

## **Testimony of M. Patricia Smith**

National Employment Law Project

### **As New York's Economy Reopens, Thousands of Jobless New Yorkers Will Lose Their Unemployment Lifelines or Be Forced to Return to Jobs That Can Expose Them to COVID-19 Unless the New York Legislature and Governor Cuomo Act**

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#### **Joint Hearing Before the New York State Senate and Assembly**

Senate Standing Committees on Labor, on Banks, and on Investigations and Government Operations

Assembly Standing Committees on Labor, on Banks, and on Oversight, Analysis and Investigation

By Zoom

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Thank you for the opportunity to testify today about some of the serious problems facing New York workers during the COVID-19 pandemic. My name is M. Patricia Smith and I am a former Commissioner of Labor here in New York and was Solicitor of the U. S. Department of Labor in the Obama Administration. I am currently of counsel to the National Employment Law Project (NELP).

My testimony will address two serious problems facing jobless New Yorkers as they attempt to access unemployment benefits during the COVID-19 crisis: The first is New York's outmoded rule that, unlike the rules in almost all other states, disqualifies many jobless workers who are able to find limited part-time work from receiving unemployment insurance (UI) benefits to make up some of the difference in their lost income. Earlier this session the Assembly passed Assembly Member Stirpe's A.446 to fix this "Partial UI" problem and conform New York UI law to the approach followed by other states. We urge the Senate to do the same by passing Senator Ramos's companion bill S.5754. Other states, including Georgia under Governor Brian Kemp, have acted quickly during the pandemic to expand UI eligibility for part-time workers, and New York should do the same.

The second UI issue concerns troubling and we believe legally inaccurate and misleading guidance that New York's Department of Labor (DOL) issued on the critical question of when workers may decline to return to a dangerous job and continue receiving unemployment insurance. Contrary to DOL's guidance, New York's unemployment case law has long held that where an employer is not maintaining a safe workplace, an employee may decline to return to work and remain eligible for unemployment insurance. We urge the Senate and Assembly to pass Senator Hoylman's S.8309 and Assembly Member Simon's companion bill A.10468 to clarify that workers whose employers are not maintaining safe workplaces can refuse to return to work and keep their unemployment benefits—as many other states have done, including Ohio under Governor Mike DeWine.

I should also note, however, that NELP strongly supports action on another urgent, unemployment-related topic on which you will hear important testimony today: assistance for the thousands of unemployed New Yorkers who are facing extreme hardship but are not eligible for unemployment insurance, such as undocumented immigrants. New Yorkers without documentation staff many of the frontline service jobs on which all New Yorkers and New York's economy depend. Thousands were thrown out of work by the pandemic, and many remain out of work since many service industries continue to be shut down entirely or are operating at very reduced levels. Yet undocumented workers are locked out of unemployment insurance and most other relief programs. Other states have acted to create relief funds for such workers. New York should do the same by approving Senator Ramos's S.8277A and Assembly Member De La Rosa's A.10414.

Finally, I should note that because the Trump Administration's Occupational Safety and Health Administration (OSHA) has abdicated its responsibility to protect workers during the pandemic, it is important that New York step in to mandate health and safety standards to protect workers from COVID-19. Since OSHA has issued no binding federal COVID

standard, states are free to act. New York should do so, as other witnesses will testify today.

Action on all of these fronts is crucial for protecting working New Yorkers during the pandemic. However, it is especially important for protecting Black, Latinx, Indigenous, and other workers of color in the state. Workers and communities of color have borne the brunt of the COVID-19 crisis in the state. They are very disproportionately represented both among the state's unemployed—and in dangerous frontline jobs where workers are at greatest risk of exposure to COVID-19. Taking swift action to ensure access to the UI program and health and safety protections is thus an urgent racial justice priority on which the state cannot afford to delay.

