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Making Unemployment Insurance Work for Working People

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ABSTRACT

During just the first four months the COVID-19 pandemic, 50 million people applied for unemployment insurance. The COVID-19 economic crisis has exposed a frayed social safety net that simply does not work for working people. In this Article, we describe how the unemployment insurance system punishes working people, rather than supporting them, in times of crisis; excludes many vulnerable workers, especially workers of color; and is being weaponized to force workers back onto the pandemic's front lines without adequate safety measures in place. These acute failures are the result of a decades-long right-wing campaign to shred unemployment insurance and the social safety net—which reflects a system of racial capitalism that rests on deep and dangerous inequality. This Article also identifies the urgent reforms needed to save and strengthen unemployment insurance and discusses lawyers' roles in both meeting immediate needs in the COVID-19 crisis and supporting movements building longterm worker power.

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TABLE OF CONTENTS

INTRODUCTION.....	104
I. THE UNEMPLOYMENT SYSTEM HAS LONG FAILED WORKING PEOPLE	105
A. Many Precarious Workers Are Excluded	106
B. Good Cause Quits and Forced Return to Work.....	108
C. Benefits Workers Cannot Survive On.....	109
II. UNDERFUNDED STATE UNEMPLOYMENT INSURANCE AGENCIES.....	111
A. Lawyers Must Meet Immediate Needs, But Also Support Workers Building Power for the Longterm	112
B. Fighting for Lasting Improvements to Unemployment Insurance	115
CONCLUSION	117

INTRODUCTION

This year, millions of families were hurled into deep financial precarity as the COVID-19 pandemic, and the Trump Administration's failure to slow the spread, forced businesses across the country to shut their doors. From mid-March to mid-June, more than 44 million Americans filed for unemployment insurance.¹ Unemployment, which spiked to its highest rate since the Great Depression,² is even higher for Black workers than white workers,³ and will almost certainly remain high for years after the pandemic subsides.⁴ The COVID-19 crisis also exposed a crisis of racial capitalism: During a pandemic that is killing Black and Latinx people at twice the rate it is killing white people, and killing Indigenous people at elevated rates,⁵ workers of color are more likely to be financially precarious and at risk of losing their jobs,⁶ have far less wealth to fall back on because of a deep racial wealth gap, and are more likely to be the workers in retail, food service, and shipping jobs who are sent to the front lines of the pandemic to put their lives at risk for corporate bottom lines.⁷ And this crisis is far from over:

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1. *Over 44 Million Americans File for Unemployment Since Mid-March*, CNN (June 11, 2020), <https://www.cnn.com/videos/business/2020/06/11/jobless-claims-unemployment-since-march-vpx.cnn> [<https://perma.cc/3W5G-CVNN>].
 2. Health Long & Andrew Van Dam, *U.S. Unemployment Rate Soars to 14.7 Percent, the Worst Since the Depression Era*, WASH. POST (May 8, 2020), <https://www.washingtonpost.com/business/2020/05/08/april-2020-jobs-report> [<https://perma.cc/BKK5-ZVLB>].
 3. Michael Leachman & Jennifer Sullivan, *Some States Much Better Prepared Than Others for Recession*, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 20, 2020), <https://www.cbpp.org/research/state-budget-and-tax/some-states-much-better-prepared-than-others-for-recession> [<https://perma.cc/N44H-7XR8>].
 4. See Phill Swagel, *CBO's Current Projections of Output, Employment, and Interest Rates and a Preliminary Look at Federal Deficits for 2020 and 2021*, CONG. BUDGET OFF. (Apr. 24, 2020), <https://www.cbo.gov/publication/56335> [<https://perma.cc/C542-ZPS7>].
 5. Amanda Arnold, *The Glaring Race Gap in Coronavirus Deaths*, N.Y. MAG.: CUT (July 6, 2020), <https://www.thecut.com/2020/07/black-latino-people-twice-as-likely-to-die-from-coronavirus.html> [<https://perma.cc/HWN8-BDR9>].
 6. See Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2210 (2013) (discussing how the "racial commodification that racial capitalism enforces renders racial minorities particularly vulnerable to broad fluctuations in market conditions"); K. Sabeel Rahman, *COVID-19 and the Crisis of Racial Capitalism*, DEMOS (Apr. 6, 2020), <https://www.demos.org/blog/covid-19-and-crisis-racial-capitalism> [<https://perma.cc/37NG-8RDE>]; Darrick Hamilton, *A Paycheck Guarantee is Popular With Voters*, DATA FOR PROGRESS (July 8, 2020), <https://www.dataforprogress.org/blog/2020/7/8/paycheck-guarantee-is-popular> [<https://perma.cc/LL8M-XEWY>] ("During recessions, corporations treat Black workers as the 'first fired, last hired'—as the economy recovers, the Black unemployment rate falls more slowly.").
 7. See HYE JIN RHO, HAYLEY BROWN & SHAWN FREMSTAD, CTR. FOR ECON. & POL'Y RES., *A BASIC DEMOGRAPHIC PROFILE OF WORKERS IN FRONTLINE INDUSTRIES 3–4* (2020), <https://cepr.net/wp-content/uploads/2020/04/2020-04-Frontline-Workers.pdf> [<https://perma.cc/3HLZ-AWKZ>].

