimants.²²¹

As one advocate described: “[A]t the beginning of the pandemic, it seemed as though the Department of Labor was making hasty determinations just to get money into people's pockets, which isn't necessarily a bad thing. But then later on, and I mean months later, they tried to claw that money back, as if the claimants were at fault for not catching the Department's own error.”²²² NYSDOL has sought enormous clawbacks, such as \$25,000 over 36 months from an individual claimant.²²³

Ms. Goldzweig Panitz noted the toll of clawbacks on workers and the problematic fraud narrative that wrongly blames workers who are unfairly penalized:

“The important thing to remember about the Cuomo administration, perhaps the current administration, is that they loved putting out fraud statistics. They say, ‘We saved NY \$60B last year.’ What that actually means is that someone made an easy mistake and then gets their money clawed back from them. They’re going after people who spent the UI on rent and food, and kept the economy afloat.”²²⁴

Notably, NYSDOL does not translate overpayment notifications, like so many other DOL UI documents.²²⁵

The overpayment amounts can be staggering. Ms. Salk reports that one of her LEP client is facing a \$35,000 overpayment plus an additional \$4,000 monetary penalty because her application was not properly assessed

²¹⁵ NCLEJ Interview with LSNYC Assistant Newman.

²¹⁶ Mario Marroquin, *NY to Begin Collecting on Unemployment Overpayments. What You Need to Know*, LOHUD.COM (Apr. 20, 2021), <https://www.lohud.com/story/news/2021/04/20/new-york-collecting-unemployment-overpayments/7288951002/>.

²¹⁷ Recognizing the “enormity of the challenge placed on claimants” and state agencies, the U.S. DOL created seven categories of broad waivers of overpayments, and encouraged states to apply for additional waivers U.S. Dep’t of Labor, Emp. & Training Admin., Unemployment Insurance Program Letter No. 20-21, Change 1 (Feb. 7, 2022), https://wdr.dola.gov/directives/attach/UIPL/UIPL_20-21_Change_1.pdf; U.S. Dep’t of Labor, Emp’t. & Training Admin., Unemployment Insurance Program Letter No. 20-21 (May 5, 2021), https://wdr.dola.gov/directives/attach/UIPL/UIPL_20-21.pdf.

²¹⁸ NCLEJ Interview with The Legal Aid Society Paralegal Goldzweig Panitz.

²¹⁹ *Id.*

²²⁰ See N.Y. Dep’t of Labor, *Overpayments and Penalties: Frequently Asked Questions*, <https://dol.ny.gov/overpayments-and-penalties-frequently-asked-questions>.

²²¹ NCLEJ Interview with LSNYC Senior Staff Attorney Salk; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interview with VOLS Staff Attorney Roseman.

²²² NCLEJ Interview with Make the Road New York Staff Attorney Ward.

²²³ NCLEJ Interview with LSNYC Senior Staff Attorney Salk and Email from Nicole Salk to NCLEJ (March 22, 2022).

²²⁴ NCLEJ Interview with The Legal Aid Society Paralegal Goldzweig Panitz.

²²⁵ NCLEJ Interview with Flushing Workers Center Organizer Ahn; NCLEJ Interview with VOLS Attorney Roseman.

for PUA eligibility.²²⁶ Her client could not find childcare due to the pandemic, but instead of assessing her eligible for PUA, NYSDOL issued her traditional UI benefits they are now seeking to collect repayment for, due to their error.²²⁷

To make matters worse, even when workers sent NYSDOL money in repayment, NYSDOL did not cash the payments for months afterwards—and continued to deduct 20% from these workers' UI benefits as if they hadn't already paid.²²⁸ Many workers reported repaying their overpayments after they received notice in April 2021, and NYSDOL publicly stated in May 2021 that it would cash checks within 45 days.²²⁹ However, as of June 2021, NYSDOL still had not cashed the repayment checks and was still deducting penalties from workers' UI checks.²³⁰

The federal government has a waiver program, but New York has been egregiously slow in implementing these waivers.²³¹ In February 2021, 12 state senators wrote NYSDOL Commissioner Reardon, urging the State to forgive state and PUA unemployment obligations, which federal law permits.²³² In April 2022, six organizations urged Gov. Hochul to pause overpayment collections in light of the broad federal waivers.²³³

The Governor and State DOL refused to do so. In contrast, recognizing the deep economic pain imposed on workers by these clawbacks, numerous states have paused all overpayment collection, adopted these waivers for hundreds of thousands of workers, and refunded eligible workers for overpayment recoupment.²³⁴

Further, as of May 2022, even with the relatively small number of overpayment waiver notices NYSDOL has sent out to eligible claimants, NYSDOL representatives openly admitted that the notices were only in English.²³⁵ NYSDOL did not translate any notices it sent about claimants' eligibility for and instructions for obtaining overpayment waivers.²³⁶ As a result, overpayment waivers are still out of reach for LEP workers, left in the dark about their ability to get relief.

Assemblywoman Latoya Joyner and Senator Liz Krueger introduced legislation in 2022 that would require New York to adopt the federal waivers.²³⁷ According to Senator Krueger: "Out of work New Yorkers have suffered enough in this pandemic—they don't need the state pounding on their door to collect debts they never even knew they had incurred in the first place. These overpayments were the result of mistakes made by the state, and the state should pay for them."²³⁸

²²⁶ Email from Nicole Salk to NCLEJ (March 22, 2022).

²²⁷ *Id.*

²²⁸ Kelly Dudzik, *NYSDOL: Unemployment Overpayment Checks Are Being Processed*, WGRZ (June 29, 2021), <https://www.wgrz.com/article/news/local/nysdol-new-york-state-department-of-labor-unemployment-overpayment-checks-are-being-processed/71-1dfbee6e-5718-475d-a013-33c917aa49ab>.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ NCLEJ Interviews with LSNYC Senior Staff Attorneys Salk; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interview with VOLS Staff Attorney Roseman.

²³² Letter from James Gaughran et al., N.Y. Sens., to Roberta Reardon, Comm'r, N.Y. Dep't of Lab (Feb. 12, 2021).

²³³ <https://www.nysenate.gov/newsroom/press-releases/liz-krueger/senators-call-state-department-labor-forgive-unemployment#:~:text=%22Out%20of%20work%20New%20Yorkers,state%20should%20pay%20for%20them>.

²³⁴ Nat'l Ctr. for L. & Econ. Justice (@NCLEJJustice), TWITTER (Apr. 26, 2022, 12:22 PM), <https://twitter.com/NCLEJJustice/status/1518988993043603456?s=20&t=2ouu-lszfb3Au9j7hPEdmA>.

²³⁵ Rose White, *Michigan pauses collections on pandemic unemployment overpayments until May*, Michigan Live (Apr. 08, 2022), <https://www.mlive.com/public-interest/2022/04/michigan-pauses-collections-on-pandemic-unemployment-overpayments-until-may.html>; Daniel Chacon, *Collections on unemployment overpayments on hold*, Santa Fe New Mexican (Feb. 23, 2022), https://www.santafenewmexican.com/news/local_news/collections-on-unemployment-overpayments-on-hold/article_40c7b850-94bc-11ec-97b4-2359dc13dd8c.html;

²³⁶ Tamara Sacharczyk, *On Your Dime: Rhode Island waives unemployment overpayments*, NBC10 News (Feb. 16, 2022), <https://turnto10.com/i-team/on-your-dime/rhode-island-unemployment-overpayments-waives>; Sophie Nieto-Munoz, N.J. will no longer attempt to recover some overpaid unemployment payments, New Jersey Monitor (Feb. 8, 2022), <https://www.njmonitor.com/2022/02/08/n-j-will-no-longer-attempt-to-recover-some-overpaid-unemployment-payments/>;

²³⁷ <https://www.wqbn.com/news/local-news/2022/02/15/labor-committee-chairs-want-to-halt-unemployment-agencys-collection-of-overpayments>; Sarah Betancourt, Labor committee chairs want to halt unemployment agency's collection of overpayments, WGBH News (Feb. 15, 2022), <https://www.wgbh.org/news/local-news/2022/02/15/labor-committee-chairs-want-to-halt-unemployment-agencys-collection-of-overpayments>;

²³⁸ <https://www.wqbn.com/news/local-news/2022/02/15/labor-committee-chairs-want-to-halt-unemployment-agencys-collection-of-overpayments>; Chris Wade, *Lawmakers seek pause on jobless overpayments*, The Salem News (Feb. 15, 2022).

