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Reforming Unemployment Insurance in the Age of Non-Standard Work

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Reforming Unemployment Insurance in the Age of Non-Standard Work

Jeremy Pilaar*

Unemployment Insurance (UI) is one the nation's most effective anti-poverty and economic stabilization measures. Unfortunately, the number of workers receiving benefits has substantially declined in recent decades. This Note probes one likely cause of this phenomenon that scholars have mostly ignored: the rise of non-standard employment, including part-time, temporary, contract, on-call, and independent contract work. Like many New Deal programs, UI was designed to aid individuals with long-term, full-time jobs. It is therefore poorly adapted to a non-standard workforce characterized by low wages, uncertain schedules, and short-lived assignments. Indeed, the analysis shows that UI's monetary eligibility criteria, non-monetary eligibility requirements, outreach mechanisms, and exclusions all disadvantage non-standard workers. The Note proposes reforms in each of these areas to combat this imbalance.

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INTRODUCTION

Every year, millions of Americans rely on Unemployment Insurance (UI) to make ends meet.¹ The federal-state UI program provides up to twenty-six weeks of income support to individuals who become unemployed.² To qualify, a worker must lose a job through no fault of her own and satisfy her state's eligibility requirements.³ UI is one of the government's most effective means of reducing poverty⁴ and stabilizing the economy.⁵ During the Great Recession, the program offered vital assistance to over seventy million people.⁶

Unfortunately, in the last several decades, the share of workers eligible for UI has plummeted.⁷ The proportion of unemployed persons receiving benefits regularly exceeded 50% in the 1950s.⁸ Since then, however, it has

¹ U.S. DEP'T OF LABOR, UNEMPLOYMENT INSURANCE OUTLOOK: PRESIDENT'S BUDGET FY 2019, at 10 (2018), https://workforcesecurity.doleta.gov/unemploy/pdf/prez_budget_19.pdf [<https://perma.cc/98YK-J5T2>].

² JULIE M. WHITTAKER & KATELIN P. ISAACS, CONG. RESEARCH SERV., RL33362, UNEMPLOYMENT INSURANCE: PROGRAMS AND BENEFITS 1 (2016), <https://fas.org/sgp/crs/misc/RL33362.pdf> [<https://perma.cc/H6H2-LD9M>].

³ U.S. DEP'T OF LABOR, STATE UNEMPLOYMENT INSURANCE BENEFITS (2018), <https://workforcesecurity.doleta.gov/unemploy/uifactsheet.asp> [<https://perma.cc/MB84-2E94>].

⁴ See THOMAS GABE & JULIE M. WHITTAKER, CONG. RESEARCH SERV., R41777, ANTIPOVERTY EFFECTS OF UNEMPLOYMENT INSURANCE 24–25 (2013) (using the official federal poverty line as a baseline), https://greenbook-waysandmeans.house.gov/sites/greenbook-waysandmeans.house.gov/files/R41777_gb.pdf [<https://perma.cc/KRV9-S6ML>].

⁵ See Jason Furman, Chairman, Council of Econ. Advisers, The Economic Case for Strengthening Unemployment Insurance, Remarks at the Center for American Progress 5 (July 11, 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160711_furman_uireform_cea.pdf [<https://perma.cc/5WAK-JPHZ>].

⁶ *Id.* at 1.

⁷ See WILL KIMBALL & RICK MCHUGH, ECON. POLICY INST., BRIEFING PAPER NO. 392, HOW LOW CAN WE GO? STATE UNEMPLOYMENT INSURANCE PROGRAMS EXCLUDE RECORD NUMBER OF JOBLESS WORKERS 5 (Mar. 9, 2015), <https://www.epi.org/files/2015/how-low-can-we-go-state-unemployment-r3.pdf> [<https://perma.cc/DX66-886Y>].

⁸ Catherine Sauviat, *The Unemployment Benefit System: A Degree of Minimal Protection, for 'Insiders' Only*, in UNEMPLOYMENT BENEFIT SYSTEMS IN EUROPE AND NORTH AMERICA 311, 316 (Florence Lefresne ed., 2010).

fallen to a record low of around 23%.⁹ In thirteen states—including some of the most populous, such as Florida and North Carolina—fewer than 20% of jobless individuals now receive benefits.¹⁰ This decline has put the well-being of millions of families¹¹ and the economy¹² at risk.

While scholars have debated the causes of this trend,¹³ at least one explanation remains underexplored: the rise of non-standard forms of employment. UI was founded in an era when full-time manufacturing jobs were the norm.¹⁴ Yet today, part-time work, temporary work, contract work, on-call work, and independent contracting are all fast-growing.¹⁵ The changing nature of employment raises the prospect that UI is poorly matched to new markets. This problem is especially important given that disproportionate numbers of non-standard workers are from marginalized groups, such as women and people of color.¹⁶ This Note therefore seeks to answer two questions: (1) how well does UI serve non-standard workers and (2) what can policymakers do to improve it?

The analysis shows that UI disadvantages non-standard workers along four dimensions. First, UI's monetary eligibility requirements fail to reflect non-standard workers' low wages and intermittent assignments.¹⁷ Second, UI's non-monetary requirements shut out individuals who leave jobs for compelling personal reasons, unfairly penalize part-time workers who cannot search for full-time employment, and trap temporary workers in a cycle of poorly-paid gigs.¹⁸ Third, UI information schemes do not account for non-standard workers' low education levels and difficulty determining program eligibility.¹⁹ Fourth, UI unnecessarily excludes independent contractors.²⁰

⁹ KIMBALL & MCHUGH, *supra* note 7, at 5.

¹⁰ RACHEL WEST ET AL., NAT'L EMP'T LAW PROJECT, STRENGTHENING UNEMPLOYMENT PROTECTIONS IN AMERICA 39 (2016), <http://www.nelp.org/content/uploads/Report-Strengthening-Unemployment-Protections-in-America.pdf> [<https://perma.cc/N362-YGGS>].

¹¹ GABE & WHITTAKER, *supra* note 4, at 1.

¹² JOSH BIVENS, ECON. POLICY INST., INEQUALITY IS SLOWING US ECONOMIC GROWTH 1 (2017), <https://www.epi.org/files/pdf/136654.pdf> [<https://perma.cc/6E66-MJ5Y>].

¹³ MICHAEL J. GRAETZ & JERRY L. MASHAW, TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE 77–78 (1999).

¹⁴ Jeffrey Wenger, *Improving Low-Income Workers' Access to Unemployment Insurance*, in WHAT WORKS FOR WORKERS?: PUBLIC POLICIES AND INNOVATIVE STRATEGIES FOR LOW-WAGE WORKERS 247, 248–49 (Stephanie Luce et al. eds., 2014).

¹⁵ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-168R, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS 12 (2015), <http://www.gao.gov/assets/670/669766.pdf> [<https://perma.cc/Y2HQ-NHJ8>]; Lawrence F. Katz & Alan B. Krueger, The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015, at 7 (Apr. 25, 2016) (unpublished manuscript), <http://www.sole-jole.org/16KK.pdf> [<https://perma.cc/39FN-Z5RT>].

¹⁶ WEST ET AL., *supra* note 10, at 42; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 15, at 67 (author's own calculations); OFFICE OF EMP'T AND UNEMP'T STATISTICS, BUREAU OF LABOR STATISTICS, REPORT 1005, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2007, at 12 (2008), https://www.bls.gov/opub/reports/race-and-ethnicity/archive/race_ethnicity_2007.pdf [<https://perma.cc/7K4D-D7UP>].

¹⁷ See *infra* Section IV.A.

¹⁸ See *infra* Section IV.B.

¹⁹ See *infra* Section IV.C.

²⁰ See *infra* Section IV.D.

Fortunately, solutions to these problems exist. States could relax monetary requirements by calculating the earnings needed to qualify for UI over longer timespans, replacing earnings thresholds with work-hour minimums, and eliminating benefit waiting periods.²¹ Furthermore, states could refine non-monetary criteria by allowing part-time workers, people who leave jobs for family reasons, and temps searching for full-time employment to obtain benefits.²² States could also strengthen informational conduits by mounting UI advertising campaigns, notifying laid-off workers about program eligibility, providing multiple benefit application methods, and expanding resources for non-English speakers.²³ Finally, lawmakers could increase independent contractors' income security by integrating them into the UI system and combatting employee misclassification.²⁴

The discussion proceeds in five parts. Part I explores UI's design and history. Part II traces the rise of non-standard employment since the 1970s. Part III outlines the most prominent types of non-standard jobs. Part IV examines the institutional mismatches between these new forms of work and the UI program. Finally, Part V details the changes that could strengthen UI going forward.

I. WHAT IS UNEMPLOYMENT INSURANCE?

The Unemployment Insurance program was created during the New Deal to protect workers from the financial hardship of temporary job loss.²⁵ In the decades since its inception, UI has become a critical anti-poverty and macro-economic stabilization tool.²⁶ Unfortunately, it has also fallen out of step with changing markets and failed to cover an increasingly large swath of America's workforce.²⁷

A. Program History and Background

The UI program was established in the wake of the Great Depression by the Social Security Act of 1935.²⁸ Between 1929 and 1933, the U.S. economy contracted by 40%.²⁹ Unemployment rose to 25%, plunging millions of families into poverty.³⁰ This desperation convinced lawmakers of the need to protect workers against future shocks.³¹ The program they created advanced

²¹ See *infra* Section V.A.

²² See *infra* Section V.B.

²³ See *infra* Section V.C.

²⁴ See *infra* Section V.D.

²⁵ See *infra* Section I.A.

²⁶ See *infra* Section I.B.

²⁷ See *infra* Section I.C.

²⁸ GRAETZ & MASHAW, *supra* note 13, at 73.

²⁹ THEODORE R. MARMOR ET AL., *SOCIAL INSURANCE: AMERICA'S NEGLECTED HERITAGE AND CONTESTED FUTURE* 49 (2013).