The Congressional Budget Office projects that the economy may not fully recover until 2030.⁸

As people struggle to make ends meet during the COVID-19 pandemic, unprecedented numbers of Americans are turning to unemployment insurance (UI), only to find a shredded social safety net already in tatters. Congress's third COVID-19 relief package, the Coronavirus Aid, Relief, and Emergency Security (CARES) Act, provided urgently needed relief by expanding UI coverage and providing an extra \$600 per week to every person receiving benefits.⁹ But the CARES Act's benefits were temporary. Although the Democrat-controlled House of Representatives passed a comprehensive package reauthorizing the \$600 benefit in May, the GOP-controlled Senate refused to do so¹⁰—and benefits expired on July 31st, leaving tens of millions of unemployed workers to live on state unemployment insurance, which pays workers an average of just \$320 a week,¹¹ and pays many workers far less. As the current economic crisis has shown, temporary expansions to UI, like those in the CARES Act, are necessary, but not sufficient: Unemployment insurance will not work for working people without systemic change.

I. THE UNEMPLOYMENT INSURANCE SYSTEM HAS LONG FAILED WORKING PEOPLE

Unemployment insurance is administered by the states, and programs vary widely—but in every state, the COVID-19 crisis has exposed an underfunded, patchwork UI system that is failing to provide workers with a real social safety net, and particularly failing workers of color. As this Part explains, some of these issues were temporarily addressed by the CARES Act, but they require lasting systemic fixes.

8. See Heather Long & Eli Rosenberg, *The U.S. Economic Slide Is Likely Bottoming Out, But a Recovery Could Take Years*, WASH. POST (June 5, 2020), <https://www.washingtonpost.com/us-policy/2020/06/04/economy-bottoming-out> [<https://perma.cc/C5T9-TJ72>].

9. NAT'L EMP. L. PROJECT, UNEMPLOYMENT INSURANCE PROVISIONS IN THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY (CARES) Act 1 (2020) [hereinafter CARES ACT EXPLAINER], <https://s27147.pcdn.co/wp-content/uploads/Fact-Sheet-Unemployment-Insurance-Provisions-CARES-Act.pdf> [<https://perma.cc/N8CS-6RN8>].

10. See Paul McLeod, *The \$600 Unemployment Benefits Are Expiring This Weekend Because Senate Republicans Didn't Do Anything*, BUZZFEED (July 24, 2020), <https://www.buzzfeednews.com/article/paulmcleod/congress-lets-600-unemployment-money-expire> [<https://perma.cc/3MGD-FPCT>].

11. See Sarah Jones, *Congress Is Hanging Single Parents Out to Dry*, N.Y. MAG.: INTELLIGENCER (Aug. 14, 2020), <https://nymag.com/intelligencer/2020/08/single-parents-need-enhanced-unemployment-benefits.html> [<https://perma.cc/98V5-46XZ>].

A. Many Precarious Workers Are Excluded

Many workers are simply excluded from unemployment insurance altogether. This Subpart will explain three common barriers to eligibility.

First, under federal law, undocumented workers are nearly always ineligible for unemployment insurance.¹² To qualify for unemployment insurance, workers must be “able and available” for work and “permanently residing under color of law” (PRUCOL) during the base period of past employment used to calculate the benefit amount.¹³ Although state interpretations of the PRUCOL requirement vary, it is generally understood to exclude anyone without work authorization.¹⁴ As a result, undocumented workers across the country have no source of income if they lose their jobs as a result of the COVID-19 pandemic, and have no way to pay rent or bills—unless they accept low-paying frontline jobs where employers put workers’ lives at risk every day. The CARES Act did not extend unemployment insurance to undocumented workers, reflecting a system that profits off of undocumented workers’ underpaid labor, and keeps their wages low by denying undocumented workers critical labor and employment protections.

Second, millions of workers are misclassified as independent contractors nationwide.¹⁵ Misclassified workers perform the same work as employees, but employers instead classify them as “independent contractors” making them ineligible for critical benefits and protections, including workers’ compensation, paid leave, and unemployment insurance.¹⁶ Misclassification is a widespread problem in industries vulnerable to mass layoffs and lower demand during the COVID-19 crisis, including the app-based “gig economy,” construction, trucking,

12. In rare individual circumstances, individual workers may be able to claim benefits for people who do not have work authorization. For example, the National Employment Law Project explains that “if work authorization has lapsed due to circumstances beyond the workers’ control, and they can show that they have applied for an extension” some states may consider people unauthorized to work eligible for UI benefits. REBECCA SMITH, NAT’L EMP. L. PROJECT, IMMIGRANT WORKERS’ ELIGIBILITY FOR UNEMPLOYMENT INSURANCE 1 (2020), <https://s27147.pcdn.co/wp-content/uploads/Immigrant-Workers-Eligibility-Unemployment-Insurance.pdf> [<https://perma.cc/P5B7-4SYP>]. Undocumented workers seeking UI should contact an attorney. *Id.*

13. NAT’L EMP. L. PROJECT, NAT’L IMMIGR. L. CTR. & OSH L. PROJECT, FAQ: IMMIGRANT WORKERS’ RIGHTS AND COVID-19—A RESOURCE FOR WORKERS AND THEIR ADVOCATES 1, 13 (2020), <https://s27147.pcdn.co/wp-content/uploads/FAQ-Immigrant-Workers-Rights-COVID-19-Resource-v-2020-04-10.pdf> [<https://perma.cc/E6UD-DMCG>].

