

June 16, 2021

Via Email

Joseph Barela, Executive Director

Division of Unemployment Insurance
Colorado Department of Labor and Employment
[REDACTED]

RE: Challenges Facing Unemployment Insurance Claimants

Dear Director Barela,

We write as advocates for and representatives of unemployment insurance claimants to urge the Colorado Department of Labor and Employment (CDLE) to address several concerns that have come to our attention regarding claimants' ability to access or maintain benefits.

Over the past 15 months, the CDLE has taken on the monumental task of expanding Colorado's unemployment insurance system to meet the extraordinary economic challenges posed by COVID-19. We appreciate all you have accomplished during this time, especially given resource constraints and an infrastructure that was never designed to provide benefits at the volume necessary during the pandemic. In particular, we saw how many Coloradans were able to survive solely because of your efforts to get benefits out quickly in 2020. Thank you for all of your work. We know it has been a challenging year for your agency.

We are writing to bring to your attention several discrete challenges facing our clients and the communities we serve. We are interested in working with you collaboratively to address these challenges, which have impeded economically vulnerable Coloradans' ability to access or maintain unemployment insurance benefits. We write specifically to address five common problems: (1) identification verification through ID.me, especially in cases where individuals do not have access to a smartphone or the software is otherwise inaccessible; (2) challenges receiving benefits for claimants who have received notice of approval for benefits; (3) the process for identifying eligibility for and providing readjustments and overpayment waivers; (4) the accessibility of notices posted to the MyUI system; and (5) communication with the CDLE for both represented and *pro se* claimants.

First, we are deeply concerned about the inequities and barriers to access to unemployment insurance created by the introduction of the identification verification process through ID.me. In particular, the ID.me interface makes timely access to benefits contingent on the use of a smartphone—which is simply not a realistic option for many. Claimants report that attempting to gain access to the ID.me system without a smartphone is so arduous and time consuming that they have lost benefits before ever receiving help from CDLE or ID.me representatives. Troublingly, through no fault of their own, some such claimants had to wait several weeks before ever having their access issues resolved by ID.me or the CDLE. This is true despite their repeated calls and submissions due to extremely long wait times to troubleshoot issues or coordinate alternate means of verification.

According to the CDLE website, if a claimant does “not have the appropriate technology to complete the process,” they should contact the CDLE at “303-536-5615.”¹ But people seeking help from this number report receiving vague or otherwise unhelpful guidance, such as to reach out to ID.me directly, to try using a friend’s computer (with no instructions about whether or how the process could be completed by a computer or whether a webcam will be necessary), or to call a local unemployment office to see if they happen to be making in-person appointments.

Though we are heartened by recent reports suggesting that more in-person appointments will become available with time, we remain concerned that unless the CDLE greatly and quickly expands avenues to coverage that do not rely on smartphones or other inequitably accessible technology, some who need benefits urgently may suffer irreparable harm. At the very least, for any alternatives to be meaningful, information about their availability and accessibility should promptly be made clear on the CDLE website. It currently suggests that the only real remedy for ongoing delays is to wait it out. In the meantime, claimants’ benefits are cut off despite their best efforts to comply with ID.me’s elusive requirements.

The ID.me verification process is disproportionately arduous for populations with less access to or proficiency with technology or less access to required documentation² as well as for individuals with specific technology accessibility needs.³ See Andrew Kenney, *A New Digital Divide: People Without Smartphones Struggle to Get Colorado Unemployment Benefits*, CPR (April 26, 2021), <https://www.cpr.org/2021/04/26/a-new-digital-divide-people-without-smartphones-struggle-to-get-colorado-unemployment-benefits/> (“But about 15 percent of the U.S. population doesn’t own a smartphone, a group that disproportionately includes older adults, Black and Latino people, people with less income and those in rural areas.”). ID.me itself “acknowledges its process is especially difficult to navigate for people who don’t have experience with technology.” *Id.* There is also evidence that “even the best-performing facial recognition systems . . . do not perform as well on women and people with darker skin tones.” See Dave Gershgorin, *21 States Are Now Vetting Unemployment Claims With a ‘Risky’ Facial Recognition System*, ONEZERO (Feb. 3, 2021), <https://onezero.medium.com/21-states-are-now-vetting-unemployment-claims-with-a-risky-facial-recognition-system-85c9ad882b60> (“In some cases, people with darker skin tones were misidentified at rates 10 to 100 times more often than people with lighter skin tones.”). Further, it is unclear what efforts, if any, have been made to ensure that ID.me’s platform and verification process are accessible. As a result, we are concerned that the requirements posed by this verification process have likely had a disparate impact on indigent claimants, elderly claimants, claimants of color, claimants who have disabilities, claimant women, and claimants living in rural areas.