³⁰ *Id.*

³¹ *Id.* at 52-55.

two goals: to temporarily replace a share of earnings for workers who lost jobs through no fault of their own, and to steady the economy by raising aggregate demand for goods and services.³²

The UI program is a state-federal partnership. It is funded by both federal taxes under the Federal Unemployment Tax Act and state payroll taxes under state unemployment tax acts.³³ It is therefore best described as a collection of fifty state-administered programs subject to federal oversight.³⁴ States determine the key features of their systems, including eligibility conditions, benefit levels and duration, and employer tax rates and exemptions.³⁵ Though federal guidelines mandate a set of minimum criteria,³⁶ states' differing appetites for social spending lead to varying program generosity across the country.³⁷

UI remains one of the pillars of the American welfare system. In 2015, state governments collected more than forty-two billion dollars in unemployment taxes and disbursed close to thirty-two billion dollars in regular benefits.³⁸ The excess revenue went toward rebuilding states' UI trust funds, which were badly depleted during the Great Recession.³⁹ The UI program covered a total of 135.9 million jobs in 2015.⁴⁰ Although only 2.6 million workers received benefits that year,⁴¹ UI provides a safety net for a much larger group; during the Great Recession, more than seventy million Americans—including seventeen million children—were supported by UI extensions.⁴²

B. UI's Economic and Anti-Poverty Effects

UI largely fulfills its economic stabilization and anti-poverty objectives. Jason Furman, former Chairman of President Obama's Council of Economic Advisers, has highlighted four major economic benefits of UI.⁴³ First, it provides households with much-needed income when a breadwinner loses his or her job; absent UI, a typical family whose head of household becomes unemployed would spend about 15% less on food.⁴⁴ Second, by providing households with income replacement, UI limits the depth of economic re-

³² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-291, UNEMPLOYMENT INSURANCE: INFORMATION ON BENEFIT RECEIPT 13 (2005), <http://www.gao.gov/assets/250/245685.pdf> [<https://perma.cc/N4RA-ZCYV>].

³³ WHITTAKER & ISAACS, *supra* note 2, at 1.

³⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 32, at 14.

³⁵ *Id.*

³⁶ *See id.*

³⁷ H. Luke Schaefer, *Identifying Key Barriers to Unemployment Insurance for Disadvantaged Workers in the United States*, 39 J. SOC. POL. 439, 440 (2010).

³⁸ *See* WHITTAKER & ISAACS, *supra* note 2, at 12.

³⁹ *See* U.S. DEP'T OF LABOR, *supra* note 1, at 4.

⁴⁰ *Id.* at 10.

⁴¹ *Id.*

⁴² Furman, *supra* note 5, at 1.

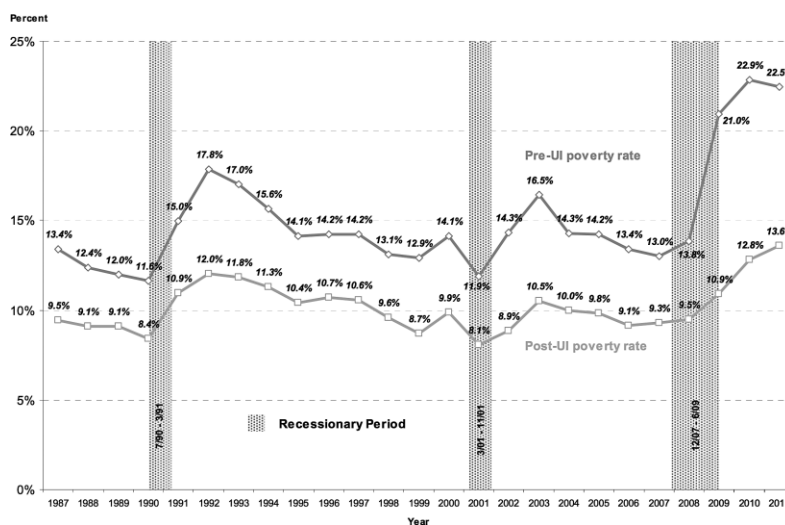
⁴³ *Id.* at 5–6.

⁴⁴ *Id.* at 5.

cessions.⁴⁵ Third, UI strengthens labor markets by including job-search requirements that incentivize workers not to drop out of the labor force.⁴⁶ Fourth, UI improves the functioning of labor markets by providing workers with enough temporary income to find jobs well-matched to their skills.⁴⁷

The UI program significantly reduces poverty, particularly during recessions. As the Congressional Research Service has shown, 26.5% of unemployed persons who received UI benefits in 2011 would have been considered poor before accounting for the program.⁴⁸ Their poverty rate fell to just 13.8% as a result of the benefits.⁴⁹ These positive effects extend to beneficiaries' dependents.⁵⁰ While 10.2 million individuals received UI payments in 2011, another 15.8 million of their family members benefited indirectly from the support.⁵¹ The poverty rate for people in families who received UI benefits was nearly 40% lower than it would have been without the program (Figure 1).⁵² Altogether, UI lifted 2.3 million Americans out of poverty in 2011, including 620,000 children.⁵³

FIGURE 1: PRE- AND POST-UI BENEFIT POVERTY RATES OF PERSONS IN FAMILIES THAT RECEIVED UI BENEFITS



Source:

GABE & WHITTAKER, *supra* note 4, at 18.

⁴⁵ *Id.*

⁴⁶ *Id.* at 5–6.

⁴⁷ *Id.* at 6.

⁴⁸ GABE & WHITTAKER, *supra* note 4, at 25.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

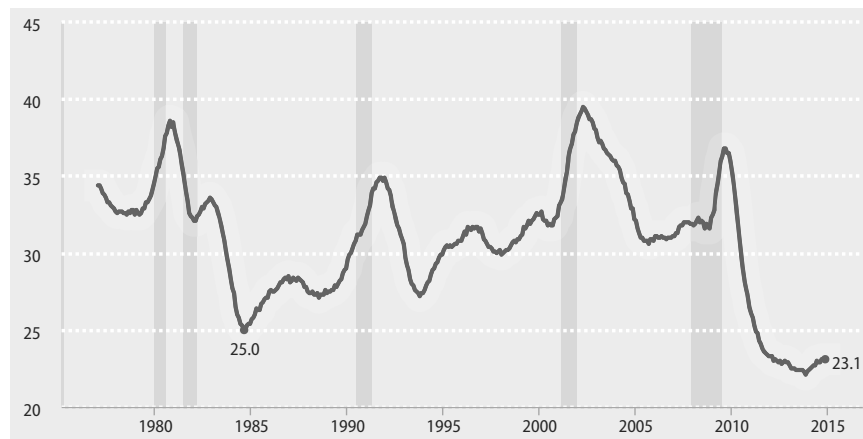
⁵² *Id.*

⁵³ *Id.*

C. Declining Reciprocity Rates and Institutional Mismatches

Unfortunately, as the UI program has matured, it has also left an increasing number of workers behind. The national UI reciprocity rate, which represents the share of unemployed persons receiving benefits, has declined significantly over the past several decades (Figure 2).⁵⁴ The reciprocity rate regularly surpassed 50% in the 1950s.⁵⁵ By December 2014, it fell to a near-record low of just 23.1%.⁵⁶ Reciprocity rates vary by state.⁵⁷ In 2015, they ranged from 10.9% in Florida to 70% in North Dakota.⁵⁸ In 13 states, however, fewer than one in five unemployed workers received UI benefits that year (Figure 3).⁵⁹

FIGURE 2: UI RECIPROCIITY RATE, 1977–2014



Source:

KIMBALL & MCHUGH, *supra* note 7, at 5.

⁵⁴ KIMBALL & MCHUGH, *supra* note 7, at 5.

⁵⁵ Sauviat, *supra* note 8, at 316.

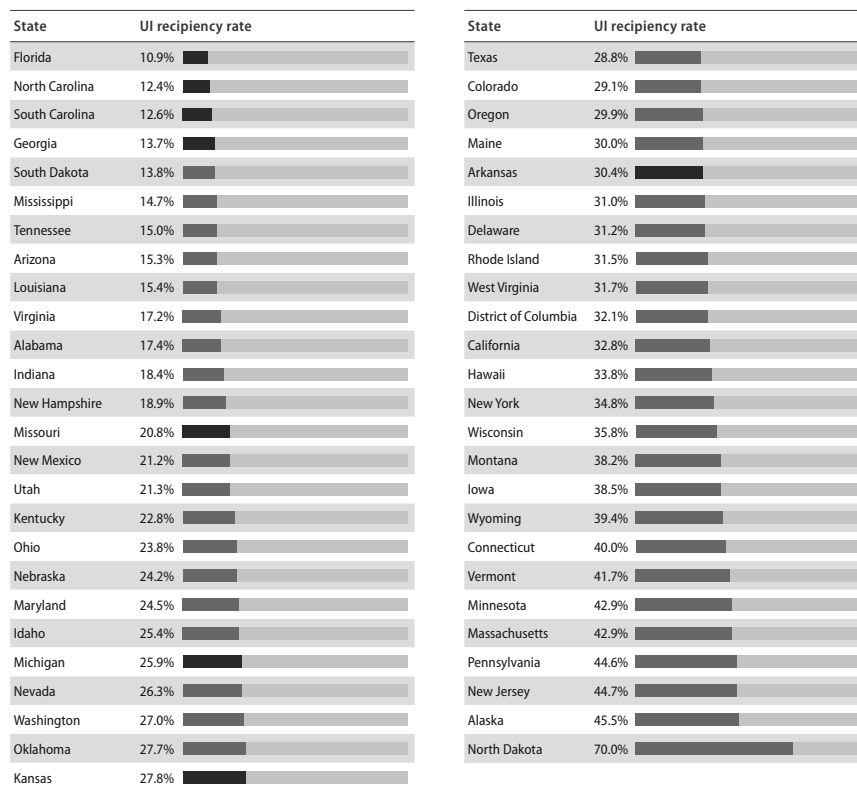
⁵⁶ KIMBALL & MCHUGH, *supra* note 7, at 1.

⁵⁷ While rate variations are likely a function of states' differing worker outreach policies, UI eligibility conditions, and claimant population characteristics, their exact sources remain understudied. See WEST ET AL., *supra* note 10, at 63–64.

⁵⁸ *Id.* at 40.

⁵⁹ *Id.*

FIGURE 3: SHARE OF UNEMPLOYED WORKERS WHO RECEIVED UI IN 2015

**Source:**WEST ET AL., *supra* note 10, at 40.

Scholars continue to debate the causes of this long-term fall in UI participation. Four explanations have been most prominent.⁶⁰ First, the workforce has become younger, meaning that more workers are concentrated in low-wage and insecure jobs that make it harder to qualify for UI.⁶¹ Second, the labor force has become more female, further increasing the proportion of workers in low-income and part-time positions, as women form an outsized share of those labor segments.⁶² Third, stable, full-time manufacturing employment has significantly declined.⁶³ Finally, many states' eligibility policies have become more restrictive.⁶⁴

⁶⁰ GRAETZ & MASHAW, *supra* note 13, at 77–78.

⁶¹ *Id.* at 77.

