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Sent: Monday, June 21, 2010 3:36 PM
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Subject: Comments on Proposed Rulemaking No. 12-78 by Legal Services Advocates
Attachments: Comments on Ch 61 regulations, 6-2010.doc

The following comments are submitted by the undersigned legal services advocates on Proposed Rulemaking No. 12-78, Department of Labor and Industry, 34 Pa. Code, Part II, Subpart A, Unemployment Compensation, Chapter 61, Administration.

Most of the proposed regulations in the Chapter 61 package address tax provisions, which are not of particular interest to legal services advocates, who represent exclusively unemployment compensation ("UC") claimants. However, we have several serious concerns about the proposed regulation governing confidentiality, especially the provision requiring the payment of fees.

Sect. 61.25 – Confidentiality of information and fees

Section 61.25 raises several issues that could compromise advocates' handling of claims on a day-to-day basis. We understand that federal regulations on confidentiality and disclosure of UC information, located at 20 C.F.R. § 603.1 et seq., are the impetus for this proposed regulation, and thus we support the idea of a regulation as the method of achieving federal conformity. However, we believe that the proposed language can and should be improved in coordination with the federal regulations.

- (1) Information should be accessible to parties' representatives with a minimum of red tape.

Regarding subsection (a)(3)(2), "permissible disclosure," we would like to see the language read that disclosure can be made to "a claimant, the last employer or a base year employer or the claimant's or employer's representative". Otherwise, based on our community's decades of experience in UC claims handling, we are concerned that advocates who are representing claimants at hearings will face difficulties from UC staff in getting access to the case files, which is needed so that the advocates can adequately prepare their cases or even make informed decisions on whether to provide representation.

For the same reasons, as well as for legal reasons explained below, we urge that the regulation also address the issue of releases and that any release requirements be minimized. Because notice of UC hearings tends to be short, advocates often have very short periods of time between being retained and having to prepare for a hearing. Often, our intakes are done by telephone, and the client is not present to provide a signature for a release. Thus, requiring releases will often impede access to files.

The federal regulations indicate that UC information can be released to an "agent" of a party as follows:

- (a) To an attorney, based on the attorney's assertion that he or she is representing the party (20 C.F.R. § 603.5(d)(1)(iii));

- (b) To an elected official performing constituent services, with reasonable evidence that the party has authorized the disclosure (such a written record of a telephone request) (20 C.F.R. § 603.5(d)(1)(ii)) ; and
- (c) To other agents for the party who present a written release, except when a written release is impossible or impractical to obtain (20 C.F.R. § 603.5(d)(1)(i)(A) and (B)).

Thus, under the federal regulations, written releases are not required for legal or constituent services staff and can be excused for good cause for other agents who cannot readily obtain them.

However, ***the federal regulations require that these disclosures of confidential information be authorized by state law.*** 20 C.F.R. § 603.5. Thus, for Pennsylvania to adopt these options requires explicit provision in the UC Law. We therefore recommend that the following language be added to Section 61.25(a)(3)(2):

A written release is required for a representative to obtain the information unless:

- (a) *The representative is an attorney or his or her staff and asserts that he or she is representing the individual, for purposes of evaluating the case, advising the client, or providing representation at a hearing or other stage of an appeal;*
 - (b) *The representative is an elected official or his or her staff providing constituent services and has reasonable evidence that the party has authorized the disclosure; or*
 - (c) *The representative produces evidence that he or she is providing representation and that getting a written release is impossible or impracticable under the circumstances.*
- (2) The parties' ability to use UC information in related litigation should be preserved, to the extent permitted under the federal regulations.

Currently, information provided in UC claims by both parties (both documents and testimony) is frequently used in other legal forums, such as employment arbitrations and litigation. We believe that such use is appropriate, especially the testimony that has been given under penalty of perjury.

Whether such “rediscovery” in other cases is permitted under proposed Section 61.25 is unclear. The drafting, by which three provisions – subsections (a)(2)(ii), (a)(5), and (a)(4)(ii) -- must be read together, is extremely confusing. We read them to mean that if UC information is provided to the parties in the course the determination of a UC claim, it can be used in other litigation. However, the lack of clarity created by the current language should be corrected.

Assuming that we have correctly read proposed Section 61.25, the implication is that if a party must make a special request for UC information outside of handling a claim (such as requesting that the UC Board of Review to provide notes of testimony even though there is no appeal), its rediscovery in other litigation would be prohibited. This outcome does not seem to be required by the federal regulations, which address rediscovery in circumstances other than those where the information is obtained by the parties or their representatives. (*See* 20 C.F.R. § 603.9(a) for the categories subject to the rediscovery limitations).

To summarize, we think that the parties ought to be able to obtain and rediscover UC information in related employment litigation. This ancillary use of UC information has long been the practice in Pennsylvania and should not be prohibited unless required by federal law.

(3) Fees should not be charged to claimants and their representatives.

We strongly object to subsection (b), the provision providing for fees. We do not believe that claimants should be charged any fees for records that they request. As most of them are unemployed at the time of request, the fee will be a hardship for many of them. Moreover, we do not believe that claimants' representatives should be charged for copies. Legal services fought for a "one free copy" rule in the 1970s and have had to continue to press for it ever since. We do not want to see it undermined by regulation. Note, too, that Pa. R. App. P. 556 waives all fees and costs for UC claimants filing a Petition for Review in Commonwealth Court. Claimants should not face heavier costs in the administrative system.

We understand that the impetus of this provision may be 20 C.F.R. § 603.8(a), which states that as a general matter, "grant funds must not be used to pay any of the costs of making any disclosure of UC information." However, in the exceptions, the federal regulation does permit grant funds to be used for providing information to an individual, employer or agent. 20 C.F.R. § 603.8(b). Moreover, "grant funds may be used to pay the costs associated with any disclosure of UC information if not more than an incidental amount of staff time and nor more than nominal processing costs are involved in making the disclosure." *Id.* These provisions seem to encompass the routine request for documents made by claimants and their representatives.

(4) These rules should be clearly communicated to UC staff.

While not a regulatory matter, the training of UC staff on the new rules is crucial to avoid interference with claims handling. We fear – again, based on past experience -- that unless it is made clear to staff that claimants and their representatives continue to get access to case records at no cost, we will face barriers as a result of misunderstanding of the new rules.



For further discussion of these points, contact Sharon M. Dietrich, Esquire at 215-981-3719 or sdietrich@clsphila.org .

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