14. *Id.*

15. See FRANÇOISE CARRÉ, ECON. POL’Y INST., (IN)DEPENDENT CONTRACTOR MISCLASSIFICATION (2015), <https://files.epi.org/pdf/87595.pdf> [<https://perma.cc/RNL6-VA2W>].

16. *Id.* at 2.

and janitorial industries.¹⁷ Misclassified workers in these industries are completely ineligible for state unemployment assistance if they lose their (often full-time) jobs. The CARES Act's Pandemic Unemployment Assistance (PUA) program temporarily addressed this exclusion by extending emergency UI to independent contractors, misclassified workers, and freelancers.¹⁸ PUA, however, is set to expire on December 31, 2020, and independent contractors are only eligible if they can show they are unemployed or unable to work for a narrow set of COVID-19 related reasons.¹⁹ Misclassified workers who lose their jobs next year or who can't work for other reasons—for example, suffering any other debilitating illness or injury—will not be eligible for UI.

Lastly, to receive UI, workers must show that they have a sufficient work history to qualify: They must have worked for a minimum amount of time and earned a minimum amount of wages during a “base period” prior to job loss to qualify for the program. Work history rules vary significantly from state to state, but “[m]ost states define their base periods as the first four of the last five completed calendar quarters.”²⁰ Anyone who did not work sufficiently during the base period is excluded from benefits.²¹ Prepandemic, many low-wage workers were also ineligible for unemployment insurance because they simply did not earn enough wages in low-paid, part-time jobs.²² In part because of strict work history requirements, in the last quarter of 2019, just 9.5 percent of unemployed workers in Mississippi received unemployment insurance.²³

17. NAT'L EMP. L. PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES 1, 6 (2015), <https://www.nelp.org/wp-content/uploads/Independent-Contractor-Costs.pdf> [<https://perma.cc/SW3Q-VSHR>].

18. CARES ACT EXPLAINER, *supra* note 9.

19. *Id.*

20. NAT'L EMP. L. PROJECT, WHAT IS AN “ALTERNATIVE BASE PERIOD” & WHY DOES MY STATE NEED ONE? EXPANDING UI FOR LOW-WAGE & PART-TIME WORKERS 1 (2015), <https://www.nelp.org/wp-content/uploads/2015/03/Alternative-Base-Period.pdf> [<https://perma.cc/4R4H-YJ3M>].

21. GEO. CTR. ON POVERTY & INEQ. ET AL., A JOBSEEKER'S ALLOWANCE WOULD RESPOND TO COVID-19 AND BEYOND 1, 2 (2020), <https://www.georgetownpoverty.org/wp-content/uploads/2020/05/JSA-COVID-brief-20200519.pdf> [<https://perma.cc/SES8-TW39>].

22. Ben Zipperer & Elise Gould, *Without Fast Action From Congress, Low-Wage Workers Will Be Ineligible for Unemployment Benefits During the Coronavirus Crisis*, ECON. POL'Y INST.: WORKING ECON. BLOG (Mar. 26, 2020, 10:39 AM), <https://www.epi.org/blog/without-fast-action-from-congress-low-wage-workers-will-be-ineligible-for-unemployment-benefits-during-the-coronavirus-crisis> [<https://perma.cc/EG9U-5A7F>].

23. *Unemployment Insurance Data*, DEP'T LAB., https://oui.doleta.gov/unemploy/data_summary/DataSum.asp [<https://perma.cc/WAB4-RR8F>] (last visited July 6, 2020) (select “Mississippi” under “States”; then select year 2019 and quarter 4 for both the start and end date ranges; then select “Submit”).

The CARES Act temporarily expands UI to all workers who lose their jobs because of the COVID-19 pandemic, even if they don't have a sufficient work history.²⁴ But the CARES Act still leaves many workers vulnerable. For example, graduating students or people exiting incarceration who cannot find a job in the worst job market since the Great Depression—but who did not lose an existing job because of the COVID-19 pandemic—are not eligible for UI, and thus have no way to pay rent or bills as the pandemic continues to decimate the job market.

B. Good Cause Quits and Forced Return to Work

Generally, people who lose their job are only eligible for unemployment insurance if they are unemployed for reasons beyond their control and actively seeking new work.²⁵ Workers who quit their jobs without “good cause” are thus ineligible.²⁶ Workers who refuse an offer of “suitable work” without “good cause” are similarly ineligible.²⁷

In the COVID-19 pandemic, states and employers are wielding these rules to coerce workers back into unsafe workplaces. By early June, thousands of workers who did not want to return to in-person work for fear of contracting the deadly coronavirus were reported to state unemployment insurance agencies “to have their unemployment benefits cut off.”²⁸ Vermont’s UI agency warns workers that “[r]efusal to return to work . . . may result in the termination of unemployment benefits,” and warns employers that they “**MUST**” [sic] report workers who refuse to return to work to state unemployment agencies.²⁹ Oklahoma and Ohio UI agencies created new processes for businesses to report workers who decline work.³⁰ Tennessee’s Labor Commissioner announced that the state would cut off

24. CARES ACT EXPLAINER, *supra* note 9.

25. NAT'L EMP'T L. PROJECT, TEMP WORK AND UNEMPLOYMENT INSURANCE—HELPING EMPLOYEES AT TEMPORARY STAFFING AND EMPLOYEE LEASING AGENCIES 1, 2 (2001), <https://www.nelp.org/wp-content/uploads/2015/03/Temp-Work-and-Unemployment-Insurance.pdf> [<https://perma.cc/4HX3-CDU8>].

