February 16, 2021
Via email: SenateTestimony@ilga.gov

NELA-IL TESTIMONY TO SENATE LABOR COMMITTEE
From IDES SUBCOMMITTEE OF NELA LEGISLATIVE COMMITTEE

The National Employment Lawyers Association (NELA)is an organization of thousands of lawyers around the United States who represent employees in worker rights litigation. Our Illinois chapter handles claims at the federal, state and local levels on behalf of employees who have been victims of discrimination and /or retaliation; of wage or overtime pay theft, of harassment; and other violations of their rights in the workplace. The IDES subcommittee of NELA-Illinois is composed of members who represent claimants seeking unemployment benefits through the Department of Employment Security.

We have provided input to Director Kristin Richards and General Counsel Kevin Lovellette to strengthen the Amendments enacted on an emergency basis to protect claimants in these unusually difficult times.

Since the start of the pandemic, many NELA members have experienced a surge in calls, oftentimes desperate, from Illinois workers having problems receiving their unemployment benefits including regular, extended and those granted through the Federal Pandemic Assistance programs. We have also been spending additional time advising claimants on requirements for showing eligibility for unemployment benefits given some of the changes the Governor has enacted.

Prominent among those problems we have noted are the following:

1. **RECOUPMENT DEMANDS**

Our members have noticed an increase in calls from claimants who have been alarmed by IDES notices demanding significant amounts of recoupment. Recoupment is demanded because the claimant who was originally found to be eligible is later disqualified by an administrative judge or other agency rulings. The monies claimants have received have been spent on food, rent and other necessities in amounts that these claimants can never repay.

These recoupment notices pressure claimants to sign a legal document without fully explaining their rights. The letters do state that they can appeal the recoupment, but claimants are often unclear about how to proceed. For instance, claimants are unsure whether they need to file an appeal of a recoupment decision if they have already filed an underlying appeal on the denial of benefits. We ask that changes be made to make it clear what claimant's rights are when they receive a recoupment notice and that they have a right to ask for a waiver under Ill. Admin. Code tit. 56 §2835.30 if they can show

"extreme financial hardship" **and that the benefits were received without fault**, and recoupment in the week(s) would be against equity and good conscience pursuant to 56 Ill. Adm. Code 2835.45." Claimants also would like clarity as to whether this provision still applies even if they have received both state and federal money from regular UI (i.e.. would they face similar federal restrictions as under PUA, described below).

We would like to make the further point that an individualized process is problematic and imposes undue burden on claimants. After talking to IDES regarding PUA benefits, it is our understanding that IDES cannot offer blanket waivers because of the federal pandemic assistance and federal restrictions. It appears that legislative action is required so that blanket recoupment waivers can be granted. We strongly support legislative measures which would provide blanket waivers to claimants who have received benefits not through any fraudulent acts on their part, but solely due to different rulings in the administrative process.

2. INTERPLAY OF REGULAR UNEMPLOYMENT BENEFITS (UI) AND PANDEMIC UNEMPLOYMENT ASSISTANCE (PUA) BENEFITS

Our members also have received many calls from Claimants who have either (1) mistakenly received the wrong type of benefit (generally UI instead of PUA) or (2) have been rejected from UI but don't know how to then get into PUA. IDES has offered little assistance here even though this was supposed to be a seamless transition. IDES told Claimants they should first apply for UI and if they were ineligible, they would be kicked to the PUA system. Instead, we are seeing cases where Claimants are pushed into the UI system (even when they believe they are not eligible) and sometimes getting regular UI (even though they shouldn't have) and then facing extreme difficulties in getting into the PUA system.

In the meanwhile, when they are wrongly approved for UI and that determination is then reversed by the Agency catching its own error, Claimants are facing recoupment notices through no fault of their own (see Issue 4 below). In other cases, Claimants first apply for UI and are rejected (as apparently required by IDES in order to get PUA) but still need a better/easier way to then get into PUA. There are no instructions on any letters sent by IDES on how to do this and of course calling IDES yields weeks of wait time and inconsistent answers. IDES must give Claimants a better way to navigate between these two systems.

3. REPORTING OF UNEMPLOYMENT CLAIM FRAUD

Our members have difficulty advising clients or callers who have been defrauded or have received notices of fraudulent use of their name. Although a fraud hot line number has been set up, the constant refrain is that persons who attempt to report using that hot line cannot reach a live person. There is only one means for persons to report they have been

victim of fraud. Clearly the IDES requires additional resources to adequately respond to the amount of staff time and resources that must be spent on this problem of massive fraud. We urge the legislators to increase the budget for IDES to provide that assistance.

4. MISCONDUCT DEFINITION IN THE UNEMPLOYMENT INSURANCE ACT

If a claimant is separated from employment due to misconduct, they will be deemed ineligible for unemployment benefits. The statutory definition of misconduct is crucial especially given that most claimants do not have benefit of legal counsel when they appear at hearings with the Administrative Law Judge.

In 2016 the General Assembly enacted an amendment to add to what had been the definition of misconduct for a long period of time. The amendment inserted the following into the statute:

“The previous definition notwithstanding, "misconduct" shall include any of the following work-related circumstances:”

The amendment then lists eight circumstances that show misconduct *per se*. This means that none of the requirements contained in the misconduct definition need to be proven in order to deny claimants benefits if their conduct falls under any *per se* rule.

Among these *per se* rules in the statute is number #5, to wit:

5. Refusal to obey an employer's reasonable and lawful instruction, unless the refusal is due to the lack of ability, skills, or training for the individual required to obey the instruction or the instruction would result in an unsafe act.

“Refusal to obey instruction” is broad enough language to include any behavior of the employee that did not satisfy an employer’s expectations. The *per se* rule does not require that the claimant willfully and deliberately violated a rule even though that has been the standard for misconduct in our state for over thirty years. In these times of pandemic, employees must navigate difficult workplace requirements and balance these with concerns about their health. That situation increases the likelihood that an employee will “fail to follow instructions,” and therefore be ineligible for benefits when they are terminated.

This new misconduct standard places a heavier burden on the claimant than the employer, even though the law specifies that it is the employer’s burden to prove misconduct. This new *per se* rule undermines the purpose of unemployment benefits which are to assist those who become unemployed through no fault of their own.

We urge the Senate to consider rescinding the offending parts of the Act and affirming the misconduct standard as outlined below:

"…the deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual's behavior in performance of his work, provided such violation has harmed the employing unit or other employees or has been repeated by the individual despite a warning or other explicit instruction from the employing unit."

NELA-IL would be happy to provide case studies additional testimony to support our position and our belief that this change to the Unemployment Insurance Act is needed.

Thank you for allowing us to submit this testimony and giving consideration to our collective experiences. If you have any questions, please follow up with Denise DeBelle who can be reached at 773-728-0136 or denise@debelle-law.com.

Sincerely,

The Legislative Committee – NELA-ILLINOIS