- 1. In New York, unemployed workers who return to work for just a few hours a week risk losing most or all of their unemployment insurance benefits—even when they are making just a tiny fraction of their former earnings. All other states have “partial unemployment insurance” rules that solve this problem by allowing workers who work just a few hours to keep much of their unemployment benefits. Unless New York fixes its rule, thousands of New Yorkers will continue to lose much or all of their benefits even if their employers offer them just a few hours of work.**

New York is one of the only states in the country that disqualifies workers whose hours have been slashed from receiving UI if they still work a few hours spread over four or more days. Under New York's archaic Partial Unemployment Insurance (Partial UI) rule, for each day in a week that a worker works even one minute, they lose 25 percent of their weekly unemployment assistance—and workers who work even briefly four days a week lose all of their UI benefits.

In nearly all other states, jobless workers who return to work part time are allowed to earn a few hundred dollars a month and continue receiving UI benefits. These other states typically have a two-part system. First, there is an “earnings disregard” which allows workers to earn a few hundred dollars—sometimes defined as a flat amount, and sometimes defined as a percentage of their unemployment benefit—and continue to receive full unemployment insurance payments. Second, once workers start earning more than that amount, their UI is gradually reduced and ultimately phased out. As a result, workers in almost all other states can work substantial part-time hours and earn several hundred dollars a week before finally losing their unemployment benefits.

New York's Partial UI system has been criticized for years and is long overdue for change. But it is having especially harmful effects during the current pandemic. That's because eligibility for the extra federal Pandemic Unemployment Compensation (PUC) unemployment benefits of \$600 per week that Congress authorized during the pandemic was linked to whether a worker is receiving UI benefits. So if state rules disqualify part-time workers from receiving state UI—as New York's Partial UI rule does for thousands of

workers—those workers also lose eligibility for the federal \$600 a week benefit. This means that as New York’s economy reopened and workers were called back to work part-time, or found new part-time jobs, they were cut off of both their state UI and disqualified for the federal \$600 week benefit. Not only has this rule been denying New York workers a significant lifeline that their federal tax dollars are helping finance—it has denied New York’s economy the very significant consumer spending power of those \$600 a week supplements, further hurting the state’s ability to rebound.

**Table 1: Comparison of Partial UI in NY and Other States**

<b>State</b>	<b>NJ</b>	<b>CT</b>	<b>PA</b>	<b>KY</b>	<b>NY</b>
<b>State or Federal UI benefit for a \$15/hour, full-time worker when returning to work 10 hours/week; or a self-employed worker making the same amount of money</b>	\$210	\$200	\$195	\$180	0
<b>Federal Pandemic Unemployment Compensation (PUC) Supplement</b>	\$600*	\$600*	\$600*	\$600*	0
<b>Total State and Federal UI Received</b>	\$810	\$800	\$795	\$780	0
* The federal PUC \$600 a week supplement expired in late July and Congress is still determining whether to extend it and, if so, at what level.					

Here’s a concrete illustration of how a part-time worker has been treated under New York’s Partial UI rule and under those of other states. Take a \$15 an hour, full-time restaurant worker who used to earn \$600 per week but was laid off. If the restaurant then reopened and called the worker back for just 10 hours a week spread over four days, she would earn \$150 a week. In typical states like New Jersey, Connecticut, Pennsylvania or even Kentucky, she would continue to receive close to \$200 per week in UI benefits, whereas in New York she would receive nothing in state UI benefits. Another example relates to the UI benefits for self-employed persons like accountants, therapists, and freelance writers that Congress authorized under the federal CARES Act through a new, temporary program known as Pandemic Unemployment Assistance (PUA). That program also incorporates state UI rules, including those on Partial UI. As a result, in most states self-employed people whose hours have been cut as their work has dried up may continue to work part-time hours and earn a few hundred dollars a week while still receiving federally funded partial UI benefits. But in New York, with its draconian Partial UI rule, such a worker would not qualify for federal UI at all. And prior to the July 31<sup>st</sup> expiration of the PUC program, in

both cases above, the workers would lose the federal \$600 a week supplement on top of that. See Table 1 above.

I should note that the federal \$600 a week PUC supplement expired at the end of July and it is uncertain whether Congress will extend it. It is true that the President has signed a somewhat legally and operationally questionable Memorandum that purports to give workers an additional \$300 a week in federal benefits. But the memo also ties eligibility for that money to receipt of UI benefits of at least \$100 per week. Therefore, New York's Partial UI rule will prevent many part-time workers from receiving that assistance if the memo is ever implemented.