⁶² *Id.*

⁶³ *Id.* at 78.

⁶⁴ *Id.*

What the literature has thus far paid too little attention to is the common theme underlying these factors: that UI's design may be poorly suited to the rise of non-standard employment.⁶⁵ As Furman has noted, perhaps no challenge is as pressing as the "changing nature of the employment relationship, and in particular the movement toward models of the employer-employee relationship that have shifted greater risk onto workers."⁶⁶ The poor wages characteristic of these arrangements should indeed be cause for concern: while low-income workers are two-and-a-half times more likely to be unemployed than high-wage workers, they are about *half* as likely to receive UI benefits.⁶⁷ The following section therefore explores the changes that have made labor markets more precarious.

II. THE RISE OF NON-STANDARD EMPLOYMENT IN THE UNITED STATES

Like many New Deal programs, UI was premised on a particular vision of the American worker: heads of households employed full-time in a trade or the manufacturing sector.⁶⁸ Since the 1970s, globalization, technological advances, and new management practices have encouraged firms to abandon the standard contract for more precarious arrangements.⁶⁹ Studies reveal that non-standard employment relationships have predominated among jobs created after the Great Recession.⁷⁰

A. *The Old Paradigm: The "Standard Employment Contract"*

When lawmakers created UI in 1935, they tailored the program to fit the labor market of their time. Much of the workforce consisted of prime-aged males who served as their families' breadwinners.⁷¹ While not all of them enjoyed stable employment, many worked full-time in manufacturing or a unionized trade.⁷² A sizable majority received good pay.⁷³ Even if they

⁶⁵ Only one group of researchers has previously examined this question, with a special focus on how other social programs could make up for UI's shortcomings. See NANCY K. CAUTHEN, ANNETTE CASE & SARAH WILHELM, PROMOTING SECURITY IN A 21ST CENTURY LABOR MARKET (Sept. 2015), http://familyvaluesatwork.org/wp-content/uploads/2015/05/nonstandard_work_final-1.pdf [<https://perma.cc/W8DQ-YXVJ>].

⁶⁶ Furman, *supra* note 5, at 4.

⁶⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-1147, LOW-WAGE AND PART-TIME WORKERS CONTINUE TO EXPERIENCE LOW RATES OF RECEIPT 19 (2007), <https://www.gao.gov/assets/270/266500.pdf> [<https://perma.cc/UM77-KR57>]. Unfortunately, the report did not investigate the reasons for this discrepancy. The GAO merely hypothesized that "[l]ow levels of UI receipt among low-wage workers may be explained by the circumstances and preferences of low-wage workers coupled with UI eligibility rules, particularly the base period for meeting the minimum earnings requirement for UI and reasons for separating from work." *Id.* at 3.

⁶⁸ See *infra* Section II.A.

⁶⁹ See *infra* Section II.B.

⁷⁰ See *infra* Section II.C.

⁷¹ Wenger, *supra* note 14, at 248–49.

⁷² *Id.*

were laid off during a recession, these workers could count on finding similar jobs once the economy rebounded.⁷⁴

This “standard employment contract” reflected employers’ desire to build strong internal labor markets.⁷⁵ Firms sought to minimize costs by ensuring that the skilled workers they hired and trained stayed with them for decades.⁷⁶ In order to achieve this goal, they provided “an implicit promise of long-term employment and of orderly and predictable patterns of promotion.”⁷⁷ Many companies also forged employee loyalty by offering generous health and pension benefits.⁷⁸ Labor unions, buoyed by laws that strengthened worker protections and collective bargaining, entrenched and expanded these practices throughout the 1940s and 1950s.⁷⁹

According to sociologists Arne Kalleberg and Peter Marsden, the standard employment relationship has four main characteristics.⁸⁰ First, it involves the exchange of employee labor for monetary compensation.⁸¹ Second, it requires that workers perform duties according to a pre-set schedule at the employer’s place of business.⁸² Third, it requires that workers follow detailed directions and labor under the employer’s control.⁸³ Finally, and most importantly, it features a shared expectation of long-term, full-time work.⁸⁴

Standard employment relations lie at the foundation of not just the UI system, but of many welfare institutions in the United States. American social policy’s continued reliance on employer-provided health and pension plans is a holdover from an era in which the standard contract was dominant.⁸⁵ National employment and labor laws also continue to take traditional job structures as their point of departure.⁸⁶ Over the past several decades, however, socio-economic shifts have placed a major strain on the standard model and the welfare constructs that depend upon it.

⁷³ See Arne L. Kalleberg, *Precarious Work, Insecure Workers: Employment Relations in Transition*, 74 AM. SOC. REV. 1, 4 (2009).

⁷⁴ See Sauviat, *supra* note 8, at 319–20.

⁷⁵ Katherine V.W. Stone, *Flexibilization, Globalization, and Privatization: Three Challenges to Labour Rights in Our Time*, 44 OSGOODE HALL L.J. 77, 79 (2006).

⁷⁶ *Id.* at 80.

⁷⁷ *Id.*

⁷⁸ See Katherine V.W. Stone, *The Decline of the Standard Contract of Employment in the United States: A Socio-Regulatory Perspective*, in *RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT* 59, 59 (Katherine V.W. Stone & Harry Arthurs eds., 2013).

⁷⁹ *Id.* at 64.

⁸⁰ Arne L. Kalleberg & Peter V. Marsden, *Transformation of the Employment Relationship*, in *EMERGING TRENDS IN THE SOCIAL AND BEHAVIORAL SCIENCES* 3 (2015).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See Kalleberg, *supra* note 73, at 16.

⁸⁶ See generally Katherine V.W. Stone, *The Future of Labor and Employment Law in the United States*, in *ENCYCLOPEDIA OF LABOR AND EMPLOYMENT LAW AND ECONOMICS* (UCLA Sch. of Law, Law & Econ. Research Paper Series, Research Paper No. 08–11, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1127885 [https://perma.cc/DUM7-N97C].

B. The Demise of Standard Employment Relationships

Since the mid-1970s, globalization has pushed firms to abandon the standard contract.⁸⁷ Heightened capital mobility, cheaper shipping, and the internet have moved price competition to a global level, pressuring firms to pay more attention to profitability and consumer preferences.⁸⁸ These forces have also allowed companies to reduce costs by splintering production across multiple countries.⁸⁹ Meanwhile, widespread mechanization has significantly reduced corporations' dependence on manual labor.⁹⁰ All of these changes have been encouraged by neoliberal politicians eager to loosen employment regulations and promote transnational trade.⁹¹

In response to these forces, firms have sought to increase the flexibility of their labor relations. The aforementioned "changes [have] made the fixed costs and overhead obligations associated with the [standard contract] less viable for employers, ushering in a new economic order fundamentally distinct from the bureaucratic model of work."⁹² Companies have pursued the "flexibility to hire and fire on short notice; to increase or shrink the overall size of their workforce; to adjust pay to short-term performance results; to redeploy workers within the firm and to outside production partners; and to retain workers with particular skills on an as-needed basis."⁹³

The non-standard jobs firms have created to meet these goals differ greatly from those they embraced during the New Deal. In general, non-standard employment relationships are more transactional and less secure than their predecessors.⁹⁴ Some are mediated through third parties rather than directly.⁹⁵ Others dissolve the employer-employee distinction by forcing workers to engage in significant self-management.⁹⁶ Almost none provide a guarantee of stable, long-term employment or adequate benefits.⁹⁷

⁸⁷ See Kalleberg, *supra* note 73, at 2–3; Kalleberg & Marsden, *supra* note 80, at 4; Katherine V.W. Stone, *In the Shadow of Globalization: Changing Firm-Level Employment Practices and Shifting Employment Risks in the United States*, in GLOBALIZATION COMES HOME: HOW THE UNITED STATES IS BEING TRANSFORMED BY GLOBALIZATION 2 (UCLA Sch. of Law, Law & Econ. Research Paper Series, Research Paper No. 07–13, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1023696 [<https://perma.cc/BW8J-A2Z8>].

⁸⁸ See e.g. Kalleberg & Marsden, *supra* note 80, at 4; Stone, *supra* note 87, at 2.

⁸⁹ See Stone, *supra* note 75, at 85.

⁹⁰ Mark Mauro, *Manufacturing Jobs Aren't Coming Back*, MIT TECH. REV. (Nov. 18, 2016), <https://www.technologyreview.com/s/602869/manufacturing-jobs-arent-coming-back> [<https://perma.cc/9P85-GT3F>].

⁹¹ See Stone, *supra* note 75, at 89.

⁹² Kalleberg & Marsden, *supra* note 80, at 4.

⁹³ Stone, *supra* note 87, at 2.

⁹⁴ Kalleberg & Marsden, *supra* note 80, at 5.

⁹⁵ *Id.*

⁹⁶ *Id.* at 6.

⁹⁷ See *infra* Part III.

C. The Rise of Non-Standard Work

Non-standard relationships now account for a sizable number of jobs in the United States. In 2015, the Government Accountability Office (GAO) estimated that non-standard, or “contingent,” work—which it defined to include agency temporary work, on-call work, contract company work, independent contracting, self-employment, and standard part-time work—represented approximately 40.4% of the nation’s employed labor force.⁹⁸ The analysis showed that the proportion of the labor force employed in non-standard arrangements rose by 5.1% from just 2006 to 2010.⁹⁹

Indeed, evidence suggests that non-standard employment relationships make up a disproportionate share of the jobs created in recent years.¹⁰⁰ In a 2016 study, economists Lawrence Katz and Alan Krueger found that workers in these arrangements—which they define to include temporary help agency work, on-call work, contract work, and independent contracting (but not part-time work)—climbed from 10.1% to 15.8% of the labor force between 2005 and 2015 (Figure 4).¹⁰¹ Most strikingly, their analysis revealed “that all of the net employment growth in the U.S. economy from 2005 to 2015 . . . occurred in alternative work arrangements.”¹⁰² Better grasping these non-standard employment relationships is therefore key to uncovering UI’s impact on labor markets.

⁹⁸ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 15, at 4.

