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By CM-ECF
Hon. LaShann DeArcy Hall
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *Islam et al. v. Cuomo et al.*, 20-CV-2328(LDH)(CLP)

Dear Judge DeArcy Hall:

We represent Plaintiffs in the above-referenced matter and submit this letter motion seeking Defendants' compliance with the Court's July 28, 2020 order granting, in part, Plaintiffs' motion for a preliminary injunction. Defendants have not fully complied with the Court's order in two significant respects:

1. Defendants have failed to ensure that app-based FHV driver claimants receive the full employee weekly benefit rate for all weeks in which claimants are entitled to benefits. Most significantly, this happens when DOL fails to increase claimants' benefit rates for prior weeks, while nonetheless increasing their benefit rate for all later weeks.
2. Despite paying out claims at the employee rate, as opposed to the lower self-employed rate under PUA, Defendants have failed to move app-based FHV driver claims from the PUA program into the regular state UI program where they are properly classified. This failure has significant consequences for the total number of benefit weeks claimants may receive.

Defendants' failures violate the "when due" provision of the Social Security Act. Accordingly, Plaintiffs move for an Order requiring Defendants to take all necessary steps to pay eligible claimants the full amount of benefits to which they are entitled, and to properly classify such claims in the UI system.

Defendants' Failure to Pay the Full Amount of Back Benefits to Claimants Violates the When Due Provision of the Social Security Act and This Court's July 28 Order

Plaintiffs seek compliance with the Court's July 28, 2020 Order which requires Defendants to provide full payment of unemployment benefits as soon as administratively feasible in accordance with the Social Security Act and regulations. Memorandum and Order, Dkt 24. Plaintiffs previously submitted status reports on November 1 and November 23, 2020, describing DOL's failures to pay retroactive benefits to hundreds of NYTWA app-based FHV driver members, and sought more information from Defendants about claimants who had yet to receive their full benefits. Plaintiffs' Status Report in Response to Defendants' Sept. 30 Status Report, Dkt. 36; Letter in Reply to Defendants' Status Report, and Request for a Conference, Dkt. 39. A typical scenario for an affected driver is as follows: the driver applied for UI in March 2020, but by mid-May began to receive only PUA benefits. Such benefits were only paid at the self-employed rate, often as low as $182 per week. Pursuant to this Court's order, the DOL was mandated to process the claimant's request for reconsideration by September 11, and if the driver worked full-time, they would have typically seen an increase in their benefit rate to $504 per week. However, many drivers still have not received the increase from the much lower PUA rate for all weeks between their effective claim dates and the DOL's processing of their requests for reconsideration. For many drivers, this constitutes up to six months of incomplete benefit payments, totaling upwards of $8,000 in benefits still owing. The failure to receive $8000 in back benefits is a significant burden for low-income workers who are still struggling to pay for basic expenses such as groceries and rent.

Plaintiffs' November status reports requested that Defendants provide detailed information as to the number of app-based drivers still waiting to receive retroactive benefits; Defendants have yet to provide a straightforward answer. Instead, Defendants' statements indicate an inability to fully diagnose the scope of this problem, yet Defendants claim to be in complete compliance with the Court's order. After Plaintiffs raised this issue, Defendants claimed that they had no way to query which claimants had not received their retroactive benefits and, in any case, "It is incumbent on the claimant to notify DOL if they are experiencing an issue with their benefit rates or retroactive benefit payments." Third Supplemental Declaration of Lars Thompson, Dkt. 37-1, at ¶11. In reply to Plaintiffs' November 23 letter in reply to Defendants' status report, Defendants changed their position, stating that they did, in fact, have a method to determine whether some app-based drivers had not received retroactive benefits. Specifically, Defendants claimed that they had "flagged" 4,520 app-based FHV drivers who were missing their retroactive payments. *See*, Fifth Supplemental Declaration of Lars Thompson, Dkt. 47-1, at ¶ 4. Defendants further claimed that all of these 4,520 claims had been fully processed and would be paid out by the end of the week of December 14, 2020. *Id*, at ¶6. Defendants have also claimed that "there is absolutely nothing left to adjudicate regarding the promptness of reimbursements for any app-based FHV claimants." Defendants' Motion for a Pre-Motion Conference, Dkt. 38, at 2.

However, it has become clear that whatever methods DOL has employed have failed to capture significant numbers of app-based FHV drivers who have yet to receive retroactive benefits. After the DOL's target date for completing back payments at the end of the week of December 14, 2020, NYTWA sent out an e-mail and text message to membership to inquire if other drivers had still failed to receive their retroactive benefits. Within 24 hours, NYTWA had received 204 replies from drivers who had yet to receive retroactive benefit increases or had not seen a benefit rate adjustment. *See* the annexed Third Declaration of Allison Langley, at ¶ 4.