²³⁹ UI Overpayment Coalition meeting with NYSDOL, May, 27, 2022.

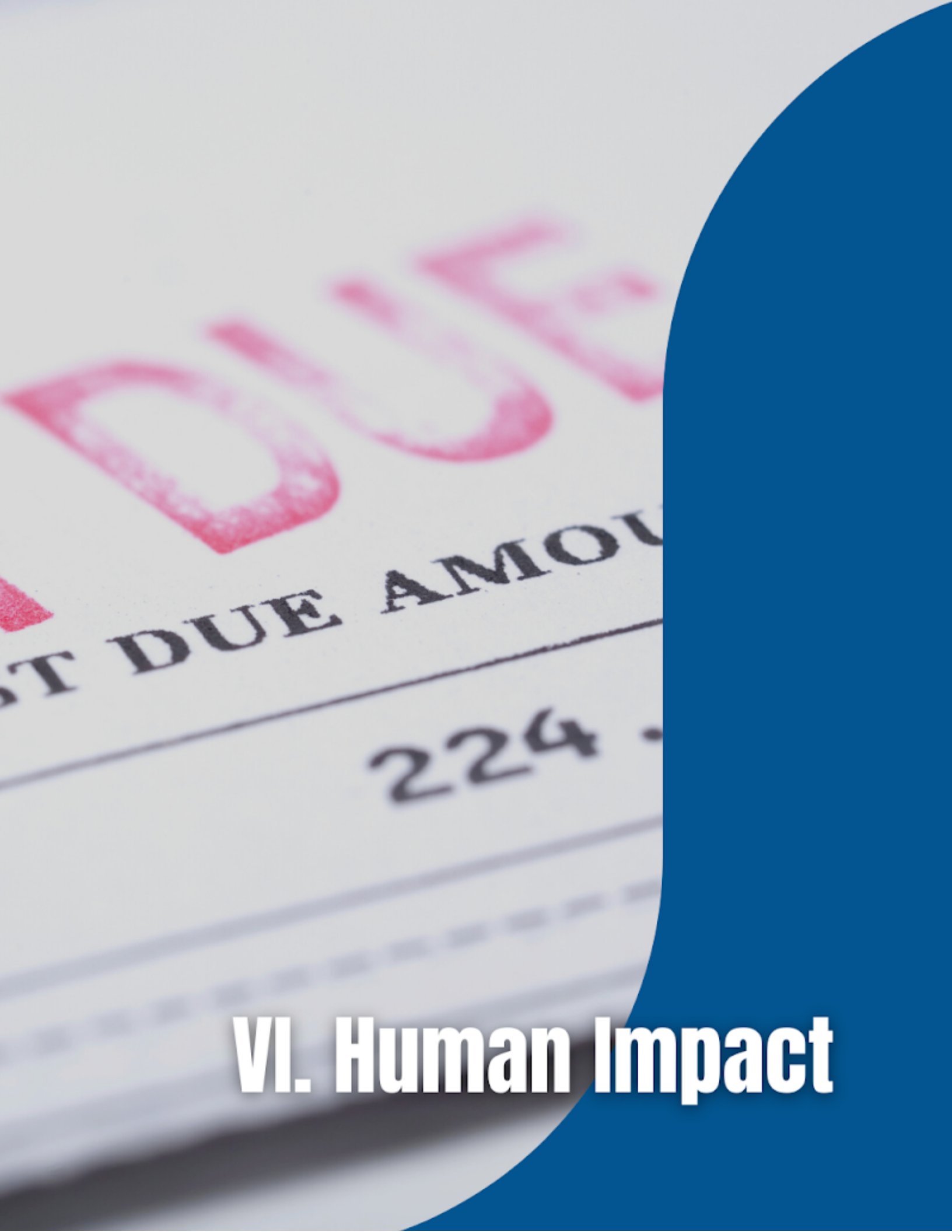
²⁴⁰ *Id.*

²⁴¹ 2021 N.Y. Sen. Bill No. 6244, 244th Leg.

²⁴² Sen. Liz Krueger, N.Y. S., *Senators Call for State Department of Labor to Forgive Unemployment Overpayments*, (Feb. 16, 2021), <https://www.nysenate.gov/newsroom/press-releases/liz-krueger/senators-call-state-department-labor-forgive-unemployment>.

PAST

PAS



VI. Human Impact

***"All my debts were coming down on top of me, I was not able to pay my rent, and my card expired. I had a car that I was paying off, and I had to call to ask for a chance, and I really went through a lot of things . . . I always save my money, but it wasn't enough, and my savings all ran out."*²³⁹**

As a result of NYSDOL's wrongful denials and delays, LEP workers faced extreme economic hardship, compounded by pandemic-related stress, anxiety, and health concerns. Nonprofits stepped in and people formed mutual aid groups, but many people could not afford basic expenses for food, rent, and utilities.²⁴⁰ Some became homeless. Others had to take unsafe jobs because they had no other option. People "literally couldn't feed their families . . . [I]t was like the DOL was assuming people could afford to wait weeks, when in fact, they were like waiting in line to try to get food."²⁴¹

Ms. Goldzweig Panitz described:

For people who haven't gotten benefits for 6-8 months, the problems compound, especially if they have bills. Sometimes we send groceries to people. I remember talking to a client and she suddenly said she hadn't eaten all week and that she's been drinking protein powder shakes. She depleted her savings."²⁴²

Buffalo-based organizer Ms. Lister described the toll of delayed benefits: a woman whom the worker center was assisting "basically was being left with no resources ... not even a couple bucks to take the bus to come get to the worker center. . . [And] having been very concerned about possible eviction, because [] it had been months

where she hadn't been able to get any sort of income."²⁴³

Workers to whom NYSDOL wrongfully delayed and denied benefits could not cover utilities, medical bills, and other expenses, resulting in escalating penalties. One advocate described hearing from claimant after claimant: "First, we couldn't pay that then we couldn't pay our light bill, but then we had to pay extra on our light bill because we couldn't pay it, then we couldn't pay our rent, and we had to pay this fee, then we had to pay ...[the delays] ends up costing you so much more money."²⁴⁴ Ms. Goldzweig Panitz commented: "These benefits were made weekly for a reason. Six months later a check for \$12,000 is not as helpful as \$600 a week [now]. I can't imagine what people's credit scores look like; the financial consequences have been horrible. And they've had their cars repossessed."²⁴⁵

Even formerly middle-class claimants struggled. Ms. Salk described how workers "relied on the pre-food program that the city was doing . . . they relied on food stamps, they weren't paying rent, they weren't making their car payments. They relied on family. . . We had a lot of formerly middle-class folks who weren't used to struggl[ing], and they had trouble because they didn't know how to handle things."²⁴⁶

²³⁹ NCLEJ Interview with Worker 4.

²⁴⁰ NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell.

²⁴¹ NCLEJ Interview with Make the Road New York Staff Attorney Bransford.

²⁴² NCLEJ Interview with The Legal Aid Society Paralegal Goldzweig Panitz.

²⁴³ NCLEJ Interview Queen City Worker Center Organizer Lister.

²⁴⁴ NCLEJ Interview with MRNY Staff Attorney Bransford.