26. *Id.* at 2.

27. *Id.*

28. Jack Healy, *Workers Fearful of the Coronavirus Are Getting Fired and Losing Their Benefits*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/04/us/virus-unemployment-fired.html> [<https://perma.cc/HX74-65CT>].

29. *Refusal to Return to Work: COVID-19*, VT. DEP'T LAB., <https://labor.vermont.gov/unemployment-insurance/refusal-return-work-covid-19> [<https://perma.cc/JM7U-VYUD>] (last visited June 25, 2020).

30. Healy, *supra* note 28.

benefits for people who do not return to work.³¹ Employees in some states might be able to challenge a denial of benefits, arguing that refusing to return to work at a restaurant or retail store as new infections climb is good cause to quit—but challenging denials could take years and rent is due every month.

States' eagerness to force workers back to work reflects a system of racial capitalism.³² Ruth Wilson Gilmore defines racism as the “state-sanctioned and/or extralegal production and exploitation of group-differentiated vulnerability to premature death.”³³ When racism intersects with capitalism to violently exploit the labor of people of color, a system of racial capitalism is created. During the COVID-19 pandemic, it is those with less wealth to fall back on and less ability to work from home who are being coerced into literally risking their lives to facilitate capital accumulation.³⁴

C. Benefits Workers Cannot Survive On

State unemployment insurance programs typically replace just about half of an individual's previous wages, subject to a maximum and minimum benefit amount.³⁵ Before the pandemic, minimum benefits ranged “from as low as \$5 a week in Hawaii to as high as \$188 a week in Washington state.”³⁶ But after decades of stagnating wages and skyrocketing housing, healthcare, and education costs, working- and middle-class people simply cannot survive when only half of their income is being replaced. For years before the pandemic, a majority of Americans

31. Press Release, Dep't of Lab. & Workforce Dev., Refusal to Work Could Jeopardize Unemployment Benefits (May 11, 2020), <https://mailchi.mp/b289a4d8c7b7/refusal-to-work-could-jeopardize-unemployment-benefits?e=e2ff54732a> [<https://perma.cc/VS6X-G3HR>].

32. Cf. Robin D.G. Kelly, *What Did Cedric Robinson Mean By Racial Capitalism?*, BOS. REV. (Jan. 12, 2017), <http://bostonreview.net/race/robin-d-g-kelley-what-did-cedric-robinson-mean-racial-capitalism> [<https://perma.cc/H86C-V4Z5>].

33. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 247 (2007).

34. Whitney N. Laster Pirtle, *Racial Capitalism: A Fundamental Cause of Novel Coronavirus (COVID-19) Pandemic Inequities in the United States*, 47 HEALTH EDUC. & BEHAV. 504 (2020); compare Jack Pitcher, *Jeff Bezos Just Added a Record \$13 Billion to His Fortune in a Single Day*, TIME (July 20, 2020), <https://time.com/5869262/jeff-bezos-13-billion> [<https://perma.cc/E7QL-4M8N>], with Ezra Kaplan & Jo Ling Kent, *Eighth Amazon Warehouse Worker Dies From COVID-19*, NBC NEWS (May 21, 2020), <https://www.nbcnews.com/news/us-news/eighth-amazon-warehouse-worker-dies-covid-19-n1212546> [<https://perma.cc/HHB9-ALW8>].

35. See *Policy Basics: Unemployment Insurance*, CTR. ON BUDGET & POL'Y PRIORITIES (June 25, 2020), <https://www.cbpp.org/research/economy/policy-basics-unemployment-insurance> [<https://perma.cc/9EV2-F2XX>].

36. Greg Iacurci, *How Much Unemployment Will I Get? That Depends on Your State*, CNBC (Apr. 10, 2020), <https://www.cnbc.com/2020/04/09/how-much-unemployment-will-i-get-that-depends-on-your-state.html> [<https://perma.cc/XAW4-42J2>].

reported in surveys that they would be unable to cover an unexpected \$500 expense without falling into debt.³⁷ In 2018, about one in four renters reported spending more than half of their income on housing alone.³⁸ Low-wage workers cannot survive solely on half their income.

Meager unemployment benefits are similarly a product of racial capitalism. For decades, predominantly white politicians have invoked and exploited racist tropes about people of color “on the dole” to slash safety net programs, forcing workers of color to take any low-paying, exploitative job they can take to make ends meet. According to data compiled by the Center for Popular Democracy, 47 percent of Black people in America live in the fourteen states with the lowest caps on unemployment benefits.³⁹ By contrast, the seven states with the highest benefits are, on average, only 7 percent Black.⁴⁰ And because of the United States’s deep racial wealth gap, Black and Brown workers have fewer, if any, resources to fall back on if they lose their jobs during a crisis.