New York's Partial UI rule is hurting the full range of New Yorkers who are out of work during the COVID crisis: everyone from low-paid service workers like restaurant workers or Uber drivers who now can find only a few hours of work a week, to higher-paid individuals who lost their jobs but have the potential to freelance a little to replace some of their income. All are finding that when they work a few hours, they lose most or all of their vital UI benefits, leaving them unable to pay their bills or afford the essentials.

At this hearing you will hear the stories of some of these and other workers like Gaela Solo and John Smith. Gaela was working more than 40 hours a week as a bartender and restaurant server and lost her job when her midtown restaurants shut down. She was receiving \$504 a week in New York unemployment plus an additional \$600 in federal Pandemic Unemployment Compensation, which roughly made up for her lost income. But she was eager to return to work and help others. So when she was offered a 15-hour a week job spread over four days each week working from home staffing a community helpline, she jumped at it. Only later did she learn that, because of New York's Partial UI rule, she would lose all of her UI benefit, including the \$600 a week federal supplement. She's now struggling on her \$260 a week paycheck, unable to pay her bills and not knowing what she will do when she burns through her limited savings.

John Smith's story offers another example of how the Partial UI rule is hurting working New Yorkers. Note that Mr. Smith is submitting his testimony under a pseudonym as he is concerned, like many workers, about possible retaliation. He was laid off from his \$90,000 a year job as a fundraiser for a New York university. However, he also was trained as a social worker and had worked on the side one day a week for about five hours as a therapist at an organization that provides counseling services, for which he earns \$140 a week. In most states he would keep all of that extra part-time earnings. But in New York, he loses 25 percent of his UI benefit, costing him \$126—meaning he keeps just \$14 of the extra earnings. And if he were unable to schedule all his clients into a single day, he would lose 50 percent of his UI benefits, or \$252—leaving him far worse off than if he didn't work at all.

John has also considered trying to make a career transition and expanding his therapy practice into a full-time job. But the Partial UI rule means that if he started to see more clients more days a week to gradually build a practice, he would lose all of his

unemployment benefits, leaving him no way to pay his bills for the months it would take to build up a full-time practice.

John is an example of how New York's Partial UI rule is deterring some New Yorkers from increasing their work hours—and so may in fact be costing New York's UI program more than it saves it. If New York had a Partial UI rule like other states, John could gradually build up his part-time therapy practice. As his hours increased, his UI benefit would phase down—a cost-saving for New York's UI program—but he would still receive some UI benefit, including any federally funded supplement, so he would have income support as he gradually transitioned to new full-time work.

Unemployed New Yorkers of all demographics are being hurt by the outmoded Partial UI rule. But the impact is most severe among New York's workers of color, since they are bearing the brunt of joblessness during the pandemic. Workers of color are heavily concentrated in the service industries that have seen the highest levels of unemployment during the crisis. As of July, 47 percent of all unemployed workers in the U.S. were non-white<sup>1</sup>—out of a labor force that is just 22 percent non-white.<sup>2</sup>

New York's Assembly and Senate and Governor Cuomo have in the past all indicated that they support fixing the Partial UI problem—which is denying thousands of New Yorkers their state and federal unemployment benefits. In Governor Cuomo's 2019 budget (2019 Education, Labor, and Family Assistance Budget, Part P), he proposed phasing in a fix to Partial UI over three years, arguing that it would take several years to update NYS DOL's computers to implement the change. The Assembly objected that three years was too long to wait, and as a result the change was not approved that year.