²⁴⁵ NCLEJ Interview with The Legal Aid Society Paralegal Goldzweig Panitz.

²⁴⁶ NCLEJ Interview with LSNYC Senior Staff Attorney Salk.

As Ms. Stanton of The Legal Aid Society witnessed:

[F]inancially, people are falling behind on their rent and utility payments. Worrying about just general finances, the emotional toll. While a lot of clients are simultaneously dealing with UI issues, wrongful denials or unable to contact DOL, they're also going through different medical issues. It's an immensely stressful issue to deal with while they're already going through concurrent medical issues, or family care issues. I think the whole stressful nature of it is compounded by DOL's horrible communication and they are drowning with no clear answer or understanding of what's going on.²⁴⁷

According to Ms. Ward from Make the Road New York:

[S]o many people were waiting months and months and couldn't pay their rent, couldn't even buy food for their families. They knew that they were entitled to the money but had no way of accessing it. It was heartbreaking to see people give up and decide they weren't going to get unemployment benefits, even though they were 100% eligible and entitled to them ... I know a lot of people who have not paid rent in over a year now and are facing eviction from their homes, and I imagine that a lot of those who were unable to tap into their unemployment are in that horrible situation.²⁴⁸

At the height of the pandemic, many eligible LEP workers barred from receiving unemployment benefits had no choice but to accept unsafe work—they had to work to survive.

The absence of unemployment benefits—to which they were legally entitled—contributed to the already sharp, disturbing disparities of immigrants and people of color forced to work in unsafe, high risk jobs.

This harmed workers deeply:

[P]eople would be waiting for months to get the unemployment benefits that they were owed. In the interim, they faced the difficult choice of either holding out for benefits that may never materialize or going back to work, even if it meant unsafe work, to try to make ends meet. Of course, if someone did take a job here and there, this created a host of issues around what to put when they certified. DOL recently changed its rules on this issue, but for a long time, if someone worked four days a week but only one hour or less each day... they were still completely ineligible for benefits for that week. People are in desperate situations. They want to put down the right thing, but it also just seems really unjust to take away someone's entire benefit, because they got a job that was going to feed dinner to their kids for a night. So, I was very frustrated by the way that people had to certify and being stuck in that hard place . . . waiting on benefits while also [], feeling like they had no choice but to take really risky, unsafe jobs to survive.²⁴⁹

"[T]he government really doesn't want to help us, they know that people are dying here because of COVID . . . why can't it just be easy?"²⁵⁰

²⁴⁷ NCLEJ Interview with The Legal Aid Society Paralegal Stanton.

²⁴⁸ NCLEJ Interview with Make the Road New York Staff Attorney Ward.

²⁴⁹ *Id.*

²⁵⁰ NCLEJ Interview with Minkwon Center for Community Action Human Resources & Operations Specialist Lee (conveying statements from worker-clients).

ADVOCATE STORY

An advocate powerfully captured the experience for LEP applicants as “hugely” impactful and “incredibly stressful and scary” especially because most of her clients lived paycheck to paycheck and did not have savings. However, she was also impressed with her clients’ strength and determination:

“I’m always impressed by how composed my clients are. [They say:] ‘Yeah I haven’t received benefits for months, yeah, I don’t know how I’m paying anything.’ And most of them are pretty chill about it, and I’m just like, ‘You’re something special,’ because it’s been a truly ridiculous time, and I think it would be one thing if ...

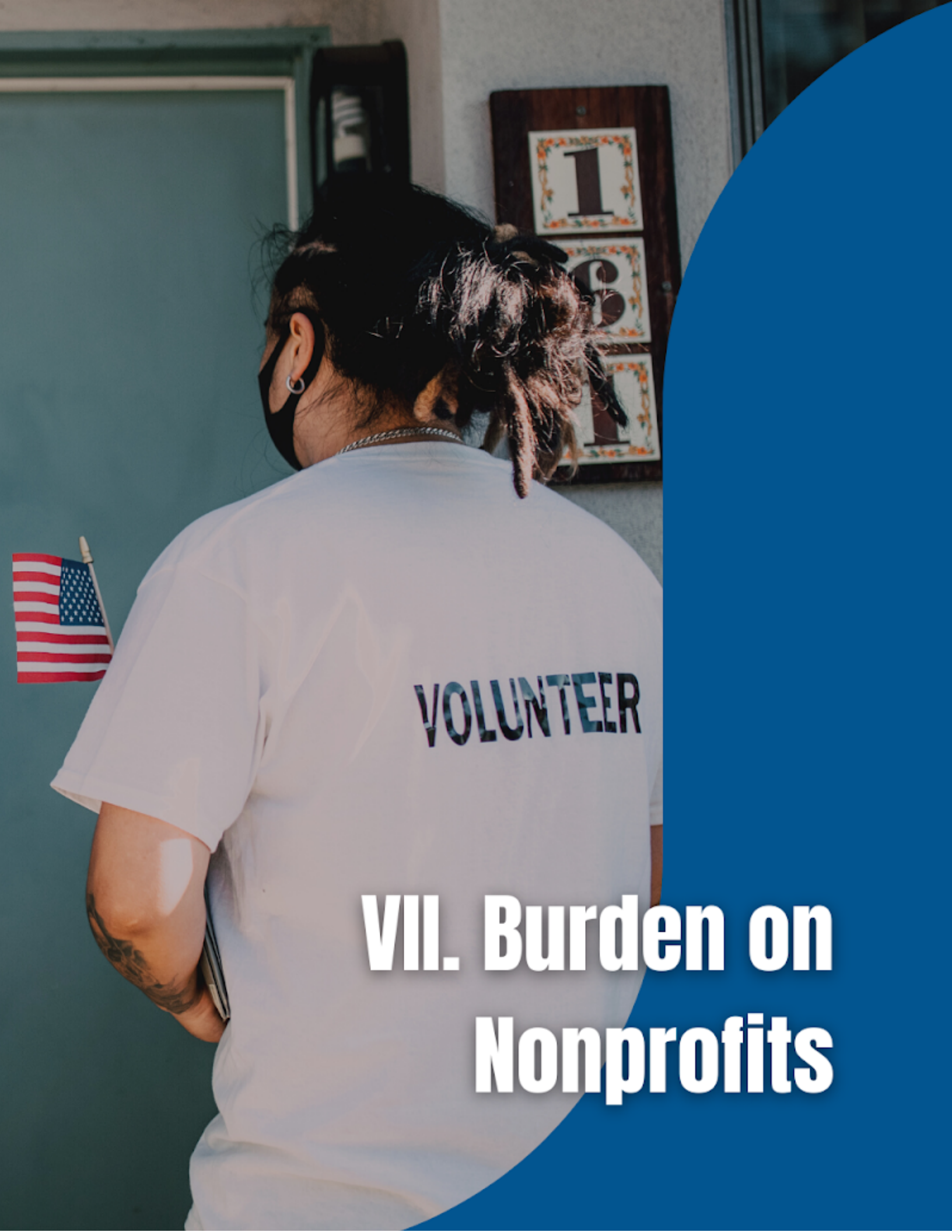
there were people who weren’t being approved for benefits, but there’s people who are enduring patiently, the ridiculousness of not being paid for months, not knowing what to do, not being able to talk to anyone, and they get to me and they’re somehow together. There’s something special. And so, it’s been pretty remarkable.

Not everyone has savings, some people are living paycheck to paycheck, you lose that, and then you’re not able to get your benefits—it’s incredibly stressful and scary.”²⁵¹



²⁵¹ NCLEJ Interview with LSNYC Assistant Newman.





VII. Burden on Nonprofits

Because of the absence of translated applications and other documents critical for the UI application process, nonprofit community, immigrant, and legal organizations throughout New York had to reorient their work towards assisting UI claimants.²⁵² These organizations redirected resources and assigned staff to help LEP workers through every stage of the process—becoming a safety net for the LEP, immigrant, and broader community struggling to access UI benefits and put food on the table during one of the most stressful periods in recent history.