The CARES Act temporarily addressed this problem by creating the Pandemic Unemployment Compensation (PUC) program, under which people who lose their jobs for qualifying, COVID-19 related reasons “will receive their usual calculated benefit plus an additional \$600 per week in compensation.”⁴¹ This temporary but critical expansion in benefits kept millions of people out of poverty in the early months of the pandemic.⁴² Now that benefits have expired, unemployed workers are once again receiving nothing but state unemployment insurance benefits—which, in many states, fall thousands of dollars short of what the typical single parent needs to pay for basic necessities, like housing, medication, utilities, and food for themselves and their children.⁴³ For workers

37. Aimee Picchi, *A \$500 Surprise Expense Would Put Most Americans Into Debt*, CBS NEWS (Jan. 12, 2017), <https://www.cbsnews.com/news/most-americans-cant-afford-a-500-emergency-expense> [https://perma.cc/97UZ-X3WM].

38. JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *AMERICA’S RENTAL HOUSING 2020*, at 1, 6 (2020), https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_Americas_Rental_Housing_2020.pdf [https://perma.cc/Q5PE-APP8].

39. Emily Badger, Alicia Parlapiano & Quoc Trung Bui, *Why Black Workers Will Hurt the Most If Congress Doesn’t Extend Jobless Benefits*, N.Y. TIMES: UPSHOT (Aug. 7, 2020), <https://www.nytimes.com/2020/08/07/upshot/unemployment-benefits-racial-disparity.html?smid=tw-upshotnyt&smtyp=cur> [https://perma.cc/3BME-SG9R].

40. *Id.*

41. CARES ACT EXPLAINER, *supra* note 9, at 1.

42. Jason DeParle, *Vast Federal Aid Has Capped Rise in Poverty, Studies Find*, N.Y. TIMES (June 21, 2020), <https://www.nytimes.com/2020/06/21/us/politics/coronavirus-poverty.html> [https://perma.cc/765E-4KRZ].

43. See PROGRESSIVE CAUCUS ACTION FUND, *WORKING FAMILIES CANNOT MEET BASIC NEEDS UNDER EXISTING UNEMPLOYMENT INSURANCE BENEFITS* (2020), <https://static1.squarespace.com/static/53cab2c3e4b0207d2957d0d2/t/5f356ebb8614490400d101ec/1597337275465/Unemployed+Workers+Can%27t+Meet+Basic+Needs.pdf> [https://perma.cc/2ZHD-PKSV].

receiving as little as \$81 a week, there is simply no way to make the math add up.⁴⁴ Because the Senate GOP allowed the \$600 boost to unemployment insurance expire, as many as 40 million people are at risk of losing their homes.⁴⁵

II. UNDERFUNDED STATE UNEMPLOYMENT INSURANCE AGENCIES

Over the last decade, while invoking the racist “welfare queen” myth, Republican governors and state legislators have starved state unemployment insurance systems,⁴⁶ leaving unemployed workers out to dry pre-crisis and leaving states unprepared for today’s COVID-19 driven recession. As recently as March 2020, the majority of unemployed workers in most states were not receiving benefits,⁴⁷ with fewer than 20 percent of workers in Florida, Alabama, Mississippi, Georgia, North Carolina, Texas, Missouri, and other states that have shredded UI systems.⁴⁸

And the UI system deepens inequalities that are a cause and consequence of systemic racism. Unemployed Black workers are even less likely than unemployed white workers to receive benefits,⁴⁹ all while the pandemic is killing Black people in most states at twice the rate it is killing white people.⁵⁰

44. Alana Semuels, *\$600 a Week in Extra Unemployment Benefits May Soon End, But Millions of Americans Still Can't Find Jobs*, TIME (July 17, 2020), <https://time.com/5867908/stimulus-unemployment-benefits-coronavirus/> [<https://perma.cc/W6QU-4WF2>].

45. Emily Benfer et al., *The COVID-19 Eviction Crisis: An Estimated 30–40 Million People in America Are at Risk*, ASPEN INST. (Aug. 7, 2020), <https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk/> [<https://perma.cc/2FJF-LZ7J>].

46. See, e.g., Eric Levitz, *Florida GOP Realizes Deliberately Impoverishing the Unemployed Has Downsides*, N.Y. MAG.: INTELLIGENCER (Apr. 3, 2020), <https://nymag.com/intelligencer/2020/04/florida-unemployment-benefits-desantis-trump-rick-scott.html> [<https://perma.cc/CC2S-ZCWJ>].

47. Drew Desilver, *Not All Unemployed People Get Unemployment Benefits; In Some States, Very Few Do*, PEW RES. CTR. (Apr. 24, 2020), <https://www.pewresearch.org/fact-tank/2020/04/24/not-all-unemployed-people-get-unemployment-benefits-in-some-states-very-few-do> [<https://perma.cc/8TFR-GERA>].

