BLANCHARD | WALKER PLLC
ATTORNEYS AND COUNSELORS

221 N. Main Street, Suite 300
Ann Arbor, MI 48104
Phone: (734) 929-4313
www.bwlawonline.com

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Via email only to: *EdMcBroom@house.mi.gov*

Representative Ed McBroom
Michigan State House
Ethics and Oversight Committee
February 18, 2016 Hearing

Re: House Bill 4982 and Other Necessary UIA Reforms

Blanchard & Walker is an Ann Arbor based Employment and Civil Rights firm. For over a decade, my partner and I have represented and advised hundreds of claimants in the Michigan Unemployment Insurance Agency (UIA). Since 2013, we have noticed a drastic change in the way eligibility determinations and also fraud allegations have been leveled against claimants. The firm currently represents individual claimants and interested groups like the UAW, and Sugar Law Center, in a pending federal court lawsuit alleging that current and past practices of the agency violate federal law and the constitutional rights of claimants. Please include this note in the record as the Committee considers the necessary reforms to the UIA system. I look forward to reviewing and discussing specific language to address the problems and potential fixes outlined below.

THE PROBLEM(S)

The State of Michigan has adopted the most draconian penalties for unemployment fraud of any state in the union (four times the benefits received), often resulting in tens of thousands of dollars in fines to the accused claimant. And the State Agency has adopted a system where fraud is automatically presumed in most circumstances. By the time a claimant gets notice in the mail of a garnishment, they are out of time to appeal.

In many cases, the Agency as a matter of practice determines that eligible beneficiaries committed unemployment fraud without any factual basis and without ever having a live person make the determination. The Agency uses an automated computer program to search for discrepancies in the records of all individuals who have claimed benefits, affecting not only current beneficiaries but also subjecting previous beneficiary payments to renewed automated scrutiny.

If any discrepancy is found between the information reported by a claimant and their former employer, the system flags the claimant's file as fraudulent. Under the Agency's

automated processes, once this occurs there is often no meaningful way for a claimant to respond to the Agency's allegation of fraud.

After the computer discrepancy is found, former UIA Claimants - some who have not received benefits for years, are presumed to have committed fraud simply because they did respond to a vague questionnaire posted to the UIA's computerized portal (known as "MiWAM"). This fraud presumption has been done by computer without human involvement since 2013. It is currently unclear how much the Agency continues to rely on the MIDAS computer system. Whether by computer or by UIA applying a flow chart, the fraud presumption continues.

This system has resulted in countless unemployment insurance claimants being accused of fraud even though they did nothing wrong. This finding automatically results in a penalty equal to five times the benefits received (the maximum allowed under the state statute). These punitive assessments regularly total $10,000-$50,000 and sometimes up to $100,000. Far more than a typical resident could actually pay.

Wrongful practices related to the Agency's determination of fraud include:

a. Sending "fraud questionnaires" containing self-incriminating questions, without any explanation of the factual basis for the Agency's fraud allegations or any sufficient information that would provide claimants with a meaningful opportunity to respond;

b. At times, failing to send fraud questionnaires at all and yet issuing automated determinations of fraud without even having a basis to believe that the questionnaires were received;

c. Automated determinations of fraud based solely on the claimant's silence in not returning the fraud questionnaire;

d. Automated determinations of fraud when claimants return a fraud questionnaire yet the receipt of the questionnaire is not recorded in the Agency's computer system;

e. Misallocating income a claimant received prior to unemployment across all 13 weeks in the fiscal quarter in which a claim is filed and thereafter issuing a robo-determination of fraud when a claimant truthfully reports no income in a benefit week;

f. Automatic robo-determinations of fraud based on differences between the claimant and the employer's characterization of an employment separation without any investigation into whether the discrepancy was the result of administrative error, good faith dispute, or misrepresentation by the employer;

g. Sending confusing and defective fraud determination notices that do not inform claimants of the factual basis of the Agency's determination of fraud and do not provide any information to allow claimants to evaluate or respond to the Agency's determination;

h. Automatically assessing the maximum penalty allowed by statute—five times overpayment (base amount PLUS a four times penalty)—without any factual basis to conclude fraudulent intent;

i. Unauthorized and warrantless seizures of tax returns and wage garnishment without any evidentiary basis or factual finding that would permit the conclusion that fraud has occurred, depriving claimants of their property without due process of law; and

j. Using unsupported fraud determinations as a basis to impose never-ending payment plans with the State for which the claimant is financially unable to pay.