Between December 20, 2020 and January 4, 2021, NYTWA had received 497 replies from such drivers. *Id*. These responses indicate that significant numbers of drivers have still not received back benefits. Among the drivers for whom NYTWA had data indicating when they had filed requests for reconsideration and who were still waiting for their full benefits, 30.8% had submitted their requests for reconsideration more than two weeks prior and were still waiting for their benefit rates to be adjusted at all; 66.6% had submitted their requests for reconsideration more than two weeks prior and, although they have had their benefit rates adjusted, they are still waiting for retroactive benefits. *Id*., at 6.

Although NYTWA staff has been forwarding these claims to the DOL for correction and payment of retroactive benefits, these survey responses indicate beyond doubt that the DOL simply has no idea how many app-based drivers whose benefit rates were increased pursuant to the Court's order have received retroactive benefits and how many drivers have not. The DOL process that flagged 4,520 cases clearly did not yield a complete review. DOL cannot continue to claim that it "remains in compliance" with the Court's order while hundreds and possibly thousands of drivers have yet to receive their full benefits. As Plaintiffs have previously noted (*see* Letter in Reply to Defendants' Status Report, Dkt. 39, at 3) we have good reason to believe that the number of drivers who have reported failures to receive their full back benefits to NYTWA may be far less than the total number of drivers in this situation.

Defendants' partial efforts at compliance to flag those cases it can identify and to process those claims forwarded by the NYTWA do not satisfy the demands of the Social Security Act and this Court's order. The "When Due" provision of the Social Security Act requires payment of the ***full amount*** of benefits to which claimants are entitled. This is not a matter of interpretation, but a statutory mandate. *See* 42 U.S.C. §503(a)(1) (requiring that state unemployment compensation laws provide for "methods of administration" that are "reasonably calculated to insure ***full payment*** of unemployment compensation when due…") (emphasis added); *see also* 20 C.F.R. § 640.3(a). In line with this mandate, this Court held that a claimant "cannot be deemed whole unless he or she is also receiving the full unemployment benefits to which she is entitled." Memorandum and Order, Dkt. 24, at 17. Of course, full payment of benefits would include not only a claimant's full benefit rate going forward but also retroactive payments for all previous benefit payments that were below the amount to which claimants are entitled. As evidenced by the hundreds of claimants who informed NYTWA that they had not received increased back benefits after the DOL claimed it to be in full compliance, Defendants still have not paid significant numbers of app-based FHV driver claimants the benefits to which they are entitled. Accordingly, Defendants have failed to comply with this Court's order.

DOL's position that it is incumbent upon claimants to notify the DOL when they have not received full back benefits, is not an adequate response to Defendants' statutory burden under the SSA to pay full benefits when due where claimants have done all that is required of them. DOL's cavalier attitude regarding these incomplete payments dismisses the very real concern that drivers in the FHV workforce, who are largely immigrants (*see* Complaint, Dkt. 1, at ¶ 48), and many of whom likely have limited English proficiency, may not be aware that they are entitled to substantial retroactive benefits and that they must again challenge the government's decision to obtain them.

Defendants' Have Continued to Improperly Classify App-Based FHV Driver Claims as PUA Claims

Despite the fact that the vast majority of app-based FHV drivers qualify for conventional UI benefits, many of their claims remain in the PUA program. This continued misclassification of claims violates the Court's July 28 order, which required Defendants to rely on DOL's prior fact-findings to determine that drivers' wages were "'covered wages' for the purposes of ***unemployment insurance*** benefits." Memorandum and Order, Dkt. 24, at 26 (emphasis added). The Court further noted that Defendants' violation of the When Due provision was "not cured by the issuance of benefits under PUA" and that "not all Individual Plaintiffs or other FHV claimants are eligible to receive PUA." *Id*, at 24, n. 9; 17, at n.7 (noting that, at the time, PUA was set to expire at the end of 2020).

Under federal law, a claimant for unemployment benefits may only be eligible for PUA benefits if they are first deemed ineligible for regular state UI benefits. 15 U.S.C.A. § 9021(a)(3)(A)(i). Accordingly, app-based FHV driver claimants whose claims should be treated as employee claims pursuant to the DOL's prior fact findings and this Court's order will be eligible for UI, and thus ineligible for PUA, so long as the facts of their separation from employment present a qualifying reason for state UI eligibility. Facing the explosion of the COVID-19 pandemic in New York City and the near-total cessation of business activity in March, FHV ridership evaporated practically overnight. For drivers who were unable to work as ridership disappeared, the cause of separation (best understood as "lack of work") qualifies them for regular state UI.[1] By contrast, employee drivers who would otherwise have remained employed, but separated from their employment because they were, *e.g.*, diagnosed with COVID, or had to remain at home with a child whose school had been closed because of COVID, would not qualify for UI, but should find their claims properly classified in PUA. 15 U.S.C.A. § 9021 (a)(3)(A)(ii).