Community organizers, policy advocates, and leaders became front line interpreters and translators for workers applying for unemployment. Attorneys who had never worked on UI turned into specialists. Some organizations set up food pantries in response to continued requests for resources for food. Organizations and advocates had to abandon other areas of mission, including citizenship assistance, tenants' rights, civic advocacy, and organizing work, to focus on helping LEP individuals apply for unemployment.²⁵³

*[A] lot of people ended up just having some of their staff do nothing but help people with unemployment, because they just couldn't find another way to do it, other than walking them through it. And obviously, that pulled from their resources and their ability to do other work.*²⁵⁴

Organizations set up direct service clinics, provided their personal cell phone numbers, and assisted people by Zoom, Facetime, telephone, and in other nontraditional ways: "So especially at the start of the pandemic, you

know, this involved things like meeting with a worker out in a park . . . with my own personal laptop, and trying to assist them with going the online route."²⁵⁵

Because NYSDOL's physical offices were closed, advocates also took on the task of collecting and scanning required documents.²⁵⁶ Advocates described a frenzied environment:

*[W]e just were getting flooded with calls from people who were trying to apply, who knew they were eligible. And then there are five attorneys on our team and at the time two paralegals, and so we were sharing information because it was all being done by phone. We were having people take screenshots of what they were seeing on the online application, or they were just relaying to us what their experience had been trying to apply by phone.*²⁵⁷

LEP workers detailed how they had to rely on nonprofits because they could not understand the UI forms, applications, or instructions. Advocates' assistance with each initial application could take up to two hours. One worker described:

*Because I didn't know English, I needed help. If it wasn't for nonprofits like this, I probably wouldn't receive the insurance benefits. At the time I didn't know any information regarding the rules. When I asked for help, it was a staff member and I looking at the screen, and they went through the eligibility process, and then they went through the application process and that took like an hour or two because she had to translate to me, and I had to tell back to her.*²⁵⁸

²⁵² NCLEJ Interviews with Make the Road New York Staff Attorney Ward and Staff Attorney Bransford; NCLEJ Interview with Minkwon Center for Community Action Human Resources & Operations Specialist Lee.

²⁵³ NCLEJ Interview with Minkwon Center for Community Action Human Resources & Operation Specialist Lee.

²⁵⁴ NCLEJ Interview with Make the Road New York Staff Attorney Ward and Staff Attorney Bransford.

²⁵⁵ NCLEJ Interview Queen City Worker Center Organizer Lister.

²⁵⁶ NCLEJ Interview with Make the Road New York Staff Attorney Bransford.

²⁵⁷ *Id.*

²⁵⁸ NCLEJ Interview with Worker 1.

And an advocate explained:

*Many of our clients find automated phone lines, ostensibly simple web forms, and other common technology steps to access services confusing, due to language barriers or unfamiliarity. At this time of high anxiety, stress, and fear, they sometimes become even more overwhelmed with those feelings of helplessness, and it can be harder to talk someone through those processes by phone than in person.*²⁵⁹

In addition to providing direct services, nonprofits translated NYSDOL guidance and instructions into Spanish, Hindi, Korean, Mandarin, Cantonese, and other languages, and distributed these translations to community and advocacy groups assisting individuals with unemployment. According to Mae Lee of the Chinese Progressive Association:

*There's a lot of information being pushed out, but in the Chinese language, it's very uneven. Sometimes you have a translation, and sometimes you don't. This places a greater burden on community organizations to help clients navigate. Immigrants are not accessing [benefits] because they think they aren't eligible, and still need assistance to access the benefits they are eligible for.*²⁶⁰

To address the complexities of the system, organizations developed videos and other materials to help people with the application process.²⁶¹ For example, because of NYSDOL's failure to translate the PUA application and instructions, Make the Road New York "decided we needed to create a PDF guide with screenshots of the application and step-by-step instructions for people applying... [s]o they...

knew what the difference was between UI and pandemic unemployment assistance, and what the application looked like in English versus Spanish. We then paired this guide with recorded Facebook Live events, during which we would walk through the entire application and explain what each step meant, so that people could follow along."²⁶²

NYSDOL made these advocates' jobs harder by restricting their ability to assist, interpret, and translate. NYSDOL representatives treated advocates rudely and even hung up on them because they were not family members.²⁶³ Some NYSDOL UI representatives refused to speak to advocates even when the claimant was on the phone and consented to representation. And NYSDOL strictly enforced rules requiring claimants to fill out UI forms themselves—even when the forms were only available in English.²⁶⁴ This made the process of helping applicants even longer and more arduous:

*[P]art of what made this really difficult is you're . . . not allowed to have someone else fill out the application for you. [The claimant has] to physically click the buttons. And while it's an incredibly frustrating rule for everyone, advocates who worked with English speakers who had access to a computer or smart phone were often able to set up a Zoom, share their screen, walk the claimant through the form, and then the client would fill out the online form themselves and come back if they had questions. That just wasn't an option for most of our clients, because the application either wasn't available in their language, and/or they didn't have the technology or internet they needed to apply online.*²⁶⁵

²⁵⁹ African Friends Service Committee Representative, quoted in AMANDOLARE ET AL., *supra* note 37.

²⁶⁰ *Id.*

²⁶¹ NCLEJ Interviews with Make the Road New York Staff Attorneys Ward and Bransford; NCLEJ Interview with Minkwon Center for Community Action Human Resources & Operations Specialist Lee; NCLEJ Interview with Adhikaar Senior Organizer Lama.

²⁶² NCLEJ with Make the Road New York Staff Attorney Ward.

²⁶³ NCLEJ Interview with Minkwon Center for Community Action Human Resources & Operations Specialist Lee.

²⁶⁴ NCLEJ Interviews with Make the Road New York Staff Attorney Ward and Staff Attorney Bransford; NCLEJ Interview with Minkwon Center for Community Action Human Resources & Operations Specialist Lee.

²⁶⁵ NCLEJ Interview with Make the Road New York Staff Attorney Ward.

Without the assistance of nonprofits, many workers never would have gotten their benefits:

We met with many individuals, particularly elderly individuals, who didn't have a family member or friend who was fluent in English or tech savvy. I don't know if they would have ever gotten through the application process without our assistance. Nonprofits took on the burden of providing services that really the Department of Labor should have been providing from the beginning. Without our services, many eligible workers wouldn't have gotten benefits at all.²⁶⁶

In *Islam v. Cuomo*, the Southern District of New York noted the immense stress placed on the New York Taxi Workers Alliance.²⁶⁷ The barriers to UI required the organization to dedicate its focus to the filing and appeals process for unemployment insurance claims. It specifically found that NYTWA's focus on UI benefits forced it to move away from its traditional functions of providing aid to drivers needing help with wage theft, debt

forgiveness, aiding deceased drivers' families, and the additional pandemic related task of distributing personal protective equipment for the drivers.²⁶⁸

Every organization NCLEJ interviewed described a similar harm to their provision of core services, from integrating and engaging immigrant communities and educational services to other vital legal work. As Mr. Blum at The Legal Aid Society described:

I felt hijacked by the incompetence of the Department of Labor. I wasn't spending a lot of time on unemployment until the beginning of the pandemic. Granted, if there were competent systems, there still would have been a huge need at that moment, but it was especially acute because it was such a disaster. So, my entire job was hijacked for a number of months.²⁶⁹

But organizations also took pride in the way they stepped up to meet core needs in a time of crisis.²⁷⁰

ORGANIZING STORY: QUEEN CITY WORKER CENTER

"A lot of times when crises come, and the government does not respond, I think that that's a lot of times when social movements or worker centers actually kind of get more fire under their, you know, whatever. So, for us, I think it did actually become kind of like a catalyst for us becoming more of the kind of worker center we were trying to be anyways, where, you know, a lot of workers coming in the doors, you know, the work that we were doing as organizers being very dependent on what people were coming in and asking us about, trying to, like, think of very innovative ways to be accessible to workers, like I mentioned, like, you know, going to workers' houses, or parks or things like that. So I think that for the worker center, it really kind of, I think

it really kind of catapulted us further along the process. And, and that was actually something I mentioned before, that we had talked with a sister worker center in Houston, at the beginning of the pandemic about what they were doing. And they basically told us that they had also really gotten their start during a crisis. For them, it was like a natural disaster. But they said, you know, unfortunately, there's going to be a lot of needs in the community. And so you really need to, like, jump on this and be effective. If you do, then it can be a way to really like start to, you know, bring folks in and learn from the people in the community who are most affected by these things."²⁷¹

²⁶⁶ *Id.*

²⁶⁷ See 475 F. Supp. 3d 144 (E.D.N.Y. 2020).