48. *Id.*; see also Leachman & Sullivan, *supra* note 3 (“The UI systems in Mississippi, Nebraska, North Carolina, and South Dakota are barely functioning, reaching less than 10 percent of unemployed workers as of the fourth quarter of 2019.”).

49. See Mitchell Hirsch, *Unemployment Insurance Was Crucial to Workers and the Economy in the Last Recession*, NAT’L EMP. L. PROJECT (Mar. 23, 2020), <https://www.nelp.org/blog/unemployment-insurance-crucial-workers-economy-last-recession> [<https://perma.cc/LK3Z-NK7K>].

50. Sheryl Gay Stolberg, *Pandemic Withing a Pandemic: Coronavirus and Police Brutality Roil Black Communities*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/07/us/politics/blacks-coronavirus-police-brutality.html> [<https://perma.cc/DE2F-UDWG>].

A. **Lawyers Must Meet Immediate Needs, But Also Support Workers Building Power for the Longterm**

Attorneys must secure immediate relief for struggling families in the pandemic—and fight alongside worker-led movements for a more just economy when we emerge from the COVID-19 crisis. In the immediate term, lawyers must provide urgently needed direct services to workers, especially workers who are less likely to successfully file for and receive unemployment, including workers with less wealth, who do not speak proficient English, and who do not have reliable internet access to file for UI online.⁵¹ At the same time, some attorneys have joined mass campaigns to save and strengthen UI, providing a valuable example of how law students and attorneys can leverage their knowledge and time to support worker justice movements.

The Center for Popular Democracy (CPD), a nationwide organization dedicated to strengthening base-building worker justice groups, has been organizing campaigns to both provide immediate relief and build longterm worker power. CPD operates through a network of state-level affiliates, including worker centers and housing justice groups, whose members were profoundly impacted by the pandemic. CPD's campaigns have worked first to help workers access existing UI benefits, then mobilize those workers in political advocacy to improve state administration of UI and to protect the \$600 per week boost to UI formerly provided in the CARES Act.

In New York, CPD affiliate Make the Road New York has put out step-by-step guides to accessing UI (as well as other COVID-19 workplace protections and paid leave).⁵² Make the Road brought some of the workers assisted by their rights-education program into the organization's network to demand Governor Cuomo provide relief to undocumented immigrants and others excluded from benefits on the federal level.⁵³ In Washington, CPD affiliate Working Washington

51. Cf. Colin Lecher, *Online Unemployment Benefits Systems Are Buckling Under a Wave of Applications*, MARKUP (Mar. 31, 2020, 10:00 AM), <https://themarkup.org/coronavirus/2020/03/31/online-unemployment-benefits-systems-are-buckling-under-a-wave-of-application> [<https://perma.cc/R CZ9-MZBZ>]. In addition, this spring, People's Parity Project partnered with Greater Boston Legal Services and had students walk individuals through the application for unemployment insurance. Because of the pandemic, offices are closed to in-person applicants and instead require individuals to apply online. The process is difficult and confusing, and made only more difficult for those without access to computers or internet or those with limited English proficiency.

52. See MAKE THE ROAD N.Y., *UPDATES ON WORKERS' RIGHTS IN NEW YORK IN THE MIDST OF COVID-19* (2020), <https://maketheroadny.org/wp-content/uploads/2020/04/FAQ-Workers-rights-other-resources-ENGLISH.pdf> [<https://perma.cc/88LR-YJGD>].

53. Petition, *Make the Road N.Y. et al., Governor Cuomo: New York's Excluded Workers Need Relief* (2020), <https://actionnetwork.org/petitions/governor-cuomonew-yorks-excluded->

provides comprehensive guides to workers facing unemployment, changes in hours, safety concerns, or the inability to work because of caregiving needs.⁵⁴ Because of Working Washington's large digital presence they have been able to provide information and assistance to Washingtonians and to ensure that state level political goals are being driven by the interests and needs of those workers.⁵⁵ CPD affiliate Step Up Louisiana has been hosting weekly information sessions to answer questions from the community about unemployment insurance, where they also include political education about political actors that deliberately hobbled the state's UI programs.⁵⁶ Workers who attend rights-education programs are encouraged to then join Step Up Louisiana and organize other unemployed workers. In New England, the worker center Rights and Democracy released Know Your Rights guides to unemployment insurance, explaining the basics of the UI system, then held information sessions for workers interested in political action.⁵⁷ In all of these states, workers' rights organizations are using their resources to first ensure that people's needs are met, but then use this moment of intense need to engage people as activists and to build worker power around calling for systemic change.

Lawyers can support this worker-led movement to build longterm power. Chapters of the People's Parity Project (PPP), a national nonprofit organizing law students and new attorneys to unrig the legal system, ensured that law students were following the lead of these longstanding workers' rights activists when law students sought to respond to the economic destruction wrought by the pandemic. At the University of New Hampshire School of Law, PPP organizers worked with CPD and Rights and Democracy to draft guides answering frequently asked questions on accessing unemployment insurance in New Hampshire and Vermont.⁵⁸ At New York University School of Law, PPP organizers set up and staffed an unemployment insurance hotline in April where students respond to calls from community members who have questions regarding how to access unemployment insurance. As of early June, this hotline had received 500 calls.⁵⁹

workers-need-relief?source=direct_link&referrer=group-make-the-road-ny [https://perma.cc/SW9Y-D55Y].