¹ See ID.me, COLO. DEP’T OF LABOR AND EMPL., <https://cdle.colorado.gov/idme>.

² The inequities created by policies requiring access to government issued identification have been well documented. See, e.g., *Oppose Voter ID Legislation - Fact Sheet*, ACLU, <https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet> (describing these inequities in the context of identification requirements for voters). These policies have an especially harsh impact on unhoused communities, who often lose access to government issued identification as a result of government-initiated sweeps of their homes and confiscation of their belongings.

³ For example, some facial recognition technology requires eye focus to accurately identify a person, which creates some false positives in not immediately recognizing some blind people.

Many of these inequities could be remedied, in part, by having truly accessible, in-person office visits; identifying other readily available alternatives to smartphone verification; or creating a process that allows claimants to continue receiving unemployment benefits while navigating these technological issues.

Second, some claimants report that they receive notice that they are eligible for unemployment insurance benefits but receive no payment either with no explanation or with explanations they do not understand. These claimants report going months without benefits despite making every effort to contact with the CDLE—phone calls where they wait on hold and never reach a person, requests for call-backs that never take place, and faxes or mailed letters that go unreviewed or unanswered.

In one specific instance, a claimant was approved for benefits after an appeal regarding eligibility in January but has still not received the nine weeks of benefits from October through December 2020 that had been withheld pending the outcome of the appeal, despite receiving notices that she was approved to receive benefits from October 2020 forward. In another instance, a claimant was let go from work in December 2020, was approved for benefits in February 2021, continues to apply for work every week, and has only started to receive benefits in June after repeated efforts by his attorney to contact the UI office. The cause of this delay was unclear, and without representation it is unclear whether this individual would have ever started to receive benefits.

While we imagine many of these circumstances may arise from glitches in the unemployment insurance system, the impacts on affected claimants have been devastating. We have received repeated calls from claimants in a panic and in tears, and been informed by others that they have received communications raising similar concerns and in which UI claimants have expressed suicidal ideation.

Third, claimants report difficulty both understanding and navigating the CDLE's system regarding overpayment waivers and readjustments. Specifically, claimants that are receiving notices of overpayments are not receiving communications about the ability for the overpayments to be reduced if they apply for an adjusted base period to recalculate benefits, or the communications they receive are not comprehensible. While the UI office could choose to *sua sponte* apply an alternative base period to reduce the repayment amount in the event an overpayment occurs, the onus is instead put on the claimant to interpret and navigate the overpayment and recalculation process. Similar transparency and clarity issues arise when claimants seek overpayment waivers.

The recent experiences of one claimant exemplify some of the issues with both the recalculation and overpayment waiver processes. This claimant submitted paperwork applying for an adjusted base period to recalculate benefits at least four times since February 2021, with no response from the CDLE other than a recent voicemail suggesting the agency has no documentation of these requests on file. This is despite the fact that the first request for adjustment was submitted after a phone call with a CDLE employee who confirmed that the adjustment would be completed in about 2-3 weeks, *i.e.*, by the end of February 2021. The claimant has yet to receive a readjustment calculation despite having received these assurances as well as a Hearing Officer decision from early March directing the CDLE to complete the

recalculation. This claimant also applied for an overpayment waiver by submitting a three-page, detailed letter with attachments to the CDLE by fax in mid-March. Counsel was recently informed that the CDLE had not yet entered the paperwork into the claimant's file. Accordingly, the claimant was still listed as eligible for garnishment. This issue was resolved thanks to contacts at the CDLE that were able to elevate this claimant's issue. If fax is an ineffective way to submit such documentation, that should be made clear to claimants and an alternate way to provide documentation justifying a claimant's eligibility for a waiver should be made available both to the claimant and their counsel.