²⁶⁸ *Id.* at 154. The plaintiffs were represented by Brooklyn Legal Services Senior Staff Attorney Nicole Salk.

²⁶⁹ NCLEJ Interview with The Legal Aid Society Staff Attorney Blum.

²⁷⁰ See, e.g., NCLEJ Interview with LSNYC Legal Services Assistant Newman.

²⁷¹ NCLEJ Interview Queen City Worker Center Organizer Lister.





VIII. Legal Violations

Despite clear state and federal requirements, NYSDOL has created and maintained serious and widespread language access barriers throughout the UI system that have prevented and continue to prevent LEP individuals from accessing unemployment benefits. As a result, NYSDOL has violated and continues to violate not only EOs 26 and 26.1 (and now N.Y. Exec. Law § 202-a), but also Title VI of the Civil Rights Act of 1964 and the Social Security Act.

Fundamentally, by delaying and denying benefits to LEP claimants (or attempted claimants) by reason of their inability to understand vital documents and notices issued only in English or in very poor-quality translations, NYSDOL has deprived LEP claimants of unemployment benefits and discriminated against them.²⁷²

Further, NYSDOL's imposition of ID.me raises serious statutory, due process, and discrimination concerns. In essence, in the name of preventing "fraud," New York has outsourced its governmental duty to provide critical UI benefits to a private system conditioning UI on additional eligibility requirements and the submission of biometric information without statutory or regulatory basis. According to advocates, by relying on ID.me's identity verification system, DOL treats innocent claims as fraudulent, preventing or freezing payments for weeks and sometimes

months, which makes it impossible for many LEP and immigrant workers to maintain their benefits despite their dire need.

By failing to ensure that ID.me is available in Russian, Yiddish, Bengali, Italian, Arabic, Polish, and other languages, NYSDOL is violating Title VI and state laws mandating that vital documents be translated into New York's top 12 languages.²⁷³ New York State has conditioned UI benefits on the successful navigation of ID.me, with no alternative option available, yet has failed to translate materials or to provide interpreters that LEP applicants need to complete the process.²⁷⁴

NYSDOL's use of ID.me also raises serious due process concerns and conflicts with the federal Social Security Act, which requires states to provide benefits to claimants "when due."²⁷⁵ In violation of fundamental due process principles and federal guidance,²⁷⁶ NYSDOL fails to provide LEP claimants with notice and a meaningful opportunity to contest any flag fraud. And the infliction of substantial delays in processing claims conflicts with the basic presumption in federal and state UI laws and guidance that workers should be presumed eligible to receive continuing benefits and are "entitled to promptness at all stages of the eligibility determination."²⁷⁷

²⁷² 42 U.S.C. § 2000d; 29 C.F.R. § 31.3(b); . See, e.g., *Pabon v. Levine*, 70 F.R.D. 674, 675 (S.D.N.Y. 1976); *Murguia v. Childers*, No. 5:20-CV-5221, 2021 WL 1601748, at *7 (W.D. Ark. Apr. 23, 2021).

²⁷³ See discussion and notes, *infra* § X.

²⁷⁴ *Pabon*, 70 F.R.D. at 676.

²⁷⁵ See *California Dep't of Hum. Res. Dev. v. Java*, 402 U.S. 121 (1971) (holding that a California provision precluding benefits if employer appeals frustrated the congressional objective of getting money into the pocket of the unemployed worker at the earliest point administratively feasible, which violated the federal statutory requirement that state unemployment compensation be reasonably calculated to insure full payment of unemployment compensation 'when due.'). 42 U.S.C. § 503 (specifying that state laws must be "reasonably calculated to insure full payment of unemployment compensation when due.').

²⁷⁶ See U.S. Dep't of Labor, UIPL No. 16-21, *supra* note 169, at 3.

²⁷⁷ See Federal-State Unemployment Compensation Program: Unemployment Insurance Program Letter Interpreting Federal Unemployment Insurance Law, 65 FR 70939-03; Review Letter 1-2009, Unemployment Insurance – Principles & Practices, New York State Department of Labor (March 2009) ("[G]iven the nature and public purpose of the Unemployment Insurance program, after impartial fact-finding, evenly balanced cases of eligibility, entitlement or coverage should be determined in the claimant's favor, bearing in mind the parties' rights to a hearing.").





IX. Recommendations

NYSDOL's failure to provide basic language access has caused and continues to cause catastrophic financial hardship and instability for tens of thousands of LEP community members who are disproportionately low-income people of color. We call on the NYSDOL and the New York State Legislature to take immediate corrective action and the U.S. DOL to open a Title VI investigation into the NYSDOL for systematically violating LEP claimants' rights, including:

- **NYSDOL must prioritize meaningful language access by translating the UI application, certification, and all vital documents and instructions into the top 12 languages in New York and by revamping its telephone system to provide prompt and accurate interpretation.**
 - Meaningful language access requires making the UI application, certification, and all vital documents²⁷⁸ available in high quality translation in New York's top 12 languages. This is an ongoing obligation, and any future changes in the text of these documents must be promptly and accurately translated.
 - To achieve meaningful language access, accompanying materials, such as instructions and FAQs, must also be available in the top 12 languages. This translation must be done by qualified interpreters, not computer programs, that have been vetted and tested by native or fluent speakers of the respective language.
 - NYSDOL must also adopt a quality check method for all translated documents, including hiring community groups to ensure clarity of translations.
 - NYSDOL must create an online complaint form to inform the Department about delayed or denied service arising from language barriers. This includes, but is not limited to, providing in-language notice regarding how to file such complaints.
 - Improve the automated telephone system and access to Language Line services so that claimants are promptly informed of their ability to request interpretation and effectively connected with interpreters without calls being dropped.
- **New York must end its contract with ID.me.**
 - NYSDOL must immediately cease contracting with this discriminatory private company. The IRS modified its ID.me contract because of concerns about privacy, racial bias, and privatization of core government functions.
 - The New York State Legislature must prohibit all New York State agencies from contracting with private, for-profit companies as the sole mechanism for identity verification.
- **NYSDOL must set up a system to identify and compensate all eligible LEP beneficiaries who attempted to apply for unemployment but never received benefits due to language access barriers, including allowing LEP applicants who were eligible but unable to access UI benefits due to language access barriers to apply for retroactive unemployment.**

²⁷⁸ See list of documents, *supra* note 178.