These practices have resulted in claimants being falsely accused of intentional misrepresentation and assessed onerous financial penalties because of garden variety discrepancies between employer and employee-reported information. These unlawful practices discourage eligible beneficiaries from claiming benefits they are entitled to under the law and impose substantial burdens on organizations and businesses who regularly deal with the Agency.

PROPOSED FIXES

1. REQUIRE BASIC DUE PROCESS AND FAIRNESS IN THE UIA SYSTEM. The current method of benefits administration deprives claimants of basic rights, making accusations without any probable cause, and then making presumptive fraud determinations without any further information. The Agency should conduct an investigation before issuing a determination that an overpayment has been made or that intentional misrepresentation has occurred. In so doing, the Agency should take reasonable actions to ensure that investigators gather all relevant information, which may include supporting documents and statements from either the individual to whom the payment was made or others. In addition, an individual must be given an opportunity to be heard, timely notice of the interview, and an opportunity to present evidence. Currently, many claimants find out they have been accused of fraud only after timelines are run. The first mailer that the Agency sends in the mail is a "notice of restitution due" – after all deadlines to appeal the determination has run. For those that have lost their homes or otherwise forced to move after a period of unemployment, they only learn of the determination after the Agency has taken action to garnish their taxes or wages. Garnishment should only occur if the Agency has verification that a claimant has actually received an adverse determination. For instance, proof of delivery, or computer verification that a claimant has logged onto MiWAM and opened a notice of adverse determination (this information is available in the current system).

2. ROLL BACK THE MOST DRACONIAN UNEMPLOYMENT FRAUD PENALTIES IN THE COUNTRY. The Agency regularly and mechanically imposes a four times (4x)

fraud penalty on top of seeking repayment of the benefits paid and has no discretion to adjust the penalty to take account for the individually culpability in the situation. For instance someone who received $10,000 in benefits in 2013 will receive a $50,000 restitution bill that most people are unable to pay. Most states have adopted a 15% fraud penalty. Unemployment fraud remain a crime that can be (and is) criminally prosecuted, draconian financial penalties are not useful as a deterrent. The fraud penalty should be set at the Federal recommended minimum of 15%, and if necessary, provide agency discretion to assess more in egregious situations of actual fraud (not mere data discrepancies).

3. BEFORE MAKING A FRAUD ACCUSATION, GIVE REAL NOTICE AND A REASONABLE TIME TO RESPOND: When there is a factual conflict between the information received from an individual claimant and other information received by the Agency regarding overpayment or potential misrepresentation, the Agency staff should take reasonable attempts to contact the individual, inform him or her of the conflict, and allow an opportunity for rebuttal. Currently, fraud questionnaires are uploaded to the MiWAM system months or years after the claimant has stopped receiving benefits. They rarely explain the discrepancy that has triggered the questionnaire. They are rarely received or opened, and even if they are opened only ten days is given to respond. In the absence of a response, fraud is automatically presumed.

4. VERIFY AND CONFIRM INFORMATION IS VALID BEFORE ISSUING A FRAUD DETERMINATION: All determinations of overpayments and/or misrepresentation or fraud must be issued only after the input and review by Agency staff, and after the individual is informed of the conflicting information and provided an opportunity to respond. When reviewing a data conflict, the statute must require that the same policies, procedures and practices must be utilized to evaluate and issue determinations of misrepresentation for employer statements as those used for claimants. Currently, if a claimant and an employer both fail to provide further information, then the claimant is presumed to have lied. For instance employer says the claimant was fired for misconduct, claimant says it was a layoff. Without any further information, claimant is presumed to have lied and assessed a fraud penalty.

5. STOP THE ASSUMPTION THAT INCOME EARNED DURING A FISCAL QUARTER WAS SPREAD OVER ALL WEEKS IN THE QUARTER. Currently, when an employer reports wages earned for an employee within a benefit quarter, the Agency without further information assumes that income paid was for all weeks in the quarter. The Agency should not assume that wages are compensation attributable to any specific benefit weeks throughout the quarter unless the employer actually designates the weeks for which it is attributing pay. If the employer so designates, the designation should be subject to review by the agency, and the claimant should be notified of the weeks designated and provided an opportunity to respond.