Now as New York struggles with the pandemic and the mass unemployment it has caused, the Partial UI rule is causing far-reaching harm to jobless New Yorkers. The Assembly has already passed legislation to fix New York's Partial UI problem (A.446 / Stirpe), and the companion bill (S.5754 / Ramos) is pending in the Senate. In the current crisis, the position that it will take New York State DOL years to reprogram their computers before they can implement this urgently needed fix no longer makes sense. New York has received millions of dollars under the federal CARES Act in federal funding to finance UI computer systems fixes, like the Partial UI fix, that put more dollars into the pockets of the unemployed. Moreover, the Cuomo Administration has already partnered with Google Cloud<sup>3</sup> and former Google CEO Eric Schmidt's Foundation<sup>4</sup> in other areas to provide the technological expertise needed to fix the state's computers to respond to other aspects of the COVID

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<sup>1</sup> <https://www.cbo.gov/system/files/2020-07/56447-CBO-UI-letter.pdf>

<sup>2</sup> <https://www.bls.gov/cps/cpsaat11.htm>

<sup>3</sup> <https://www.governor.ny.gov/news/nys-department-labor-launches-new-streamlined-application-new-yorkers-apply-pandemic>

<sup>4</sup> <https://www.wnypapers.com/news/article/current/2020/05/07/141376/schmidt-futures-will-help-integrate-nys-practices-systems-with-best-advanced-technology-tools-to-build-back-better>

crisis—showing that resources are available to make the types of computer system fixes necessary to get New Yorkers the support they need during the crisis.

In fact, in other states, governors and state labor departments have shown that it is possible to quickly implement changes in Partial UI rules during the pandemic to fix this problem. In March, Georgia’s Governor Brian Kemp and Georgia’s labor department issued an executive order and emergency rules increasing the amount of outside earnings that the state’s UI program disregards from \$30 to \$300—a change that has already been implemented.<sup>5</sup> With other states showing these problems can be solved and expert technical assistance and funding available, there must be a way that New York too can implement the Partial UI fix quickly before it robs more New Yorkers of their vital UI lifeline.

Some may argue that the fact that New York’s UI trust fund now has a \$5.6 billion deficit<sup>6</sup>—which will require the state to avail itself of a low-interest federal loan in the short term, and will trigger automatic adjustments in state UI tax rates over the longer term to pay it back—is a reason not to act now to fix the Partial UI problem. However, during the 2008-2009 recession when I was Commissioner of Labor, we borrowed \$13.3 billion,<sup>7</sup> all of which was pumped into New York’s ailing economy and all of which was paid back in better economic times. Moreover, as James Parrott from The New School will outline in more detail in his testimony today, such concerns do not justify further delay.

First, it is far from clear that fixing the Partial UI problem will result in significant additional costs to New York’s UI trust fund. On the one hand, expanding Partial UI eligibility for part-time workers like Gaela will increase trust fund costs. But those increased costs will be offset to some degree by savings that result from removing the disincentive for other workers like David to increase their part-time work. While on balance it is likely that Partial UI reform will result in some net increased cost to the trust fund, it is likely to be a marginal increase—and not large enough to be a reason not to move ahead. Put another way, New York’s \$5.6 billion UI trust fund deficit is driven by the fact that we are in a major economic crisis with 1.8 million New Yorkers out of work. Fixing Partial UI will only slightly change that picture—but will save thousands of part-time workers from significant economic hardship.

Second, New York’s Partial UI rule is costing New York workers and the state’s economy hundreds of millions of dollars in 100 percent federally-funded UI benefits—benefits that New York federal taxpayers are financing—that would benefit New York’s economy, but that New York workers will not receive unless the legislature approves the Partial UI fix. That’s because all of the 100 percent federally funded UI benefits are structured to piggy-back off of state UI law. They therefore incorporate by reference New York’s Partial UI rule—and the rule denies eligibility for them to part-time workers who in other states are receiving those federal benefits. Examples of this include the Pandemic Unemployment Assistance (PUA) benefits for self-employed workers and others who do not qualify for

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<sup>5</sup> <https://dol.georgia.gov/blog-post/2020-03-26/emergency-rules-adopted-03-26-20>

<sup>6</sup> <https://oui.doleta.gov/unemploy/budget.asp>

<sup>7</sup> <https://oui.doleta.gov/unemploy/docs/trustFundSolvReport2020.pdf>

regular UI; the \$600 a week federal Pandemic Unemployment Compensation (PUC) supplements that may be reinstated by Congress; and the \$300 a week supplemental benefits that may be implemented in the president's August 8 Memorandum that I have already discussed. But in New York, our draconian Partial UI rule means that if they work four days a week, even just briefly each day, they lose eligibility for any of these benefits and are shut out entirely.