- **NSYDOL must engage with and listen to community-based organizations to improve language access and respond to claimants' needs in a timely manner in accordance with federal law.**
 - NYSDOL should form an advisory committee of community-based groups representing, at a minimum, the top 12 most spoken languages in New York State, to consult on NYSDOL operations, provide oversight, and be compensated for their work.
- **NYSDOL must immediately cease all overpayment collections and apply broad waivers to the fullest extent permitted under federal laws and guidance, as U.S. DOL has advised. The New York State Legislature should pass Sen. Liz Krueger's and Assemblymember Latoya Joyner's pending legislation, A7511A/S6244B, which would force NYSDOL to take this action.**
- **NYSDOL must improve transparency about the functioning of the UI system by making data, information, and reporting publicly available.**
 - NYSDOL needs to provide oversight and monitoring over the implementation of NYSDOL's UI Language Access Plan and conduct quarterly and annual public reporting on claims received, claim disposition, data related to ID.me verifications, including the number of claims that failed, succeeded, or were abandoned claims flagged for fraud under ID.me, as well as data describing and UI beneficiary status of LEP claimants
 - NYSDOL must comply with its obligations under the Freedom of Information Law.
- **NYSDOL must redress gross failures of the last two years by proactively providing benefits to claimants still waiting on applications during the last two years.**
 - NYSDOL must create a process specifically for claimants who are still waiting for benefits owed from March 2020 to the present, including a requirement to return every message and process all outstanding applications and appeals.
- **The New York State Legislature must have hearings on the barriers and harms LEP workers face in accessing unemployment and obtaining overpayment workers, as well as the issues fueling the disproportionate unemployment denial rates of Hispanic, Black, Native American, and Hawaiian Pacific Islander workers. Following these hearings, the NYS legislature should adopt statutory solutions to all barriers to UI created by Limited English Proficiency, race, and ethnicity.**
- **U.S. DOL must open a Title VI Civil Rights investigation to bring NYSDOL into compliance with its language access obligations.**



X. Appendix: Legal Background

The New York State Department of Labor Unemployment Insurance Division administers the State's Unemployment Insurance Law. The federal government provides funding for state UI programs and conditions this funding on numerous requirements, including timeliness of benefits and language access. The Secretary of the U.S. DOL is charged with oversight of state compliance of these federal requirements.²⁷⁹

The nondiscrimination laws that apply to state UI agencies outlaw both disparate treatment and disparate impact discrimination, as well as the use of different "criteria and methods" by ethnicity or race for administering benefits. As described below, the implementing regulations and guidance prohibit states from establishing policies or procedures that, while not directly barring access to benefits or services for individuals who are LEP, indirectly prevent or limit access.

A. LANGUAGE ACCESS RULES AND REGULATIONS

Federal and state laws mandate that state agencies provide meaningful access for all qualifying New York residents, regardless of their ability to speak English. In addition to Title VI of the Civil Rights Act, which prohibits discrimination based on national origin and language,²⁸⁰ Executive Order 13166, and New York EOs 26 and 26.1,²⁸¹ and NYS Exec. Law § 202-a. U.S. DOL regulations and guidance also require that agencies provide meaningful access to unemployment insurance, including interpretation and translation for commonly used languages.²⁸² The guidance plainly requires translation of vital information, defined as any "information, whether written, oral, or electronic, that is necessary for an individual to understand how to obtain any aid [or] necessary for an individual to obtain any aid. . . ."²⁸³

NYSDOL must take reasonable steps to assess LEP individuals for language needs, provide accurate oral interpretation and written translation of hard copy and electronic materials, and conduct outreach.²⁸⁴ The regulations require that all language assistance services must be accurate, free of charge, and provided in a timely manner that ensures equal access and avoids delay or denial of any benefit.²⁸⁵ Specifically, where languages are spoken by a "significant number" of the population to be served, the state agency "must translate vital information in written materials into these languages and make the translations readily available in hard copy, upon request, or electronically such as on a Web site."²⁸⁶ In recent updated guidance, U.S. DOL has made clear that vital documents in the UI context include applications for benefits, notices of rights and responsibilities, and communications

²⁷⁹ See 42 U.S.C. § 503.

²⁸⁰ Title VI prohibits discrimination on the basis of race, color, or national origin by any federally funded agency or program. 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). The Supreme Court made clear in *Lau v. Nichols* that the term "national origin" as used in the Civil Rights Act includes discrimination on the basis of language. 414 U.S. 563, 568 (1974) (holding that the failure of a school system to provide non-English speaking Chinese students with English language instruction or to provide them with other adequate instructional procedures denied them a meaningful opportunity to participate in the public educational program and thus was a violation of Section 601 of the Civil Rights Act: "Discrimination is barred which has that effect even though no purposeful design is present. . . . It seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program— all earmarks of the discrimination banned by the regulations."). See also *Pabon v. Levine*, 70 F.R.D. 674, 676 (S.D.N.Y. 1976) (finding that Spanish-speaking plaintiff who received only English-language materials from the NYSDOL rejecting his unemployment insurance benefits claim stated a claim of discrimination upon which relief may be granted under N.Y. DOL regulations "promulgated to effectuate section 701 as applied to federally assisted labor programs.").

²⁸¹ See discussion and notes, *infra* § X(B).

²⁸² See 29 C.F.R. § 38.9. The Secretary of Labor is charged with oversight of state compliance with the federal requirements and has promulgated regulations that govern the program. 42 U.S.C. § 503.

²⁸³ 29 C.F.R. § 38.4(ttt).

²⁸⁴ 29 C.F.R. § 38.9(g)(1).

²⁸⁵ 29 C.F.R. § 38.9(d).

²⁸⁶ 29 C.F.R. § 38.9(g)(1).

requiring a response from the beneficiary or applicant.²⁸⁷ In addition, New York State is required to record the limited English proficiency and preferred language of each LEP claimant/beneficiary, and as soon as the agency is aware of the non-English preferred language, convey vital information in that language.²⁸⁸

U.S. DOL has also provided in an Unemployment Insurance Program Letter (“UIPL”) that “UI agency staff should be trained to identify language access barriers and provide affected claimants alternative access options”²⁸⁹ U.S. DOL has further recognized that “[a]s state UI agencies move to almost exclusively website-driven services, there is an increased likelihood that LEP individuals will face barriers to accessing information and claims-related access in violation of Title VI and regulations”²⁹⁰ In May 2020 U.S. DOL issued new guidance to the states on how to ensure their unemployment programs comply with civil rights laws and regulations.²⁹¹ It requires states “to translate written, oral, or electronic ‘vital information,’” including applications for unemployment benefits and communications requiring a response from the claimant.²⁹²

U.S. DOL’s implementing regulations for Title VI also make clear that federal funding recipients, which include state UI agencies, “may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.”²⁹³ Under Title VI, oral interpretation or in-language services must be accurate and “should be provided at the time and place that avoids the effective denial or the imposition of an undue burden on or delay in important rights, benefits, or services to the LEP person.”²⁹⁴

B. STATE POLICIES AND NYSDOL LANGUAGE ACCESS PLAN

New York State also has adopted and codified state language access policies that are designed to protect New York’s immigrant population. Under Executive Orders 26 and 26.1, and the recently enacted N.Y. Exec. Law § 202-a, each state agency is required to provide language access services to New York residents by:

- Translating vital documents into the top ten languages spoken by LEP residents of New York State, and top 12 languages effective July 1, 2022²⁹⁵
- Providing interpretation for LEP individuals in their primary language with respect to the provision of services or benefits;

²⁸⁷ U.S. Dep’t of Labor, Emp’t. & Training Admin., Unemployment Insurance Program Letter No. 02-16, at 3 (May 11, 2020), https://wdr.dola.gov/directives/attach/UIPL/UIPL_02-16_Change-1.pdf. In addition, pursuant to 29 C.F.R. § 38.9(g)(3), all communications containing vital information must contain a “Babel notice,” which is defined as a statement “in multiple languages informing the reader that the communication contains vital information, and explaining how to access language services to have the contents of the communication provided in other languages.” *See id.*; 29 C.F.R. § 38.4(i).

²⁸⁸ 29 C.F.R. § 38.9(h) (“[O]nce [an agency] becomes aware of the non-English preferred language of an LEP [claimant] . . . the [agency] must convey vital information in that language.”).