6. GIVE INFORMATION ABOUT WHY AN ADVERSE DETERMINATION IS MADE, ESPECIALLY FOR FRAUD ACCUSATIONS. Regardless of individual election to receive electronic notices, individual claimants accused of intentional misrepresentation, should receive written notice by mail of the determination at the last known address.

Written notice should include: a) a summary statement of the material facts on which the determination is based; b) the reason for allowing or denying benefits; and c) the potential penalties that may be assessed or consequences associated with the determination if it is not appealed and it becomes final. This should be required by statute.

7. APPEAL RIGHTS SHOULD BE CLEAR AND REASONABLE. Written notice should also provide a statement of appeal rights that includes the individual's right to appeal, protest, or to request a redetermination; the period in which the appeal, protest, or request for redetermination must be filed; the manner in which it must be filed, information on whether an extension for filing may be available; and where the individual can obtain additional information and assistance about filing an appeal, protest, or request for redetermination.

8. THE AGENCY SHOULD PROVIDE FREE ADVOCATES TO CLAIMANTS, ESPECIALLY FOR THE MOST SERIOUS FRAUD ALLEGATIONS. Currently the accusation of fraud disqualifies a claimant from access to the Agency's free advocate system. The Agency will provide a free advocate at the expense of the Agency for all hearings and appearances or other responses required of a claimant regarding the basis for an eligibility determination or a determination of intentional misrepresentation. Or, to the extent the Agency concludes it cannot do so for any reason, the Agency should contract with and fund a competent non-profit or not-for-profit entity at a level reasonably necessary to provide free representation to claimants in such hearings.

9. BENEFITS SHOULD CONTINUE WHILE APPEALS AND PETITIONS TO REOPEN ARE PENDING. During the pendency of a decision on any overpayment or misrepresentation determination, the Agency should continue to make timely UC payments when due and shall not make any attempts to collect restitution while an appeal is pending, and shall not begin collection of restitution or penalties until or after 45 days from the date of a decision becomes final in the case (allowing time for appeals sent on the 30th day to be processed).

10. GARNISHMENT SHOULD BE STAYED WHILE APPEALS AND PETITIONS TO REOPEN ARE PENDING. The Agency should not initiate or continue overpayment recovery or imposition of penalties, whether by garnishment, bill collection, offset against current eligibility, or other means while an appeal is pending or a claimant is seeking to reopen their case and get a hearing on the adverse determinations.

11. "GOOD CAUSE" TO REOPEN SHOULD BE PRESUMED ABSENT PROOF THAT THE CLAIMANT KNEW OF THE ADVERSE DETERMINATION IN TIME TO APPEAL. In any application to reopen a determination on eligibility or on intentional misrepresentation, the Agency should presume good cause and allow a hearing unless the Agency can confirm that notice was received by certified mail, that the claimant viewed a notice on MIWAM, or that an email providing the full information notice and opportunity to respond was viewed by the Claimant (by "read receipt").

12. ALLOW AGENCY JURISDICTION AND REQUIRE NEW REVIEW IN ALL CASES WHERE THE COMPUTER SYSTEM MADE A FRAUD DETERMINATION,

REGARDLESS OF THE DEADLINES. Because of past practices discussed above, Claimants are discovering that they received an adverse determination often more than a year after it occurred. Currently the Agency claims it has no jurisdiction to review determinations over a year old, regardless of the defects. For individual Plaintiffs and all claimants where garnishment or other collection activity based on determinations of intentional misrepresentation generated by a computer or otherwise issued without individual review by Agency staff, the Agency must be required to undertake individual review by Agency staff and to issue new original determinations by mail which must be subject to the policies, procedures or practices outlined above.

I look forward to following the work of this Committee on this important topic. The UIA system is badly in need of reform. I am saddened that I have heard from so many Michigan residents that have lost confidence in this basic public benefits system. I remain available to work with the Committee to reform the UIA process to provide basic procedural protections along the lines outlined above on behalf of the many clients have represented and will represent in the UIA process.

Sincerely,

David M. Blanchard (P67190)
BLANCHARD & WALKER, PLLC
221 North Main Street, Suite 300
Ann Arbor, MI 48104
(734) 929-4313