Initially, Defendants treated most app-based FHV drivers as self-employed workers in the PUA program.[2] In their attempt to comply with the Court's order, Defendants have adjusted claimants' benefit rates by treating claimants' earnings as employment earnings, but apparently have often not moved their claims out of the PUA program when processing their reconsiderations. Plaintiffs are not easily able to determine the scope of this problem because the DOL online account portal for claimants nowhere indicates whether a claim has been categorized as UI or PUA; however, by looking at their weekly certification questions, which differ depending on placement in UI or PUA, claimants may be able to see how their claim is currently

[1] Nonetheless, Defendants had argued (*see*, *e.g.*, Defendants' Response in Opposition to Motion for a Preliminary Injunction, Dkt. 12, at 18-19), and Plaintiffs understand that Defendants continue to take the position that any unemployment that has a "COVID-related cause" is properly in PUA. Such an argument belies Defendant's complete misunderstanding of the relationship between PUA and UI, which first requires UI ineligibility to establish PUA eligibility. Nor would such an argument be consistent with Defendants' treatment of the named plaintiffs in this case, including Plaintiffs Rumon, Islam, and Ouattara, who despite only working for app-based FHV companies at the time they became unemployed, were eventually approved for UI benefits. To say that any COVID-related job loss puts a claimant in PUA would require the DOL to process ***any*** job loss related to businesses that closed due to COVID as PUA claims. Obviously, that is not how PUA operates.

[2] Claimants were receiving PUA benefits at a rate based on their net income, a payment that is only possible when the DOL considers such workers to be self-employed. 20 C.F.R. §625.6(a)(2).

classified. After reviewing certification questions with a small, random sampling of 20 drivers, NYTWA staff found that 15 of these drivers, or 75%, remained in PUA. Third Langley Decl., at ¶ 9.

Although claimants can receive the employee benefit rate through either PUA or UI, Defendants' failure to properly classify these claims in UI is not academic, but has substantial consequences for claimants' ability to receive continued benefits should they need them.[3] Recipients of regular state UI may qualify for up to 70 weeks of unemployment insurance benefits through a combination of 26 weeks of conventional UI benefits, 24 weeks of federal Pandemic Unemployment Compensation ("PEUC") and 20 weeks of NYS-provided Extended Benefits ("EB") *See* New York State Department of Labor, Unemployment Insurance, "Continued Assistance for Unemployed Workers Act of 2020 FAQs" (website) (Jan. 4, 2021), available at https://dol.ny.gov/system/files/documents/2021/01/continued-assistance-act-faq.pdf. By contrast, PUA recipients may only receive 57 weeks of benefits but, in any case, PUA benefits are currently set to expire on March 14, 2021, with a potential extension to April 11. *Id*. For most driver claimants, who stopped working around the time of the state-ordered shutdown on March 20, this would mean, at most, 55 weeks of benefits.

Plaintiffs raised the issue of proper UI classification and its potential consequences for claimants as early as August 24, 2020 in the parties' Joint Status Report, urging remedial action sooner rather than later. Joint Status Report, Dkt. 29, at 5 ("Of the named Plaintiffs, two are receiving UI, and two are receiving PUA, with no clear explanation….Plaintiffs believe that this issue could be dealt with most effectively at the current time, when the DOL is processing reconsiderations."). In October, Defendants informed Plaintiffs that the reclassification of claims from PUA to UI was being dealt with on a rolling basis. However, in recent weeks, Plaintiffs have asked Defendants for an understanding of how many app-based FHV driver claimants are in each program and why, but have yet to receive any information; so far, NYTWA's small survey would indicate that many drivers are still in PUA. Defendants have yet to indicate any way in which such claimants could contest their continued status in PUA, once their benefit rates have been adjusted.

The question of proper UI classification reached dramatic urgency as PUA benefits nearly expired in late December (*see* Emily Cochrane, *Jobless Benefits Run Out as Trump Resists Signing Relief Bill*, N. Y. TIMES (Dec. 26, 2020), https://www.nytimes.com/2020/12/26/us/politics/trump-unemployment-coronavirus-aid.html); if they had, drivers properly classified in UI would have received benefits, while those still stuck in PUA would have gone without. Fortunately, PUA's renewal was authorized at the last minute, but app-based drivers who were still in PUA came dangerously close to losing their benefits because of Defendants' failure to properly classify these claims in UI pursuant to this Court's Order. As PUA is currently set to expire on March 14, Defendants must begin to take action immediately to complete the proper classification of eligible claims into UI, to avoid any disruption to benefits. It is also imperative that Defendants do so in order to avoid limiting the scope and duration of benefits available to any claimants who properly qualify for UI.

[3] Although it makes no practical difference to claimants, PUA benefits are paid from federal funds while UI benefits are paid from state funds.

CONCLUSION

Plaintiffs request that the Court order Defendants to comply with the July 28, 2020 Order by:

1. Completing full payment of back benefits to all eligible app-based FHV driver claimants and, where necessary, reviewing all app-based driver claims to find discrepancies between current benefit rates and previous benefit rates, to identify claimants who have yet to receive retroactive benefit increases.
2. Re-classifying the claims of all app-based FHV drivers that are currently in the PUA program as UI claims, when such claimants meet the requirements to qualify for state UI.

Sincerely,

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cc: Counsel of Record (via CM/ECF)