54. *Resources for WA Workers in the Coronavirus Crisis*, WORKING WASH. (Aug. 3, 2020), <http://www.workingwa.org/coronavirus/resources> [https://perma.cc/963Z-F8L4].

55. Telephone Interview with Rachel Deutsch, Supervising Att'y for Worker Just., Ctr. for Popular Democracy (June 17, 2020).

56. Telephone Interview with Alyssa Peterson, Liman Fellow, Ctr. for Popular Democracy (June 22, 2020).

57. *Id.*

58. *Id.*

59. Telephone Interview with Chiraayu Gorsani, Organizer, People's Parity Project (June 7, 2020).

Nationally, PPP responded to the pandemic by launching the COVID-19 Rapid Response Network to mobilize law students to combat the impact of the pandemic on workers. PPP mobilized hundreds of students to assist dozens of grassroots, statewide, and national organizations with the immense need for direct legal services and advocacy created by the pandemic.⁶⁰ PPP student organizers have helped secure statewide eviction moratoriums in New England, helped workers access unemployment insurance and paid leave nationwide, and supported state partners in strengthening unemployment insurance for the longterm.

For example, in Boston, PPP's rapid response network worked closely with Greater Boston Legal Services (GBLS), the largest provider of free legal services in Massachusetts, to raise the dependency allowance for Massachusetts UI claimants. GBLS and PPP researched the limits on the dependency allowance, the costs of living in the state, and the economic impact of coronavirus-induced school closures. Following local advocates' lead, PPP students were able to add capacity for movement groups and provide research that advocates needed to demonstrate that the dependency allowance was not enough to sustain a family. Thanks to GBLS's advocacy Senate Bill 2618 passed on May 26, 2020, lifting a previous cap on benefits.⁶¹ While this bill has provided crucial benefits to Massachusetts families, the elimination of the benefit cap expires "one year from the effective date of this act or 6 months after termination of the governor's March 10, 2020 declaration of a state of emergency, whichever is later."⁶²

Like the CARES Act, this state level fix is a short-term solution to a longterm problem. As PPP's student research demonstrated, COVID-19 laid bare the dire economic straits that many Boston families were in. But, before the pandemic, families were still struggling—and they will still be struggling six months from now, unless local, state, and federal governments stop looking for stopgap measures and start the work of creating a more just and equal society.

60. As of June 24, 2020, 1148 volunteers had signed up and hundreds have been connected to worker's rights organizations to work on short-term legal services, research, and advocacy projects. Data on file with PPP.

61. Prior to the 2020 legislation, the dependency allowance in Massachusetts was limited to \$25 per dependent, with the caveat that one cannot get more than 50 percent of the weekly benefit amount in dependency allowance. See *How Your Unemployment Benefits Are Determined*, COMMONWEALTH MASS., <https://www.mass.gov/info-details/how-your-unemployment-benefits-are-determined> [<https://perma.cc/G2MC-2VAP>] (last visited July 6, 2020); An Act Providing Additional Support to Those Affected by the Novel Coronavirus Through the Unemployment Insurance System, S. 2618, 191st Gen. Ct. (Mass. 2020) (codified as amended at 2020 Mass. Acts ch. 81).

62. 2020 Mass. Acts ch. 81.

B. Fighting for Lasting Improvements to Unemployment Insurance

As workers and the progressive movement build power to fight for a just recovery, we must fight for systemic, lasting improvements to social safety net programs like unemployment insurance.

Unemployment insurance must be extended to cover every worker—including undocumented workers, low-wage workers who will not earn enough to qualify for unemployment insurance when the PUA program expires,⁶³ and self-employed workers. States must adopt twenty-first century standards for distinguishing between true independent contractors and misclassified workers, like the ABC test adopted by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court*.⁶⁴ States must recognize a much wider range of good cause quits, including by providing benefits to workers who walk off the job because they have a credible fear that their employer is flouting worker safety best practices.

Congress must adopt a “Jobseeker’s Allowance” (JSA), which would provide a weekly cash benefit to people, like graduating college students and people exiting incarceration, who are searching for a job—but are not eligible for UI because they do not have a recent work history.⁶⁵ Under existing JSA proposals, the program would last up to thirteen weeks, cover anyone whose household income was below \$118,500 a year, and provide people seeking a job with help to mitigate barriers to employment.⁶⁶

Before the pandemic, states “typically aim[ed] to replace about half of a worker’s previous earnings.”⁶⁷ As stagnant wages and the rising costs of living have squeezed working- and middle-class families, most workers cannot afford to see only half of their paycheck replaced because they lose their job during a downturn. States should instead aim to replace 100 percent of wages, up to a statewide cap and with higher benefits for people with dependents.

63. See *supra* Part I.

64. *Dynamex Operations W., Inc. v. Super. Ct.*, 416 P.3d 1, 34 (Cal. 2018); see also Benjamin Sachs, *Looks Like the Gig Is Up for Uber in California*, ONLABOR (May 1, 2018), <https://www.onlabor.org/looks-like-the-gig-is-up-for-uber-in-california> [<https://perma.cc/479L-Z5GH>].