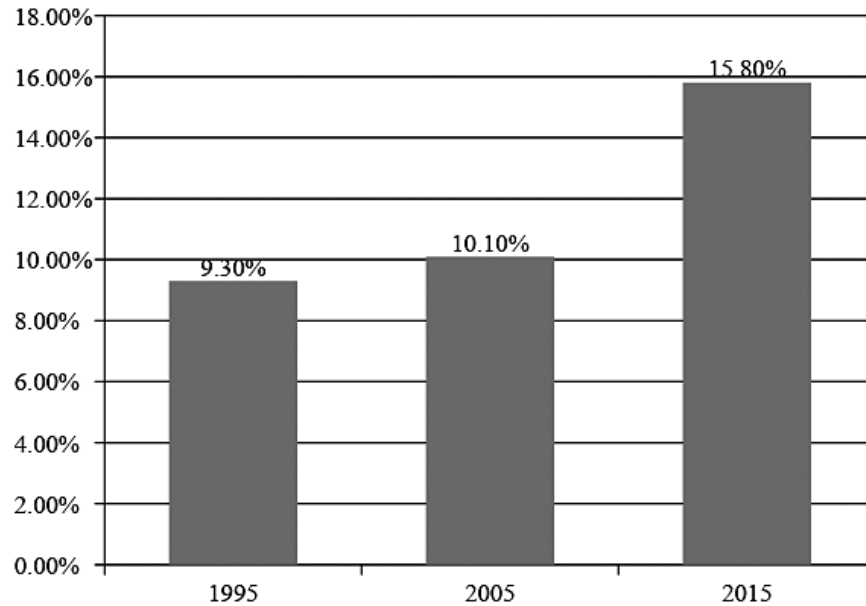
⁹⁹ *Id.*

¹⁰⁰ See generally Katz & Krueger, *supra* note 15.

¹⁰¹ *Id.* at 2.

¹⁰² *Id.* at 7 (referencing Table 2 on page 27).

FIGURE 4: NON-STANDARD WORK ARRANGEMENTS (EXCLUDING PART-TIME WORK), 1995-2015



Source:

Katz & Krueger, *supra* note 15, at 7.

III. TYPES OF NON-STANDARD EMPLOYMENT

What forms does non-standard work take? Answering this question is the first step to understanding how these jobs clash with UI's design. In effect, each type of non-standard employment holds the potential to raise unique challenges to UI. Scholars continue to debate exactly what the label "non-standard" comprises. Nonetheless, many agree that it includes at least five arrangements: part-time work, temporary help agency work, contract work, on-call work, and independent contracting.

A. Part-Time Work

Part-time work is by far the most common type of non-standard relationship.¹⁰³ It is usually defined as work lasting fewer than thirty-five hours a week.¹⁰⁴ In 2010, part-time workers accounted for approximately 16.2% of the employed labor force.¹⁰⁵ This represents more than twenty-two million

¹⁰³ See Arne L. Kalleberg, *Nonstandard Employment Relations: Part-Time, Temporary and Contract Work*, 26 ANN. REV. SOC. 341, 343 (2000).

¹⁰⁴ See *id.*

¹⁰⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 15, at 12.

Americans.¹⁰⁶ Over six million of those workers would have preferred full-time jobs if they could have obtained them.¹⁰⁷ Their swelling ranks form the main driver of an “underemployment” trend that has gripped the economy since the Great Recession.¹⁰⁸ Part-time workers are disproportionately female, as women are more likely to assume caregiving responsibilities alongside employment.¹⁰⁹ These workers also tend to have less education than their standard, full-time counterparts.¹¹⁰ A 2007 GAO study found that unemployed workers who were part-time at their last job were significantly less likely to receive UI benefits than those who were full-time.¹¹¹

B. Contract Work

Contract workers are another prominent part of the non-standard labor force. These employees work for firms that provide services to other companies under contract.¹¹² They are generally assigned to a single client and perform their duties at its place of business.¹¹³ However, the contractor continues to supervise these workers throughout the assignment.¹¹⁴ Contract workers are often brought in to perform specialized functions unavailable in-house, to reduce a project’s costs, or to meet increased demand.¹¹⁵ Their services are therefore generally short-lived.¹¹⁶ Contract workers are disproportionately African-American and Latino.¹¹⁷ They are on average less educated

¹⁰⁶ See BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS (2018), <https://www.bls.gov/cps/lfcharacteristics.htm#emp> [<https://perma.cc/R7A6-C96W>] (author’s own calculation).

¹⁰⁷ See LONNIE GOLDEN, ECON. POLICY INST., STILL FALLING SHORT ON HOURS AND PAY: PART-TIME WORK BECOMING NEW NORMAL 1 (2016), <https://www.epi.org/files/pdf/114028.pdf> [<https://perma.cc/5P92-B85A>].

¹⁰⁸ See *id.* at 3, 11. As the report underlined, the “elevated level of involuntary part-time working is no longer cyclical. . . . If the labor market in 2015 were completely back to its 2007 share then the number of involuntary part-time workers would have been 4.5 million rather than . . . 6.4 million” *Id.* at 11.

¹⁰⁹ WAYNE VROMAN, URBAN INST., LABOR MARKET CHANGES AND UNEMPLOYMENT INSURANCE BENEFIT AVAILABILITY 8 (1998), https://wdr.doleta.gov/research/FullText_Documents/op_03-98.pdf [<https://perma.cc/DG8P-T88W>].

¹¹⁰ See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 15, at 67.

¹¹¹ See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 67, at 33. Though it did not closely investigate the question, the GAO speculated that “[l]ow levels of UI receipt among part-time workers may be explained by many of the same factors that affect low-wage workers,” i.e., their “circumstances and preferences . . . coupled with UI eligibility rules, particularly the base period for meeting the minimum earnings requirement for UI and reasons for separating from work.” *Id.* at 3, 4.

¹¹² Kalleberg, *supra* note 103, at 350–51.

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See Michelle R. Snyder, *Staffing Employment Essentially Unchanged in 2016*, AM. STAFFING ASSOC. (Mar. 14, 2017), <https://americanstaffing.net/posts/2017/03/14/staffing-employment-essentially-unchanged-2016> [<https://perma.cc/5R5C-LT8J>] (noting that for “temporary and contract workers . . . [t]he average length of employment with a staffing company was 11.5 weeks in 2016, slightly longer than the tenure of 10.8 weeks in 2015”).

¹¹⁷ See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 15, at 67; BUREAU OF LABOR STATISTICS, *supra* note 16 (author’s own calculation). Comprehensive data on this question

than standard, full-time workers.¹¹⁸ In 2015, they made up 3.1% of the employed labor force, which translates to over 4.5 million Americans.¹¹⁹

C. Temporary Help Agency Work

Like contract workers, temporary help agency workers perform services for clients over a narrow period.¹²⁰ However, these workers are usually leased to other companies on an hourly basis rather than staffed to one project.¹²¹ Temporary help agencies “constitute a modern-day ‘reserve labor army’ that helps employers [to avoid] over-staffing positions with expensive full-time, permanent workers who may not be utilized. By using temporaries, employers can staff minimally and then add temporary employees on an as-needed basis.”¹²²

In 2015, temporary help agency workers represented 1.6% of the employed labor force, or nearly 2.5 million Americans.¹²³ Employers have no obligation to provide temporary help agency workers with pay similar to that enjoyed by full-time staff.¹²⁴ These workers experience turnover rates two to three times higher than those of permanent employees.¹²⁵ Like part-time and contract workers, temps tend to be less educated than individuals in standard, full-time positions.¹²⁶ They are also disproportionately Latino and African American.¹²⁷

remain elusive. However, because this is such an important dimension of the rise of non-standard work, the author calculated this statistic using the best available numbers. He did so by comparing the percentage of workers of each race in the various categories of non-standard employment (as listed in the GAO’s report on the contingent workforce, which provides 2005 figures) with the percentage of employed workers of each race in the overall labor force (as noted in the BLS’s report on labor force characteristics by race and ethnicity, which provides 2007 figures—the earliest available and the closest to the GAO’s 2005 data). While African Americans and Latinos respectively made up 11% and 14% of the total employed labor force in 2007, they accounted for 14.9% and 16.4% of contract company workers in 2005.

¹¹⁸ See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 15, at 67.

¹¹⁹ See Katz & Krueger, *supra* note 15, at 27. See also BUREAU OF LABOR STATISTICS, *supra* note 106 (author’s own calculation).

¹²⁰ Kalleberg, *supra* note 103, at 346–47.

¹²¹ See *id.*

¹²² See *id.* at 347.

¹²³ See Katz & Krueger, *supra* note 15, at 27. See also BUREAU OF LABOR STATISTICS, *supra* note 106 (author’s own calculation).

¹²⁴ See Kalleberg, *supra* note 103, at 350.

¹²⁵ See VROMAN, *supra* note 109, at 21.

¹²⁶ See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 15, at 67.

¹²⁷ See *id.* at 67; BUREAU OF LABOR STATISTICS, *supra* note 16, at 12 (author’s own calculation using the method described *supra*, note 117). While African-Americans and Latinos respectively made up 11% and 14% of the total employed labor force in 2007, they accounted for 21.8% and 21% of agency temporary workers in 2005.

D. On-Call Work and Day Labor

On-call workers are individuals called into work on an as-needed basis.¹²⁸ Day laborers are a subset of on-call workers picked up by employers to work for one day.¹²⁹ These forms of employment are characterized by poverty wages and a near-complete lack of job security.¹³⁰ The majority of day laborers are undocumented immigrants with limited rights.¹³¹ They are therefore particularly vulnerable to wage theft and the vagaries of non-standard schedules.¹³² Unsurprisingly, they are both less educated than standard full-time workers on average¹³³ and disproportionately Latino.¹³⁴ In 2015, on-call workers represented 2.6% of the employed labor force, or approximately four million people.¹³⁵

E. Independent Contracting

Independent contractors are self-employed workers.¹³⁶ They range from skilled engineers to workers in the so-called “gig economy,” who find jobs through online platforms such as Uber and Task Rabbit.¹³⁷ Independent contractors have “neither an employer nor a wage contract and are responsible for their own tax arrangements.”¹³⁸ However, many are closely directed by their customers and have little control over their pay or work conditions.¹³⁹ Some analysts hence consider them “disguised wage laborers.”¹⁴⁰ In

¹²⁸ See PETER S. FISHER ET AL., IOWA POLICY PROJECT, NONSTANDARD JOBS, SUBSTANDARD BENEFITS 5 (2005), <http://www.cfcw.org/nonstandard.pdf>. [<https://perma.cc/4QTV-83QK>]

¹²⁹ See *id.* at 4.

¹³⁰ See INT’L LABOUR OFFICE, ON-CALL WORK AND “ZERO HOURS” CONTRACTS 2 (2004), http://www.ilo.org/wcmsp5/groups/public/-ed_protect/-protrav/-travail/documents/publication/wcms_170714.pdf [<https://perma.cc/86M4-T99J>]; ABEL VALENZUELA JR. ET AL., ON THE CORNER: DAY LABOR IN THE UNITED STATES ii (2006), <http://www.coshnetwork.org/sites/default/files/Day%20Labor%20study%202006.pdf> [<https://perma.cc/5CJS-L2L8>].