Unfortunately, even the resolution of this issue presents process concerns. The CDLE responded by denying this claimant's request without explanation and misstating the overpayment amount by more than double. The denial also did not address the three pages of analysis and application of the CDLE's rules surrounding overpayment waivers in reaching its conclusion. A letter from the CDLE provides a right to appeal, but it is unclear how a claimant could dispute such a decision without a written explanation of the underlying reasoning. Further, the notice specifically stated that while the claimant could appeal the decision, the UI office would not be seeking to collect against the overpayment, and instead would apply the overpayment to any future claim for unemployment benefits. We are particularly concerned about the long-term impacts of the CDLE's position that instead of collecting on an overpayment now, the CDLE will simply withhold benefits if the claimant reapplies for benefits in the future. While likely well-intentioned, this short-term solution appears to discourage appeals by delaying the consequences until claimants find themselves in an economically vulnerable position in the future.

Fourth, many claimants report that their difficulties navigating the CDLE's unemployment insurance system are amplified by difficulties using the MyUI portal. In particular, several claimants have reported that notices are difficult or impossible to access because the documents do not appear when they click the link. While this seems to reflect a simple technological glitch, claimants report having this issue on multiple web browsers and even when they remove pop-up blockers. Even if the solution were simply to remove pop-up blockers, not all claimants are technologically fluent enough to know about pop-up blockers or the need to remove them.

Fifth, these shortfalls are exacerbated by the lack of access to the CDLE for claimants. For example, while employers may reach the CDLE by email, there are no dedicated email addresses for claimants. The phone lines are often busy, and callback requests are almost never met (and, indeed, sometimes the option to request a callback is made unavailable because of how backlogged the system is). People are suffering because of these extraordinary difficulties accessing the CDLE.

These challenges arise even for claimants with counsel. Unless counsel is able to reach out to personal contacts within the CDLE in an attempt to elevate complaints, there is no method for counsel to contact the CDLE. What is more, because counsel for claimants are only able to send written communications to the CDLE by fax, we fear representation in some instances may actually disadvantage claimants' ability to navigate the process because it appears to take months for faxed documents to even appear in a claimant's file. Overall, more clarity and transparency about effective modes of communication with the CDLE available to claimants and counsel could greatly increase the accessibility and effectiveness of the system as a whole.

* * *

We appreciate the high burden currently placed on the CDLE with the unprecedented number of applicants and claimants. We are also concerned about the catastrophic impact these shortfalls are having on the health and wellbeing of thousands of Coloradans.

We are particularly concerned about instances in which these problems result in the termination of continued benefits without an opportunity to be heard “at a meaningful time in a meaningful manner,” which present serious due process concerns. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *see also Whiteside v. Smith*, 67 P.3d 1240 (Colo. 2003) (describing similar due process concerns in the workers compensation context).

We are also deeply concerned about the disparate impact of these shortfalls on certain populations, who are often in the direst need of these benefits. As highlighted above, some of the shortfalls of this system and the corresponding due process concerns are particularly acute as applied to indigent claimants, elderly claimants, claimants of color, claimants with disabilities, claimant women, and claimants living in rural areas. *See Whiteside*, 67 P.3d at 1242 (finding a fee requirement in regulations instituting Colorado’s Workers’ Compensation Act unconstitutional as applied to indigent claimants).

We look forward to communicating and collaborating with you about how to address these challenges urgently, including about how we can collaborate to communicate with effective groups and anything we can do to bring more resources into the CDLE.

Sincerely,

ACLU of Colorado

Civil Rights Education and Enforcement Center

Colorado Center on Law and Policy

Colorado Plaintiff Employment Lawyers Association

Towards Justice