65. See CONG. PROGRESSIVE CAUCUS CTR., A STUDENTS’ STIMULUS: SUPPORTING YOUNG PEOPLE DURING THE COVID-19 PANDEMIC 1, 2 (2020), <https://static1.squarespace.com/static/5a5414caf9a61e90a854b98c/t/5ef4c5fab02e1134f493034d/1593099771159/Supporting+Students+During+COVID-19+Pandemic.pdf> [<https://perma.cc/D6YH-H6TH>].

66. GEO. CTR. ON POVERTY & INEQ. ET AL., *supra* note 21, at 1, 2.

67. CHAD STONE & WILLIAM CHEN, CTR. ON BUDGET & POL’Y PRIORITIES, INTRODUCTION TO UNEMPLOYMENT INSURANCE 1, 4 (2014), <https://www.cbpp.org/sites/default/files/atoms/files/12-19-02ui.pdf> [<https://perma.cc/W2R3-UCRR>].

Congress should also expand “worksharing,” also known as “short-time compensation.” Worksharing is a partial unemployment benefit that workers can receive if employers cut their hours.⁶⁸ Worksharing can help stop mass layoffs during economic crises. Instead of laying off workers during a temporary decline in demand, employers can reduce workers’ hours (for example, from thirty hours a week to twenty hours), allowing workers to stay attached to their jobs and benefits.⁶⁹ Workers then receive partial unemployment insurance benefits to make up the difference. Over 200,000 workers in the United States are receiving benefits through worksharing, but many others cannot.⁷⁰ Only twenty-nine states and the District of Columbia have worksharing programs and it is optional for employers. Further, some states only allow employees to claim worksharing if they face high reductions in hours.⁷¹ Worksharing should be available in all states, and should be broadly available during recessions or other periods of swift job losses.

Finally, Congress should use this moment to give the workers on the frontlines of the crisis a long-overdue raise. A new proposal from Bharat Ramamurti and Lindsay Owens calls on Congress to turn the CARES Act’s \$600-a-week boost to unemployment insurance into a “fair wage guarantee” by allowing workers to decline job offers that would pay less than workers were receiving on unemployment insurance—giving workers the power to demand more than poverty wages.⁷² Ramamurti and Owens suggest the CARES Act’s \$600-a-week UI boost be turned into a federal subsidy covering the gap between workers’ old wages and new ones, allowing employers to rehire and strengthening economic recovery.⁷³ Over time, the subsidy would be phased out—but wages would be raised forever.⁷⁴ Unemployment insurance would both help workers get by during the crisis, and build worker power when we emerge from it.

68. Dean Baker, William Spriggs & Liz Watson, *Use Work-Sharing Unemployment Insurance to Pay People to Stay Home*, HILL (Mar. 27, 2020, 12:01 PM), <https://thehill.com/opinion/finance/489785-use-work-sharing-unemployment-insurance-to-pay-people-to-stay-home> [<https://perma.cc/7ZK6-YEC4>].

69. See *Work Sharing: An Alternative to Layoffs*, NAT’L EMP. L. PROJECT (July 16, 2016), [https://www.nelp.org/publication/work-sharing-an-alternative-to-layoffs/#:~:text=Work%20sharing%20\(also%20referred%20to,a%20temporary%20decline%20in%20business](https://www.nelp.org/publication/work-sharing-an-alternative-to-layoffs/#:~:text=Work%20sharing%20(also%20referred%20to,a%20temporary%20decline%20in%20business) [<https://perma.cc/QT5K-YG33>].

70. David Wagner, *Work-Sharing Programs Allow Companies to Keep Furloughed Workers*, MARKETPLACE (June 17, 2020), <https://www.marketplace.org/2020/06/17/work-sharing-programs-unemployment-furloughs> [<https://perma.cc/BV2X-6G5T>].

71. Baker, Spriggs & Watson, *supra* note 68.

72. Bharat Ramamurti & Lindsay Owens, *How to Give Workers a Raise Without Employers Paying for It*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/2020/07/05/opinion/unemployment-benefits-coronavirus.html> [<https://perma.cc/Q824-MS6J>].

73. *Id.*

74. *Id.*

CONCLUSION

The COVID-19 pandemic spread across longstanding racial and class inequities, and a just recovery must include bold new programs designed to dismantle racial capitalism and build power and economic security for working-class people of color. Our response to mass unemployment must resist an economic system that punishes working people, especially people of color, for being poor, and which rests on low wages and dangerous conditions for working people of color. That requires fighting for bold new programs, like a Paycheck Guarantee,⁷⁵ Medicare for All, a Homes Guarantee, and freeing people held in prisons, jails, and immigration detention facilities where COVID-19 has spread like wildfire. For lawyers, it requires engaging in worker led movements, and it requires strengthening social safety net programs like unemployment insurance—ensuring that people who lose their jobs can still make ends meet during this crisis, and afterwards.

75. See Elizabeth O. Ananat & Anna Gassman-Pines, *Of the 1,000 Workers We Texted, Nearly All Are in Trouble*, N.Y. TIMES (May 19, 2020), <https://www.nytimes.com/2020/05/19/opinion/coronavirus-paycheck-guarantee-act.html> [<https://perma.cc/DKC5-XUQQ>].