¹³¹ See VALENZUELA JR. ET AL., *supra* note 130, at iii.

¹³² See *id.* at ii–iii.

¹³³ See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 15, at 67–68.

¹³⁴ See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 15, at 67 (author’s own calculations); BUREAU OF LABOR STATISTICS, *supra* note 16 (author’s own calculation using the method described *supra*, note 117). While Latinos made up 14% of the total employed labor force in 2007, they accounted for 19% of on-call workers in 2005.

¹³⁵ See Katz & Krueger, *supra* note 15, at 27; BUREAU OF LABOR STATISTICS, *supra* note 105 (author’s own calculation).

¹³⁶ See Kalleberg, *supra* note 103, at 355.

¹³⁷ See KATHERINE LUCAS MCKAY, EXPANDING PROSPERITY IMPACT COLLABORATIVE, THE ASPEN INSTITUTE, REFORMING UNEMPLOYMENT INSURANCE TO SUPPORT INCOME STABILITY AND FINANCIAL SECURITY 5 (2017), http://www.aspenepic.org/wp-content/uploads/2017/09/ASPEN_EPIC_UNEMPLOYMENT_INSURANCE_02.pdf [<https://perma.cc/G3FJ-LVHA>].

¹³⁸ Kalleberg, *supra* note 103, at 355.

¹³⁹ See *id.*

¹⁴⁰ Helen Rainbird, *The Self-Employed: Small Entrepreneurs or Disguised Wage Laborers?*, in *FAREWELL TO FLEXIBILITY*, 201 (Anna Pollert ed., 1991).

2015, independent contractors were the second-largest group of non-standard workers in the United States, encompassing a full 8.4% of the employed labor force, or thirteen million Americans.¹⁴¹

Because a firm that enlists these workers is usually not liable for their actions¹⁴² and can offload fringe benefit costs and taxes,¹⁴³ companies have strong incentives to misclassify employees as independent contractors.¹⁴⁴ The National Employment Law Project has estimated that as many as 30% of employers misclassify employees to trim their balance sheets.¹⁴⁵ This means that several million workers who should benefit from stable employment instead find themselves in non-standard arrangements with few protections.¹⁴⁶

Even those who are properly classified face challenges. While a significant number of independent contractors are satisfied with their work, many suffer financial hardship.¹⁴⁷ A 2016 McKinsey Global Institute report estimated that over a quarter of independent contractors did their jobs out of financial necessity and would have preferred traditional employment.¹⁴⁸ The study further showed that low-income individuals make up over a fifth of the independent workforce.¹⁴⁹ Participants in the expanding “gig economy” appear especially vulnerable.¹⁵⁰ As the National Employment Law Project has underscored, many “are striving to make a living by stringing together short-term and poorly-paid . . . ‘tasks’ that offer little chance of a stable income. . . . Both researchers and individual workers . . . have reported wages at a poverty level”¹⁵¹

F. Summary

In short, standard and non-standard employment relations exhibit both powerful commonalities and important differences. Most non-standard jobs

¹⁴¹ Katz & Krueger, *supra* note 15, at 27; BUREAU OF LABOR STATISTICS, *supra* note 106 (author’s own calculation).

¹⁴² See Kalleberg, *supra* note 103, at 356.

¹⁴³ FRANÇOIS CARRE, ECON. POLICY INST., BRIEFING PAPER NO. 403, (IN)DEPENDENT CONTRACTOR MISCLASSIFICATION 4 (2015), <https://www.epi.org/files/pdf/87595.pdf> [<https://perma.cc/X84K-625D>].

¹⁴⁴ *Id.*

¹⁴⁵ NAT’L EMP’T LAW PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES 1 (2015), <http://www.nelp.org/content/uploads/Independent-Contractor-Costs.pdf> [<https://perma.cc/Y3JC-KFCM>].

¹⁴⁶ *Id.*

¹⁴⁷ JAMES MANYIKA ET AL., MCKINSEY GLOBAL INST., INDEPENDENT WORK: CHOICE, NECESSITY, AND THE GIG ECONOMY 6–9 (2016), <https://www.mckinsey.com/global-themes/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy> [<https://perma.cc/YX9X-VVM6>].

¹⁴⁸ *Id.* at 8–9.

¹⁴⁹ *Id.* at 6.

¹⁵⁰ REBECCA SMITH & SARAH LEBERSTEIN, NAT’L EMP’T LAW PROJECT, RIGHTS ON DEMAND: ENSURING WORKPLACE STANDARDS AND WORKER SAFETY IN THE ON-DEMAND ECONOMY 5 (2015), <http://www.nelp.org/content/uploads/Rights-On-Demand-Report.pdf> [<https://perma.cc/N9JR-SH7W>].

¹⁵¹ *Id.*

tend to be less secure and more poorly remunerated than full-time employment. Aside from independent contracting, they disproportionately comprise less-educated Americans¹⁵² and already-marginalized populations: women fill a large majority of part-time roles, while Blacks and Latinos make up an outsized share of contract, temporary, and on-call workers.¹⁵³

However, the exact nature of the insecurities that workers confront in each arrangement varies. Individuals in stable part-time positions who wish to access full-time jobs do not face the same challenges as day laborers who may not be called back to work in twenty-four hours. Making sense of how these forms of work clash with UI requires a close look at how they interact with the program's design.

IV. INSTITUTIONAL MISMATCHES BETWEEN UI AND NON-STANDARD EMPLOYMENT

An analysis of UI's structure reveals that several of its features stand at odds with non-standard employment. The incongruities that marginalize non-standard workers fall into four categories: (1) overly restrictive monetary eligibility requirements;¹⁵⁴ (2) outdated non-monetary eligibility requirements;¹⁵⁵ (3) unnecessary barriers to information;¹⁵⁶ and (4) aggressive independent contractor exclusions.¹⁵⁷

A. Overly Restrictive Monetary Eligibility Requirements

1. *Current Program Design.* — To qualify for UI, workers must begin by satisfying a series of monetary requirements. First, individuals must have a history of work in the months before their application for compensation.¹⁵⁸ This "base period" is the "time period during which wages earned and/or hours/weeks worked are examined to determine an individual's monetary entitlement to benefits."¹⁵⁹ Nearly all states use the first four of the last five calendar quarters as a base period to determine an individual's monetary entitlement.¹⁶⁰ For individuals who do not qualify under the regular base period, certain states employ an alternative base period (ABP) consisting of the

¹⁵² See U.S. GOV'T. ACCOUNTABILITY OFFICE, *supra* note 15, at 67–68.

¹⁵³ See *supra* notes 117, 127, and 134.

¹⁵⁴ See *infra* Section IV.A.

¹⁵⁵ See *infra* Section IV.B.

¹⁵⁶ See *infra* Section IV.C.

¹⁵⁷ See *infra* Section IV.D. Cauthen and her co-authors have similarly highlighted that some of the main reasons the unemployed do not receive benefits are that they do not apply, do not earn enough during the statutory eligibility period, and do not have a reason for job separation that fulfills allowable criteria. See Cauthen Case & Wilhelm, *supra* note 65, at 17–19.

¹⁵⁸ See EMP'T & TRAINING ADMIN., U.S. DEP'T OF LABOR, 2016 COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 3-2 (2016), <https://oui.doleta.gov/unemploy/pdf/uilawcompar/2016/complete.pdf> [<https://perma.cc/82SG-K4SG>].

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

last four completed calendar quarters of employment.¹⁶¹ A handful of states also rely on an extended base period (EBP) for people who do not earn wages in the regular base period due to injury or illness.¹⁶²

Second, workers must prove that they earned a minimum amount of wages or worked a minimum amount of time (or both) over the course of the base period.¹⁶³ States generally calculate qualifying wages or employment using one of four methods: by requiring workers to have earned an amount equal to or greater than a specified multiple of the individual's weekly benefits during the base period; by requiring workers to have earned a particular dollar amount of total wages during the base period; by requiring workers to have labored a certain number of weeks at a particular wage; or by requiring workers to have earned a certain dollar amount in the quarter with the highest earnings of their base period.¹⁶⁴ Many states use some variation of the last approach, known as the "high-quarter" method.¹⁶⁵ In 2016, the minimum high-quarter wages needed to qualify for UI ranged from a low of \$728 in South Dakota to a high of \$3162 in Michigan.¹⁶⁶

Third, if a worker turns out to be eligible for benefits, she must undergo a waiting period before collecting payments.¹⁶⁷ The vast majority of states require a one-week waiting period.¹⁶⁸ In most states, this period is the same regardless of whether an individual seeks full or partial unemployment benefits.¹⁶⁹

2. *Shortfalls for Non-Standard Workers.* — UI's monetary requirements disadvantage non-standard workers in multiple ways. The regular base period that most states employ does not accurately reflect contract workers, temporary workers, and on-call workers' fractured calendars. Because these laborers lack employment security and control over their workweeks, they suffer frequent job interruptions. This makes it crucial that every day they work be counted toward their UI eligibility. Yet, as the Department of Labor highlights, relying on the first four of the last five completed calendar quarters before a claim filing produces "a lag of up to 6 months between the end of the base period and the date an individual becomes unemployed As a result, the individual's most recent work history is not used when making an eligibility determination."¹⁷⁰

Though many states have recently adopted an ABP composed of the last four calendar quarters of employment, twelve have not.¹⁷¹ As of March

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 3-4.

¹⁶⁴ *See id.*

¹⁶⁵ *Id.* at 3-9.

¹⁶⁶ *Id.* at 3-5-3-6.

¹⁶⁷ *See id.* at 3-14.

¹⁶⁸ *See id.* at 3-16.

¹⁶⁹ *See id.* at 3-14.

¹⁷⁰ *Id.* at 3-2.

¹⁷¹ *See* ANNALISA MASTRI ET AL., MATHEMATICA POLICY RESEARCH, STATES' DECISIONS TO ADOPT UNEMPLOYMENT COMPENSATION PROVISIONS OF THE AMERICAN RECOVERY AND REINVESTMENT ACT 8-9 (2016), <https://www.dol.gov/asp/evaluation/>

2018, these states—which include some of the largest in the union, such as Florida, Pennsylvania, and Texas—were together home to over forty-eight million workers, or approximately one-third of the civilian labor force.¹⁷² In its current form, the ABP also fails to adequately cover the most precarious individuals, who simply cannot accumulate four calendar quarters of employment before needing benefits.