²⁸⁹ U.S. Dep’t of Labor, UIPL No. 02-16, *supra* note 271; *See also* U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 02-16, Change 1 (May 11, 2020), https://wdr.dola.gov/directives/attach/UIPL/UIPL_02-16_Change-1.pdf

²⁹⁰ U.S. Dep’t of Labor, UIPL No. 02-16, at 8.

²⁹¹ *See id.*

²⁹² *Id.* at 3.

²⁹³ 29 C.F.R. § 31.3(b)(2).

²⁹⁴ Policy Guidance to Federal Financial Assistance Recipients Regarding the Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 32296 (“The quality and accuracy of language services is part of the appropriate analysis of LEP services required. For example, the quality and accuracy of language services in a UI appeals hearing or safety and health training, for example, must be extraordinarily high. . . .”).

²⁹⁵ The number of languages was expanded from six to ten by EO 26.1 in March of 2021; and codified to 12, effective July 1, 2022. *See* N.Y. Exec. Order No. 26.1, *supra* note 8; N.Y. Exec. Law § 202-a.

- Publishing a language access plan every two years that includes plans for ensuring compliance and progress since publication of the previous version; and
- Designating a language access coordinator with responsibility for collecting data on measures related to the provision of services.²⁹⁶

The NYSDOL has recognized that the top six languages spoken in New York State are: Spanish, Chinese, Russian, Yiddish, Bengali, and Korean, and the expansion to the ten languages adds Haitian Creole, Italian, Arabic, and Polish.²⁹⁷ As of this writing, NYSDOL has not yet indicated the two additional languages required by N.Y. Exec. Law § 202-a.

NYSDOL's 2021 Language Access Plan outlines how the agency is expected to serve the size and diversity of New York's linguistic populations.²⁹⁸ On paper, the plan states NYSDOL's commitment to ensuring that everyone who is eligible for these services, including LEP individuals, has "meaningful access" to benefits and services.²⁹⁹ However, even within its plan, NYSDOL indicates that it has *not translated* vital documents into most languages.³⁰⁰ Specifically, NYSDOL does not provide the Notices of Determination to the Claimant and Registration for Work and Claim for Benefits documents in *any language other than English*, meaning that LEP workers cannot even know the outcome of, much less the basis for, a determination of benefits and how to appeal.³⁰¹ In addition, NYSDOL inconsistently translates other central documents into New York's top six, much less ten or 12 languages—even when they directly involve fraud and immigration issues. For example, NYSDOL fails to translate requests for secondary verification, identification, Alien Employment Verification, Social Security requests or requests for work verification or entitlements into any language other than Spanish.³⁰² NYSDOL does not translate the Monetary Benefit Form, Information regarding Tax Withholding, instructions on eligibility, and other documents into all of New York's six most commonly spoken languages, as required by state law.

In addition, NYSDOL has outsourced all of its quality assurance for translations to private companies and allows internal staff to act as translators, based only on staff members' unchecked self-assessment of their fluency in a particular language.³⁰³ And although community and legal service organizations have played a significant and instrumental role in ensuring LEP workers obtained benefits, NYSDOL also affirmatively does not partner with community organizations in its LEP plan.

Finally, under recently enacted state law, all state websites providing COVID-19 related services must contain language translation technology for the 12 most common non-English language spoken by LEP New York residents.³⁰⁴ However, according to worker and advocates, the translations are web-based, of poor quality, and hard to understand.³⁰⁵

²⁹⁶ See N.Y. Exec. Order No. 26, *supra* note 8.

²⁹⁷ See N.Y. DEPT OF LABOR, LANGUAGE ACCESS PLAN, *supra* note 46, at 2.

²⁹⁸ See generally *id.*

²⁹⁹ *Id.* at 3.

³⁰⁰ *Id.* at 15–34.

³⁰¹ *Id.* at 27, 29.

³⁰² *Id.* at 29–30.

³⁰³ *Id.* at 13 (authorizing the use of "multilingual staff volunteers who are self-assessed in their own language competency").

³⁰⁴ 2021 N.Y. Sess. Laws Ch. 785 (S. 4716-A) (McKinney's). See also N.Y. Exec. Law § 202-a.

³⁰⁵ See discussion and notes, *supra* § II.E.

LANGUAGES SPOKEN

#	LANGUAGE	ESTIMATED NUMBER OF LEP SPEAKERS
1	Spanish	1,201,322
2	Chinese	379,745
3	Russian	119,380
4	Yiddish	64,070
5	Bengali	64,020
6	Korean	55,506
7	Haitian Creole	54,746
8	Italian	46,431
9	Arabic	40,781
10	Polish	34,840

Source: New York State Department of Labor, Language Access Plan (Aug. 1, 2021), <https://dol.ny.gov/system/files/documents/2022/02/dol-lap-2021.pdf>

C. UNEMPLOYMENT ELIGIBILITY AND ADMINISTRATIVE PROCESS

Unemployment insurance is a federal-state cooperative program financed in part by federal grants under the Social Security Act. States are only eligible to receive payments to finance their unemployment programs after the U.S. Secretary of Labor certifies that the State is providing benefits in a manner that is “reasonably calculated to insure full payment of unemployment compensation when due”³⁰⁶

To establish eligibility for unemployment, claimants must apply at the local office where they reside,³⁰⁷ or by phone or online.³⁰⁸ The federal regulations governing UI require state unemployment insurance programs to provide for “such methods of administration as will reasonably ensure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible.”³⁰⁹ States are also required to “obtain promptly and prior to a determination of an individual’s right to benefits, such facts pertaining thereto as will be sufficient reasonably to insure the payment of benefits when due.”³¹⁰ Pursuant to this requirement, any state agency investigation should not be “so exhaustive and time-consuming as to unduly delay the payment of benefits”³¹¹

³⁰⁶ 42 U.S.C. § 503(a)(1). States are required to act in a manner that comports with the Social Security Act. See, e.g., *Islam v. Cuomo*, 475 F. Supp. 3d 144, 156 (E.D.N.Y. 2020); *Wilkinson v. Abrams*, 81 F.R.D. 52, 57 (E.D. Pa. 1978).

³⁰⁷ N.Y. Lab. Law § 596(1).

³⁰⁸ Claimants seeking to establish eligibility for unemployment insurance in New York State must establish either a “valid original claim” or an “alternate condition.” A “valid original claim” may be established by showing that: 1) the claimant is able to and available for work; 2) the claimant is not subject to disqualification or suspension; 3) the claimant’s previously established benefit year, if any, has passed; and 4) the claimant has been paid by employers liable for contributions or for payments in lieu of contributions. N.Y. Lab. Law § 527. However, workers are not “eligible for employment” where the claimant lost employment due to disqualifying misconduct during at least two calendar quarters of the base period. *Id.* Claimants who cannot file a “valid original claim” due to their failure to establish eligibility using that base period may still qualify under an “alternate condition” so long as they meet the first three qualifications of the “basic condition.” Successful claimants pursuing the “alternate condition” path to unemployment insurance eligibility use the four most recent calendar quarters to establish eligibility, rather than the earliest four of the most recent five calendar quarters under the “basic condition” path to eligibility. N.Y. Lab. Law § 527(2). Claimants are not eligible for unemployment insurance benefits if they quit or refuse employment without good cause of if they have been fired due to misconduct. N.Y. Lab. Law § 593. However, workers remain eligible for unemployment if they quit for a “compelling reason” such as the illness or disability of a family member, domestic violence, or need to provide childcare to one’s child. N.Y. Lab. Law § 593(b).

³¹⁰ 20 C.F.R. § 640.3(a).

³¹¹ 20 C.F.R. § Pt. 602, App. A, § 6013(A).