As noted, the Assembly has already passed the Partial UI fix this session. We urge the Senate to do the same by passing Senator Ramos's companion bill, S.5754. The governor in 2019 indicated his support for this common-sense fix to align New York's unemployment law with that of other states. If states like Georgia can fix partial UI during the pandemic, surely we can too.

**2. New York's Department of Labor is wrongly telling quarantined workers whose employers are not maintaining safe workplaces that they must return to work or lose their unemployment insurance benefits. The Legislature should correct this inaccurate and misleading guidance.**

New York UI law has generally allowed workers to decline job offers without losing their unemployment benefits if the job would expose them to health and safety threats. In the context of COVID-19, many workers will face serious health and safety risks if they return to work. This is especially true for older workers, workers with disabilities or pre-existing health conditions, and workers whose employers are not adequately protecting their workers by providing adequate personal protective equipment (PPE) and reorganizing the workplace to facilitate social distancing, regular handwashing, and other basic safety precautions.

Workers of color and women will bear the brunt of these risks. Both are very disproportionately represented in frontline jobs where remote work is not possible and where workers are at great risk of illness if they are over 65, have preexisting health conditions, or are called back to a job where their employer is not providing safe work conditions.<sup>8</sup>

Unfortunately, earlier this month New York's Department of Labor issued guidance erroneously suggesting to workers receiving UI that, even if their employer is not following protocols to keep them safe from COVID-19 at work, they CANNOT refuse to return to their job and continue receiving unemployment benefits.<sup>9</sup> Nor did the guidance acknowledge that workers who would be at special risk if they returned to in-person work—such as workers over 65 and workers with pre-existing health conditions—may decline to return to work and continue to receive UI benefits. Instead, the guidance indicated that their only recourse in such circumstances is to file a health and safety complaint with NYS DOL with

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<sup>8</sup> <https://www.epi.org/blog/black-and-hispanic-workers-are-much-less-likely-to-be-able-to-work-from-home/>

<sup>9</sup> <https://www.labor.ny.gov/ui/pdfs/returning-to-work-and-UI.pdf>



no guarantee that the state can or will take action to require their employer to remedy the dangerous conditions.

This guidance from the state is out of line with longstanding case law in New York that allows workers to qualify for UI if they reasonably fear health and safety risks on the job. Under this doctrine known as “suitable work,” UI cases have allowed workers to decline offers of employment that they reasonably believe would pose such risks and continue to receive UI.

The NYS DOL guidance is also out of line with the much stronger protections against returning to dangerous jobs that other states such as North Carolina,<sup>10</sup> Colorado,<sup>11</sup> Connecticut,<sup>12</sup> and Ohio<sup>13</sup> are providing. These states are doing a better job of protecting their workforces than New York by specifically authorizing workers to continue receiving UI benefits and decline to return to a job if:

- “The employer is failing to comply with guidelines as set out by the CDC, other governmental authorities or industry groups as may be found in CDC guidance, the Governor’s Executive Orders, or other binding authority” (North Carolina<sup>14</sup>) or “Tangible evidence of a health and safety violation by the employer that does not allow the employee to practice social distancing, hygiene and wearing protective equipment” (Ohio <sup>15</sup>)
- The employee is 65 or over (North Carolina,<sup>16</sup> Colorado,<sup>17</sup> Connecticut,<sup>18</sup> and Ohio<sup>19</sup>)
- The employee is immunocompromised or has a health condition that would put him or her at risk (North Carolina,<sup>20</sup> Colorado,<sup>21</sup> Connecticut,<sup>22</sup> and Ohio<sup>23</sup>)

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<sup>10</sup> <https://des.nc.gov/need-help/covid-19-information/returning-work>

<sup>11</sup> [https://www.colorado.gov/pacific/sites/default/files/Return to Work Guidance Fact Sheet.pdf](https://www.colorado.gov/pacific/sites/default/files/Return%20to%20Work%20Guidance%20Fact%20Sheet.pdf)