The earning thresholds that UI establishes prejudice nearly all types of non-standard workers.¹⁷³ Whether they serve as part-time employees, temporary staff, or day laborers, non-standard workers generally earn less per hour and in the aggregate than their full-time counterparts.¹⁷⁴ This means that they must “work more hours than higher-income workers to qualify for UI.”¹⁷⁵ Even when they put in a high number of hours, those in the most insecure non-standard arrangements, like on-call work, risk earning too little to meet their states’ minimum requirements.¹⁷⁶

Forcing eligible persons to wait one week before receiving UI benefits also disproportionately impacts non-standard workers. Many of these individuals live paycheck-to-paycheck and have little or no savings to rely on in the event of unemployment.¹⁷⁷ Given the frequency and suddenness with which temporary, contract, and on-call workers can find themselves out of a job, the weight of a week without pay falls especially heavily on these groups and their families.

B. Outdated Non-Monetary Eligibility Requirements

1. *Current Program Design.* — Non-monetary eligibility rules also present a significant hurdle.¹⁷⁸ Here again, workers must qualify for UI along several dimensions. First, individuals must prove that they lost their job through no fault of their own.¹⁷⁹ Specifically, a worker may only obtain bene-

completed-studies/UCP_State_Decisions_to_Adopt.pdf [https://perma.cc/7FVF-J3SP]. The full list of states that have yet to adopt an ABP is: Alabama, Arizona, Florida, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Pennsylvania, Texas, and Wyoming. *Id.* at 39 tbl.V.1.

¹⁷² BUREAU OF LABOR STATISTICS, CIVILIAN LABOR FORCE AND UNEMPLOYMENT BY STATE AND METROPOLITAN AREA (June 27, 2018), <https://www.bls.gov/news.release/metro.t01.htm> [https://perma.cc/9U68-W7ZU].

¹⁷³ Cauthen and her collaborators have similarly emphasized this point, noting that unrealistic earnings thresholds plague low-wage workers of all types. Cauthen Case & Wilhelm, *supra* note 65, at 18.

¹⁷⁴ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 15, at 5–6.

¹⁷⁵ WEST ET AL., *supra* note 10, at 41.

¹⁷⁶ See *id.* at 41.

¹⁷⁷ See Katz & Krueger, *supra* note 15, at 24 (finding that “workers in alternative work arrangements earn considerably less per week than do regular employees with similar characteristics and in similar occupations”); see also Gabriella Chiarenza, Economics in the Community Context: Underemployment 23–30 (Fed. Reserve Bank of San Francisco, July 2016), <https://www.frbsf.org/community-development/files/economics-in-the-community-context-underemployment.pdf> [https://perma.cc/7N9X-WXHF].

¹⁷⁸ See, e.g., Schaefer, *supra* note 37, at 439 (finding that non-monetary eligibility criteria may depress UI reciprocity rates even more than monetary requirements).

¹⁷⁹ See EMP'T & TRAINING ADMIN., U.S. DEP'T OF LABOR, *supra* note 158, at 5-1.

fits after quitting her job on the rare occasion she can point to “good cause.”¹⁸⁰ As the Department of Labor has underlined, “[i]n many states, good cause is explicitly restricted to good cause *connected with the work*, attributable to the employer, or involving fault on the part of the employer.”¹⁸¹ The most common reasons states accept as “good cause” are compulsory retirement, sexual harassment, and service in the armed forces.¹⁸²

Second, workers must show that they are “available for work.”¹⁸³ This generally means

being ready, willing, and able to work. . . . Nonavailability may be evidenced by substantial restrictions upon the kind or conditions of otherwise suitable work that an individual can or will accept, or by the refusal of a referral to suitable work made by the employment service, or of an offer of suitable work made by an employer.¹⁸⁴

Importantly, half of the states require individuals to be available for *full-time* work, regardless of whether they would prefer a part-time position.¹⁸⁵

Third, UI claimants must prove that they are “actively seeking” employment.¹⁸⁶ All states require UI applicants to register for work at their local employment office.¹⁸⁷ Most also track the number of employers an individual applies to while receiving benefits and mandate a minimum weekly number of contacts, ranging from a low of one in Kansas to a high of five in Oregon.¹⁸⁸ Evidence suggests that states have enforced these provisions more strictly in recent years.¹⁸⁹ However, under federal law, states may not deny UI benefits to any person in an approved training program.¹⁹⁰ All states thus exempt trainees from active work search requirements.¹⁹¹ Most states also “allow a work search exemption if a separation is classified as a temporary lay-off and there is a reasonable expectation that the worker will return to work soon.”¹⁹²

2. *Shortfalls for Non-Standard Workers.* — The narrow scope of most states’ “good cause” provisions excessively burdens non-standard workers. Individuals in part-time, temporary, contract, and on-call positions generally

¹⁸⁰ *Id.* at 5-2.

¹⁸¹ *Id.* (emphasis added).

¹⁸² *See id.* at 5-2-5-5.

¹⁸³ *Id.* at 5-25.

¹⁸⁴ *Id.*

¹⁸⁵ *See* MASTRI ET AL., *supra* note 171, at 6-9.

¹⁸⁶ *See* EMP’T & TRAINING ADMIN., U.S. DEP’T. OF LABOR, *supra* note 158, at 5-29.

¹⁸⁷ *See id.*

¹⁸⁸ *See id.* at 5-29-5-31.

¹⁸⁹ GEORGE WENTWORTH, NAT’L EMP’T LAW PROJECT, CLOSING DOORS ON THE UNEMPLOYED: WHY MOST JOBLESS WORKERS ARE NOT RECEIVING UNEMPLOYMENT INSURANCE AND WHAT STATES CAN DO ABOUT IT 11 (2017), http://www.nelp.org/content/uploads/Closing-Doors-on-the-Unemployed12_19_17-1.pdf [https://perma.cc/8W6Z-JUEL].

¹⁹⁰ *See* EMP’T & TRAINING ADMIN., U.S. DEP’T OF LABOR, *supra* note 158, at 5-29.

¹⁹¹ *See id.*

¹⁹² *Id.*

receive fewer employer-provided protections, including health benefits.¹⁹³ Low wages also prevent them from affording employment support services such as childcare.¹⁹⁴ When illness or personal tragedy strikes, these workers have little choice but to take time off. Yet most states do not consider voluntarily leaving a job to care for oneself or a family member “good cause.”¹⁹⁵ As the National Employment Law Project has pointed out, these restrictions disproportionately harm people of color and women.¹⁹⁶ These barriers are starkly apparent in UI reciprocity statistics: while 62% of job losers received unemployment compensation in 2010, only 28% of job *leavers* did.¹⁹⁷

Non-monetary criteria generate other challenges for non-standard workers. The requirement that individuals be “available for work” has a particularly harsh impact on part-timers. Twenty-five states disallow part-time workers from obtaining UI benefits by requiring them to search for full-time work.¹⁹⁸ Once again, this problem has an outsized effect on women; as many are the primary caregivers in their families, they find themselves forced to limit time at work to look after children and relatives.¹⁹⁹

The work availability requirement presents further difficulties for temporary workers. Thirty-two states’ laws provide that “if an employee of a temporary service employer fails to be available for future assignments upon completion of the current assignment, such individual shall be deemed to have voluntarily left employment *without good cause* connected to the work.”²⁰⁰ This obligation prevents temps from relying on UI for short-term income while searching for more stable employment.²⁰¹ As the Center for American Progress has stressed, current policy effectively “trap[s] workers in a repeated cycle of short-lived, dead-end jobs.”²⁰²

¹⁹³ See U.S. GOV’T. ACCOUNTABILITY OFFICE, *supra* note 15, at 1.

¹⁹⁴ See *id.* at 23.

¹⁹⁵ See EMP’T & TRAINING ADMIN., U.S. DEP’T OF LABOR, *supra* note 158, at 5-2-5-9.

¹⁹⁶ See WEST ET AL., *supra* note 10, at 41-42. Cauthen and her co-authors have also stressed this gap, noting that “[s]ingle mothers, African American and young workers are more likely to become jobless for health or family reasons . . . and are thus more likely to be disadvantaged by state rules that narrowly define good cause.” Cauthen Case & Wilhelm, *supra* note 65, at 19.

¹⁹⁷ MARÍA ENCHAUTGUI, URBAN INST., DISADVANTAGED WORKERS AND THE UNEMPLOYMENT INSURANCE PROGRAM 4-5 (2012), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412620-Disadvantaged-Workers-and-the-Unemployment-Insurance-Program.PDF> [<https://perma.cc/9G5W-KTYK>].

¹⁹⁸ See MASTRI ET AL., *supra* note 171, at 8-9 tbl I.1).

¹⁹⁹ See WEST ET AL., *supra* note 10, at 42.

²⁰⁰ EMP’T & TRAINING ADMIN., U.S. DEP’T OF LABOR, *supra* note 158, at 5-10 (emphasis added).

²⁰¹ By the very nature of their jobs, temporary workers are also particularly likely to “face interrupted employment and . . . have insufficient earnings or ‘inconsistent’ work histories” that make it difficult for them to meet earning thresholds. Cauthen Case & Wilhelm, *supra* note 65, at 18.

²⁰² RACHEL WEST ET AL., CTR. FOR AM. PROGRESS, WHERE STATES ARE AND WHERE THEY SHOULD BE ON UNEMPLOYMENT PROTECTIONS 6 (2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/07/07060320/StateUI-brief.pdf> [<https://perma.cc/2QSG-R5K3>].