Id. The state agency can initiate discovery of necessary information, obtain information from the worker, the employer, or other sources. *Id.*

To facilitate workers' access to unemployment insurance benefits, employers are required to pay into the state unemployment insurance fund³¹² and "keep a true and accurate record" of both each person employed and the amount paid in remuneration.³¹³

After a claim is filed, NYSDOL provides claimants with a Monetary Benefit Determination ("MBD"), which shows the claimant's base period and the employers and wages used to determine if the claimant has enough earnings to establish a claim.³¹⁴ If the claimant qualifies, the MBD shows the weekly benefit rate.³¹⁵ Claimants who receive a MBD with incorrect wages or missing employment can file a Request for Reconsideration form, located on the NYSDOL website or in the Claimant Handbook.³¹⁶ Claimants can submit the Request for Reconsideration via fax, mail, or through a virtual messaging system with the claimant's online account.³¹⁷

Workers are owed a presumption of eligibility for unemployment benefits, and "[i]n the absence of credible, sufficient evidence that a denial of benefits is appropriate, prompt payment of benefits claimed is [their] highest priority."³¹⁸

If a claimant is denied UI and wants to challenge the MBD, the burden shifts to the claimant to request reconsideration and a hearing.³¹⁹ A claimant or employer may appeal any adverse decision to the New York State Unemployment Insurance Appeals Board by filing notice of appeal within twenty days of the decision, and then in state court.³²⁰

Under federal and state guidelines, all NYSDOL decisions on unemployment claims must be made expeditiously—whether disputed or not. Federal guidelines require "promptness at all stages of the eligibility determination and payment processes."³²¹ While federal guidelines recognize that in some cases fact-finding may be complex and take more time, they "require nevertheless that the largest proportion of claims be examined and resolved as quickly as feasible[.]"³²² The Supreme Court has also made clear that "[p]aying compensation to an unemployed worker *promptly* after an initial determination of eligibility accomplishes the congressional purposes of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes."³²³ In line with the Court's mandate, "[t]he Federal timeliness standards mandate that non-monetary determinations be made in twenty-one days upon the detection of an issue."³²⁴ Federal guidance further provides that "[d]eterminations on issues arising in connection with new

³¹² N.Y. Lab. Law § 570.

³¹³ N.Y. Lab. Law § 575. Employers must also "file a quarterly combined withholding, wage reporting and unemployment insurance return" N.Y. Tax Law § 674(a)(4)(A). In making initial determinations on eligibility, NYSDOL relies on the employer's wage and earnings data to assess whether a claimant qualifies for unemployment insurance benefits. N.Y. Lab. Law § 527; see also *Islam v. Cuomo*, 475 F. Supp. 3d 144, 148 (E.D.N.Y. 2020) ("[T]he NYSDOL uses wage and earnings data to assess whether a claimant qualifies for unemployment insurance benefits.").

³¹⁴ N.Y. Dep't of Labor, *After You've Applied for Unemployment Frequently Asked Questions*.

³¹⁵ [https://dol.ny.gov/system/files/documents/2022/01/TC318.3-English-january-2022.pdf](https://dol.ny.gov/after-youve-applied-unemployment-frequently-asked-questions#:~:text=After%20you%20file%20your%20claim,the%20amount%20of%20earnings%20reported; See N.Y. Lab. Law § 527; Islam v. Cuomo, 475 F. Supp. 3d 144, 148 (E.D.N.Y. 2020). The maximum weekly benefit rate is $504. See N.Y. DEPT OF LABOR, UNEMPLOYMENT INSURANCE CLAIMANT HANDBOOK (2022), <a href=). When an employer does not provide wage and earnings data to the NYSDOL, the agency assesses a claimant's MBD at \$0.00 in earnings, rendering the claimant ineligible to receive unemployment insurance benefits. *Islam v. Cuomo*, 475 F. Supp. 3d 144, 148 (E.D.N.Y. 2020).

³¹⁶ *Id.*

³¹⁷ N.Y. Dep't of Labor, *Request for Reconsideration*, <https://dol.ny.gov/request-reconsideration>.

³¹⁸ *Id.*

³¹⁹ N.Y. Dep't of Labor, Review Letter 1-2009, Unemployment Insurance – Principles & Practices (March 2009) ("[G]iven the nature and public purpose of the Unemployment Insurance program, after impartial fact-finding, evenly balanced cases of eligibility, entitlement or coverage should be determined in the claimant's favor, bearing in mind the parties' rights to a hearing.").

³²⁰ See N.Y. Lab. Law §§ 620, 620(1)(a); N.Y. DEPT OF LABOR, UNEMPLOYMENT INSURANCE CLAIMANT HANDBOOK 34-36 (2022).

³²¹ N.Y. Lab. Law §§ 621, 624.

³²² U.S. Dep't of Labor, *Federal-State Unemployment Compensation Program: Unemployment Insurance Program Letter Interpreting Federal Unemployment Insurance Law*, 65 FR 70939-03 (Nov. 28, 2000).

³²³ N.Y. Dep't of Labor, Review Letter 1-2009, Unemployment Insurance – Principles & Practices (March 2009). See also *Java*, 402 U.S. at 135 (emphasizing the "congressional objective of getting money into the pocket of the unemployed worker at the earliest point that is administratively feasible").

³²⁴ *Java*, 402 U.S. at 132 ("Early payment of insurance benefits serves to prevent a decline in the purchasing power of the unemployed, which in turn serves to aid industries producing goods and services.").

³²⁵ N.Y. Dep't of Labor, Review Letter 1-2009, Unemployment Insurance – Principles & Practices (March 2009). Cf. *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975) ("[The] possible length of wrongful deprivation of unemployment benefits is an important factor in assessing the impact of official action on the private interests. Prompt and adequate administrative review provides an opportunity for consideration and correction of errors made in initial eligibility determinations. Thus, the rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process.") (internal citations omitted).

claims may be considered on time within the meaning of the Court's requirement for promptness if accomplished no later than the second week after the week in which the claim is effective."³²⁵

If a state fails to comply with the prompt payment requirements or wrongly denies unemployment compensation in a substantial number of cases, U.S. DOL is authorized to "notify the State agency that further payments [of federal funds] will not be made to the State until the Secretary of Labor is satisfied that there is no longer any such denial or failure to comply."³²⁶

D. CONTINUING DUTY TO CERTIFY

To remain eligible for both traditional state and, while they existed, pandemic federal unemployment benefits, each week claimants must certify that they still meet the eligibility criteria.³²⁷ U.S. DOL requires that after an initial determination of eligibility, there is a presumption that the claimant continues to be eligible. The presumption of eligibility is considered "an expedient for the State to facilitate timely payments."³²⁸

To avoid overpayments, the state "must issue a determination as soon as administratively feasible after payment is made to verify whether the presumption was correct."³²⁹ Because of the risk of overpayments, federal guidance requires "that States must make timely determinations whenever possible."³³⁰

³²⁵ U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 1145, Section IV (November 12, 1971). For PUA benefits, federal regulations require that states pay 87 percent of eligible individuals within fourteen to twenty one days of their application. Settner & Pancotti, *supra* note 202, citing U.S. Dep't of Labor, *UI PERFORMS Core Measures*, https://oui.doleta.gov/unemploy/pdf/Core_Measures.pdf.

³²⁶ 42 U.S.C. § 503(b)(2).

³²⁷ Generally, if a worker refuses to return to their same job after being called back to work by their employer, they are no longer eligible to receive UI or PUA benefits because the worker must accept work that is considered "suitable" by the state unemployment agency. However, where an employer has failed to take the necessary health and safety precautions to protect workers against COVID-19 or where the worker is elderly or immunocompromised, a worker may be able to refuse their employer's offer and continue to receive UI or PUA. NAT'L EMP'T. LAW PROJECT, *Frequently Asked Questions About UI Benefits*, <https://www.nelp.org/faq-unemployment-anchors/>.

³²⁹ See U.S. Dep't of Labor, Unemployment Insurance Program Letter 04-01, 65 Fed. Reg. 70939, 70941 (Nov. 28, 2000).

³³⁰ *Id.*

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