<sup>12</sup> <https://www.ctdol.state.ct.us/returntowork.pdf>

<sup>13</sup> [https://content.govdelivery.com/attachments/OHOOD/2020/06/18/file\\_attachments/1477128/Signed Executive Order 2020-24D.pdf](https://content.govdelivery.com/attachments/OHOOD/2020/06/18/file_attachments/1477128/Signed%20Executive%20Order%202020-24D.pdf)

<sup>14</sup> <https://des.nc.gov/need-help/covid-19-information/returning-work>

<sup>15</sup> [https://content.govdelivery.com/attachments/OHOOD/2020/06/18/file\\_attachments/1477128/Signed Executive Order 2020-24D.pdf](https://content.govdelivery.com/attachments/OHOOD/2020/06/18/file_attachments/1477128/Signed%20Executive%20Order%202020-24D.pdf)

<sup>16</sup> <https://des.nc.gov/need-help/covid-19-information/returning-work>

<sup>17</sup> [https://www.colorado.gov/pacific/sites/default/files/Return to Work Guidance Fact Sheet.pdf](https://www.colorado.gov/pacific/sites/default/files/Return%20to%20Work%20Guidance%20Fact%20Sheet.pdf)

<sup>18</sup> <https://www.ctdol.state.ct.us/returntowork.pdf>

<sup>19</sup> [https://content.govdelivery.com/attachments/OHOOD/2020/06/18/file\\_attachments/1477128/Signed Executive Order 2020-24D.pdf](https://content.govdelivery.com/attachments/OHOOD/2020/06/18/file_attachments/1477128/Signed%20Executive%20Order%202020-24D.pdf)

<sup>20</sup> <https://des.nc.gov/need-help/covid-19-information/returning-work>

<sup>21</sup> [https://www.colorado.gov/pacific/sites/default/files/Return to Work Guidance Fact Sheet.pdf](https://www.colorado.gov/pacific/sites/default/files/Return%20to%20Work%20Guidance%20Fact%20Sheet.pdf)

<sup>22</sup> <https://www.ctdol.state.ct.us/returntowork.pdf>

<sup>23</sup> [https://content.govdelivery.com/attachments/OHOOD/2020/06/18/file\\_attachments/1477128/Signed Executive Order 2020-24D.pdf](https://content.govdelivery.com/attachments/OHOOD/2020/06/18/file_attachments/1477128/Signed%20Executive%20Order%202020-24D.pdf)

- Needs to stay home to care for a family member who is vulnerable or whose school or other care institution is closed (North Carolina<sup>24</sup>)

It is especially troubling that even Ohio, under Governor Mike DeWine, is taking stronger steps to protect workers from being forced to return to dangerous jobs than is New York—the original epicenter of the COVID crisis in the U.S.

A bill pending in the legislature would fix this serious problem by confirming and clarifying that New York law allows workers to refuse offers to return to work and maintain their unemployment benefit eligibility where the worker would reasonably fear dangerous exposure to COVID-19 if he or she returned. Specifically, Senator Holyman’s S.8309 and Assembly Member Simon’s A.10468 would clarify that workers may refuse jobs that present unsafe working conditions—for example, because the employer is not complying with government health and safety standards related to COVID-19—and continue to receive unemployment insurance benefits. Such legislation should also categorically authorize workers over 65, those with health conditions and those needing to care for vulnerable persons, or persons whose schools or other care institutions are closed to keep receiving UI and decline to return to work until the pandemic is controlled.

Ensuring access to UI for New Yorkers who do not have access to full-time work during the pandemic is crucial for enabling workers and our economy to weather the pandemic and the economic crisis. The legislature should follow the lead of other states by acting quickly to fix New York’s Partial UI problem, and to clarify its rules around refusing to return to dangerous jobs, in order to provide the support and protection working New Yorkers need.

Thank you for the opportunity to testify today. I would be delighted to answer any questions you may have.

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<sup>24</sup> <https://des.nc.gov/need-help/covid-19-information/returning-work>