C. Unnecessary Barriers to Information

Institutions designed to inform workers about UI also fail individuals in non-standard arrangements. Surprisingly, one of the most important reasons workers do not receive unemployment compensation is that they never apply in the first place.²⁰³ A 2005 Urban Institute survey found that 52% of workers who did not apply for UI refrained from doing so because “they believed they were not eligible for benefits.”²⁰⁴ As the data showed, temporary workers appeared particularly ill-informed about their ability to access the program.²⁰⁵

Recent studies have suggested why non-standard workers are at greater risk of foregoing the benefits they deserve. Less educated people who do not apply for UI are more likely to falsely perceive themselves as ineligible for not working or earning enough.²⁰⁶ As the findings in Part III indicated, such individuals form a disproportionate share of the non-standard workforce. Non-standard employment comprises a large percentage of the lowest-skill positions in the economy; while just 7.7% of standard full-time workers surveyed in 2010 had not completed high school, nearly 31% of core non-standard workers had not done so.²⁰⁷ Similarly, while 44.6% of standard full-time workers had at least some college education in 2010, only 16.3% of core non-standard workers did.²⁰⁸ Non-standard jobs are also structured in ways that may deepen misperceptions about earnings and hours: many are low-wage positions that feature minimal and variable schedules.²⁰⁹

At present, UI does little to ensure that non-standard workers know which benefits they are entitled to. Few states require employers to alert workers of their eligibility in a systematic way.²¹⁰ No state appears to directly reach out to separated workers.²¹¹ Because non-standard workers often have

²⁰³ Wayne Vroman, *Unemployment Insurance Recipients and Nonrecipients in the CPS*, 132 MONTHLY LAB. REV. 44, 49 (2009). *See also* Cauthen Case & Wilhelm, *supra* note 65, at 18 (stressing the same problem and noting that it stems partly from the fact that, while “[w]orkers are often notified about UI benefits through a formal layoff process, . . . low-wage workers are disproportionately employed in industries that tend to avoid formal layoffs”).

²⁰⁴ Vroman, *supra* note 203, at 49.

²⁰⁵ *See id.* at 49–50.

²⁰⁶ Alix Gould-Werth & H. Luke Schaefer, *Unemployment Insurance Participation by Education and by Race and Ethnicity*, 135 MONTHLY LAB. REV. 28, 38 (2012).

²⁰⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 15, at 17.

²⁰⁸ *Id.* at 17, 67–68.

²⁰⁹ *See id.* at 22, 27.

²¹⁰ WEST ET AL., *supra* note 202, at 9 (highlighting only Massachusetts as an example of a state that currently follows this practice).

²¹¹ *See id.* (recommending that states implement direct outreach to separated workers as a policy innovation); Alexander Hertel-Fernandez & Jeffrey B. Wenger, Taking Up Social Benefits: A Cautionary Tale from An Unemployment Insurance Survey Experiment 10 (Sept. 14, 2013) (unpublished manuscript), <http://ssrn.com/abstract=2341885> [<https://perma.cc/767U-C47Q>].

little attachment to their employers and cannot rely on them for information, these institutional shortfalls likely hit them the hardest.²¹²

D. *Aggressive Independent Contractor Exclusions*

Finally, independent contractors are completely excluded from UI. Because the program is financed through federal and state taxes levied on covered employers, independent contractors are not entitled to unemployment compensation.²¹³ Those with meager savings thus have few resources to fall back on in the event of a financial shock. Moreover, large numbers of workers who might otherwise qualify for UI are misclassified as independent contractors.²¹⁴ As noted earlier, as many as 30% of U.S. employers regularly misclassify their workers to lower costs.²¹⁵

E. *Summary*

In sum, UI's existing design is poorly matched to the needs of a growing non-standard workforce. The program's monetary eligibility requirements do little to account for non-standard workers' low pay and fractured schedules. UI's non-monetary eligibility criteria ignore these individuals' strenuous home lives and patterns of work. To make matters worse, many non-standard workers who qualify for UI are not provided the information needed to claim benefits. A good number are also denied support altogether because employers misclassify them as independent contractors.

V. POTENTIAL REFORMS

UI's shortfalls demand targeted reforms. While it is not possible to discuss all of the necessary changes here, the following proposals provide a baseline on which policymakers can build. These suggestions track the four broad categories of rules outlined above. A number have previously been advanced in some form by the National Employment Law Project or the Center for American Progress.²¹⁶

A. *Reforming Monetary Eligibility Requirements*

Lawmakers should make several changes to UI's monetary eligibility requirements. First, all states should adopt the alternative base period (ABP) to make it easier for workers with fissured work histories to qualify for bene-

²¹² See Vroman, *supra* note 203, at 45, 49–50 (showing that non-standard workers are relatively less informed about UI eligibility than individuals in standard employment relationships).

²¹³ EMP'T & TRAINING ADMIN., U.S. DEP'T OF LABOR, *supra* note 158, at 1-1, 2-1.

²¹⁴ See WEST ET AL., *supra* note 10, at 50–51.

²¹⁵ NAT'L EMP'T LAW PROJECT, *supra* note 145.

²¹⁶ See, e.g., WEST ET AL., *supra* note 10; WEST ET AL., *supra* note 202.

fits. As noted above, twelve states—which together hold one-third of the civilian labor force—have yet to adopt the ABP.²¹⁷ Research suggests they could significantly increase UI reciprocity if they did. One Urban Institute study concluded that the ABP expanded UI eligibility by 6 to 8% in the first six states that enacted it.²¹⁸ Regression analyses have found a positive and statistically significant correlation between the ABP and UI eligibility levels.²¹⁹ Similarly, cross-state comparisons have revealed that states with ABPs tend to have higher UI reciprocity rates than states without them.²²⁰

Second, states should consider relaxing even the ABP to accommodate workers with the most sporadic job calendars. The National Employment Law Project has suggested extending the ABP from twelve to eighteen months for the most precarious earners.²²¹ This expanded ABP (or “ABP+”) would account for the recurrent job interruptions that can befall non-standard workers.²²² This would give them a better chance to aggregate infrequent paychecks to meet UI’s earnings requirements. To guard against abuse of this new standard, states could limit the ABP+ to those groups most afflicted by work stoppages, such as contract workers, temporary help agency workers, and on-call workers.²²³

Third, states should ultimately abandon earnings requirements and instead consider the number of hours people work. Earnings thresholds are a poor way of capturing job effort.²²⁴ As the National Employment Law Project has observed, they can lead to absurd results: “in theory, a very high earner could qualify for UI with only two hours of work . . . while a low earner who worked just short of 13 weeks at the minimum wage would not qualify.”²²⁵ Basing UI eligibility on work hours would restore equity between these groups and give low earners the chance to claim vital benefits.²²⁶ Reformers would need to be careful not to set the hours minimum too high, however; Canada’s move to a restrictive hours-based system actually contrib-

²¹⁷ See MASTRI ET AL., *supra* note 171 (providing list of states that have not adopted ABP); see also BUREAU OF LABOR STATISTICS, *supra* note 172 (providing size of workforce in those states).

²¹⁸ WAYNE VROMAN, URBAN INST., UNEMP’T INS. OCCASIONAL PAPER 95-3, THE ALTERNATIVE BASE PERIOD IN UNEMPLOYMENT INSURANCE: FINAL REPORT 2 (1995), https://wdr.doleta.gov/research/FullText_Documents/op%5F03%2D95%2Epdf [<https://perma.cc/Y8QS-HKFV>].

²¹⁹ WAYNE VROMAN, URBAN INST., LOW BENEFIT RECIPIENCY IN STATE UNEMPLOYMENT INSURANCE PROGRAMS 147 (2001), <https://www.urban.org/sites/default/files/publication/61731/410383-Low-Benefit-Reciprocity-in-State-Unemployment-Insurance-Programs.PDF> [<https://perma.cc/DZR4-WHS4>].

²²⁰ See *id.* at 158.

²²¹ See WEST ET AL., *supra* note 202, at 5.

²²² See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 15, at 20 (observing that “contingent workers experience monthly job separation rates several times higher than those experienced by the overall employed labor force”); see also Snyder, *supra* note 116 (announcing average employment duration of 11.5 weeks at U.S. temporary staffing companies in 2016).

²²³ See *infra* Section III.B–D.

²²⁴ See WEST ET AL., *supra* note 10, at 41.

²²⁵ *Id.* at 127 n.135.

²²⁶ See *id.* at 43–44.

uted to reciprocity rate decreases.²²⁷ That country's unemployment insurance program continues to shut out many of its most vulnerable workers.²²⁸

Fourth, states should eliminate the one-week waiting period before workers can obtain benefits. Waiting weeks are an artifact of history: they "were originally adopted primarily because states required a delay at the start of a new claim during which agencies processed UI claims manually"²²⁹ Today, waiting weeks serve only to disadvantage non-standard and low-wage workers living paycheck-to-paycheck.

B. Reforming Non-Monetary Eligibility Requirements

Non-monetary criteria should also be altered. First, states should expand their definitions of "good cause" so that more workers who voluntarily leave their jobs remain eligible for UI. States should at minimum allow individuals who quit jobs for compelling family reasons, such as caring for children, to apply for unemployment compensation. An Urban Institute analysis concluded that states with high UI reciprocity rates also tended to allow workers who quit for personal reasons—such as illness, care for a family member, or domestic violence—to apply for benefits.²³⁰ By contrast, states with low reciprocity rates did not.²³¹ Scholars have similarly found a positive correlation between the presence of expansive "good cause" provisions and the share of job leavers who qualify for UI.²³²

Second, states should allow workers who wish to search for a part-time job to apply for benefits. As noted earlier, half of the states require the unemployed to search for full-time work to be eligible for the program.²³³ Yet part-time jobs are an increasingly large part of the labor market.²³⁴ As such, they should be treated with the same respect as full-time positions. Policy-

²²⁷ See Mouna Viprey, *Canada, From Unemployment Insurance to Employment Insurance: The Disengagement of the State*, in UNEMPLOYMENT BENEFIT SYSTEMS IN EUROPE AND NORTH AMERICA: REFORMS AND CRISIS 325, 330 (Florence Lefresne ed., 2010).

²²⁸ See Andrew Jackson & Sylvain Schetagne, Canadian Centre for Policy Alt., *Is EI Working for Canada's Unemployed? Analyzing the Great Recession*, in ALTERNATIVE FEDERAL BUDGET 2010 4, 6 (2010), https://www.policyalternatives.ca/sites/default/files/uploads/publications/reports/docs/Is_EI_Working_For_Canadas_Unemployed.pdf [https://perma.cc/SKL8-NUHL]. See generally Andrew Jackson, *Why Canada Needs Progressive Reforms in Employment Insurance*, GLOBE & MAIL (Oct. 26, 2017), <https://www.theglobeandmail.com/report-on-business/rob-commentary/why-canada-needs-progressive-reforms-in-employment-insurance/article36736240> [https://perma.cc/P6NP-QN8H].

²²⁹ RICK MCHUGH ET AL., NAT'L EMP'T LAW PROJECT, UNEMPLOYMENT INSURANCE POLICY ADVOCATE'S TOOLKIT 56 (Oct. 2015), <http://www.nelp.org/publication/unemployment-insurance-policy-advocates-toolkit-2015> [https://perma.cc/LSP5-JV9K].

²³⁰ See VROMAN, *supra* note 218, at 121 tbl.VI-4.

²³¹ See *id.*

²³² See Rebecca Smith et al., *Unemployment Insurance and Voluntary Quits: How States' Policies Affect Today's Families*, 46 CHALLENGE 89, 103 (2003).

²³³ See MASTRI ET AL., *supra* note 171, at 8–9.

²³⁴ See generally GOLDEN, *supra* note 107.

makers should also recognize that many people have no choice but to work part-time because of caretaking duties.²³⁵

Combined with the ABP, these first two reforms could significantly increase state UI reciprocity rates. A study commissioned by the Department of Labor estimated that UI first payments would have increased by 6 to 10% in 2012 if all states had adopted these three policies after the Great Recession.²³⁶

Third, states should stop requiring temps to remain available for temporary jobs to maintain eligibility for benefits. This policy locks them into a lifetime of insecure work that diminishes their opportunities for advancement.²³⁷ By holding down millions of workers' wages²³⁸—and thereby dampening their demand for goods and services—this requirement also constrains economic growth.²³⁹

C. *Reforming Informational Institutions*

Perhaps most importantly, states must strengthen institutions designed to inform workers about UI eligibility, the process of obtaining benefits, and programs that can facilitate their applications.²⁴⁰ This should at minimum entail statewide advertising campaigns.²⁴¹ To go further, lawmakers could require employers to notify all workers about UI in a systematic way.²⁴² They could even provide firms with methods of filing initial claims on behalf of separated employees.²⁴³ Alternatively, states could require employers to notify the government of recent layoffs so that government can reach out to workers directly.²⁴⁴ Such contacts would need to recur. As one study discovered, laid-off workers generally “feel[] emotionally overwhelmed at the moment of job loss, which could make new information difficult to absorb.”²⁴⁵

²³⁵ See WEST ET AL., *supra* note 10, at 3. See also Cauthen Case & Wilhelm, *supra* note 65, at 20 (emphasizing that “in an era when employers increasingly require workers to be available 24/7 with limited notice, requiring availability for full-time work denies UI benefits to jobless workers who are pursuing higher education or job training, caring for children or elderly parents or engaging in other socially-valued pursuits”).

²³⁶ See MASTRI ET AL., *supra* note 171, at 84.

²³⁷ See WEST ET AL., *supra* note 202, at 6.

²³⁸ See *supra* Section III.C.

²³⁹ See BIVENS, *supra* note 12, at 7–9.

²⁴⁰ See WENTWORTH, *supra* note 189, at 19. Cauthen and her coauthors have also concluded that improving access to information is crucial to increasing UI uptake, urging the federal government to “[p]rovide fiscal incentives for states to implement comprehensive information campaigns and enrollment assistance so that workers better understand their eligibility for UI and how to sign up.” Cauthen Case & Wilhelm, *supra* note 65, at 26.

²⁴¹ See *id.*

²⁴² See *id.*

²⁴³ See *id.*

²⁴⁴ See WEST ET AL., *supra* note 202, at 9.

²⁴⁵ Alix Gould-Werth, *Workplace Experiences and Unemployment Insurance Claims: How Personal Relationships and the Structure of Work Shape Access to Public Benefits*, 90 SOC. SERV. REV. 305, 339 (2016).

Notification would therefore likely need to be provided at least “twice: once at the time of separation and again mailed to the home of the worker.”²⁴⁶

As states improve in this area, they must be mindful of the technological and language barriers that confront many non-standard workers.²⁴⁷ States have increasingly moved to online claim-filing systems. Yet studies have shown that the low-income, less educated, and Latino workers who disproportionately fill non-standard positions have less access to—and familiarity with—the internet than the rest of the population.²⁴⁸ Many of these workers also struggle with English. As such, online outreach and benefit applications should be designed simply and in multiple languages.²⁴⁹ States should make interpreters available to assist claimants who are not native English speakers.²⁵⁰ Furthermore, states should provide “[a]t least one easily accessible alternative means to online filing[, such as] telephone or in-person customer assistance in the completion of an initial claim”²⁵¹

Available data suggests that there may be a relationship between language accommodation and reciprocity.²⁵² A 2001 study exploring variations in states’ UI reciprocity rates found that “high reciprocity states all take claims by telephone and . . . have much more client-friendly procedures for non-English speakers,” including providing “brochures in several non-English languages” and hiring telephone “staff fluent in the particular state’s most common non-English languages.”²⁵³

Nevertheless, lawmakers must approach these tasks delicately. As recent survey experiments have demonstrated, workers may have so much trouble making sense of UI eligibility rules that they may apply in lower numbers if given program specifics.²⁵⁴ At least one study has suggested that reducing application barriers alone may be insufficient to increase UI participation.²⁵⁵ More research is needed to uncover which methods of conveying information might prove most effective.

D. Addressing Independent Contractor Exclusions

Policymakers should strive to increase independent contractors’ economic security. An important way they could do so is by devoting more resources to combating employee misclassification.²⁵⁶ In concrete terms, this

²⁴⁶ *Id.*

²⁴⁷ See WENTWORTH, *supra* note 189, at 24.

²⁴⁸ See *id.* at 21.

²⁴⁹ See *id.* at 24.

²⁵⁰ See *id.*

²⁵¹ WENTWORTH, *supra* note 189, at 19.

²⁵² See VROMAN, *supra* note 219, at 119.

²⁵³ *Id.* at 119. While the study noted the relationship between language accommodation and reciprocity rates, it suggested that more investigation would be required to determine if language accommodation caused higher rates of UI reciprocity. *Id.*

²⁵⁴ See Hertel-Fernandez & Wenger, *supra* note 211, at 2–4.

²⁵⁵ See Avraham Ebenstein & Kevin Stange, *Does Inconvenience Explain Low Take-Up? Evidence From Unemployment Insurance*, 29 J. POL’Y ANALYSIS & MGMT. 111, 111 (2010).

²⁵⁶ See WEST ET AL., *supra* note 10, at 98.

could mean guaranteeing that law enforcers scrutinize employers' classification decisions, target industries that commonly evade worker protections, and establish task forces to combat specific abuses.²⁵⁷

Lawmakers should also try to find innovative solutions for workers who are properly classified. As the Aspen Institute has noted, reformers have several options at their disposal.²⁵⁸ They could follow a recommendation put forth by the Center for American Progress and the National Employment Law Project to create a "Jobseeker's Allowance."²⁵⁹ This short-term benefit would assist jobseekers, including independent contractors, by providing them with a weekly sum funded by general taxes.²⁶⁰ The allowance "would offer a stipend of about \$170 per week to jobseekers for up to 13 weeks, replacing approximately 50% of the wages of a typical low-paid worker."²⁶¹ This modest benefit would likely "encourage workforce participation, support geographic labor mobility, and promote family stability and social cohesion."²⁶²

Similarly, lawmakers could encourage independent contractors to contribute to unemployment savings accounts meant to buffer income gaps. Massachusetts Institute of Technology "[e]conomist Jonathan Gruber proposes that the government should fully fund security accounts—funded with a 6% match on earnings—for all workers earning less than \$25,000."²⁶³ States could also permit independent contractors to pay into existing social insurance schemes.²⁶⁴ California, for instance, already allows the self-employed to participate in its short-term disability and paid family leave programs.²⁶⁵ There is no reason states could not do the same in the context of unemployment insurance.²⁶⁶

E. Moving Toward a Truly National UI System

Finally, it should be noted that these reforms would be more efficient and easier to implement if UI were a truly national system. Many of the program's shortfalls—such as the lack of a nationwide alternative base period—stem from the fact that states have vast power to shape their UI laws.

This makes little sense from an economic perspective. As Michael Graetz and Jerry Mashaw have noted, "states cannot regulate interstate or foreign commerce, modify the money supply, or control migration in or out

²⁵⁷ See NAT'L EMP'T LAW PROJECT, WINNING WAGE JUSTICE: AN ADVOCATE'S GUIDE TO STATE AND CITY POLICIES TO FIGHT WAGE THEFT 84 (2011), <http://www.nelp.org/content/uploads/2015/03/WinningWageJustice2011.pdf> [<https://perma.cc/3UZP-WHRW>].

²⁵⁸ See MCKAY, *supra* note 137, at 7.

²⁵⁹ *Id.*; WEST ET AL., *supra* note 10, at 87–102.

²⁶⁰ WEST ET AL., *supra* note 10, at 90.

²⁶¹ *Id.* at 6.

²⁶² *Id.*

²⁶³ MCKAY, *supra* note 137, at 7.

²⁶⁴ See *id.* at 7.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

of their jurisdictions. Yet all of these things bear importantly on the level of economic risk experienced by their citizens.”²⁶⁷ Furthermore, “because economic cycles have regional variations both in timing and intensity, it makes sense to include the whole nation in the insurance pool.”²⁶⁸

A national system would also be politically preferable to the existing patchwork quilt. UI improvements could be made in one fell swoop, rather than on a state-by-state basis. Moreover, pro-reform coalitions could focus their organizing efforts on one federal node instead of fifty statehouses.

As it turns out, the current system is largely the product of political accident. The New Dealers who developed UI worried that Southern Democrats would balk at giving so large a role to the federal government.²⁶⁹ Furthermore, in a context where the Supreme Court expressed skepticism toward President Roosevelt’s economic program, reformers were not certain a fully nationalized system would pass constitutional muster.²⁷⁰ Graetz and Mashaw have suggested that constitutional federalism no longer poses such a threat.²⁷¹ Whether they are correct depends on the program’s design and lies beyond the scope of this analysis. Future studies should investigate this important question.

CONCLUSION

Since it was first enacted in 1935, Unemployment Insurance has played a vital role in reducing worker poverty and stabilizing the economy. However, changing employment relations have increased pressure on a program that initially catered to full-time manufacturing workers. The rise of part-time work, temporary work, contract work, on-call work, and independent contracting has challenged several of UI’s institutional pillars. The program’s monetary and non-monetary eligibility rules fail to account for non-standard workers’ sporadic job histories, low pay, and significant family duties. Furthermore, states do too little to inform individuals of their eligibility for UI and to combat employee misclassification. Benefit reciprocity rates have already been falling for decades, leaving a growing number of Americans without a basic income in the event of job loss. This situation will only worsen if lawmakers do not take steps to adapt UI to contemporary labor markets.

²⁶⁷ GRAETZ & MASHAW, *supra* note 13, at 40.

²⁶⁸ *Id.* at 74.

²⁶⁹ *See id.* at 79.

²⁷⁰ *See id.*

²⁷¹ *See id.* at 79–80, 86–87.