Senate Bills 886 and 991 Breakdown[1]

Executive Summary:

On October 20, 2020, Gov. Whitmer signed a bill into law that modified the statute governing Michigan's unemployment insurance ("UI") system in response to the historic levels of unemployment caused by COVID-19. Though heralded as a moment of bipartisanship during an intensely politicized and divise moment for our state, closer review of the newly enacted measures show that these modifications will provide unprecedented protections to employers, including a total waiving of all UI liability backdated from March of this year, while providing no tangible or long-lasting relief for millions of workers who are relying on UI during this ongoing public health crisis. The only win for workers from this legislative action was to permit the claims properly processed based on the prior executive orders to stand—rather than demand these constituents pay back the money they received.

Other protections for workers will all expire at the end of the calendar year—the benefit year will revert back to twenty weeks, the window to apply for unemployment will grow shorter, and the Agency will be forced to once again review all separations during a claimant's base period, even though only the most recent separation is relevant to receive unemployment.

The Legislature's failure to permanently remove two arbitrary roadblocks—the job separation and the leaving to accept provisions—were discussed throughout the multiple town halls that legislators held this spring. In these meetings legislators, across party lines, agreed that these two provisions were unnecessary and should be removed. The Legislature's failure to permanently remove these roadblocks is a failure to apply the lessons learned from their constituents' struggles. Despite having full knowledge of the barrier to benefits that these provisions present, the Legislature chose not to ease the heavy weight that a complicated and arbitrary UI system creates for jobless Michigan workers during this time of crisis.

Additionally, prior to the new enactment, the medical involuntary leaving section of the Act made it hard for claimants to receive unemployment benefits if they have a medical issue that prevented them from working their prior job. The Legislature's new COVID-19 criteria for a claimant to qualify for unemployment insurance is stringent, requiring a level of medical documentation that may retroactively hurt claimants who most likely left work and applied for benefits at a time when COVID-19 tests were not widely available. This was also a time when fear and employer misinformation forced claimants to choose between going to work and therefore risking exposure or staying at home. Because the statutory revisions have extended how long employers have to protest a worker's recipient of benefits, these stringent medical leaving requirements will result in people being found retroactively ineligible.

What's more notable is what the statutory amendments didn't do: they didn't allow claimants to receive benefits if they have other separations in their base period, they didn't permanently

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restore Michigan to the national standard of twenty-six weeks, they did not increase the weekly benefit amount, they didn't allow part-time workers to be able to collect unemployment benefits (which effectively cuts out half of Michigan's workforce), they didn't allow low-wage and tipped workers to qualify for benefits, they didn't extend benefits to survivors of domestic violence forced to leave work because of abuse, they didn't extend any claimant appeal deadlines, they didn't establish a subjective test for meeting the COVID-19 criteria, they didn't clarify that workers are eligible to receive benefits when they are placed on unpaid medical leave, and they didn't expand protections for gig workers. Notably, the legislature didn't even increase the dependence allowance from the $6 per child, even though caregivers are being forced to leave the workforce at a significant rate.

Roadmap: A brief breakdown on the statutory amendment's positives and negatives for claimants. A fuller discussion of each provision follows.

The Good:

- Temporary twenty-six weeks until the end of the year
- COVID-19 protections enacted (but strict and objective standard)
    - Childcare is covered but only if due to a governmental directive
- Claims are charged to the nonchargeable account
- Work share is temporarily expanded
- Repeal of refusal to accept an offer of work because of failure of a drug test
- Temporary coverage for those who left to accept, but didn't start, full-time work
- The Agency will not be forced re-consider separating employers in a wage base period (though this enactment is temporary and does not continue to any new claims)
- Claimants on a COVID-related leave of absence will still be eligible for unemployment benefits (otherwise, if a claimant is on a leave of absence, they are ineligible for benefits)
- Agency will not be mandated to recoup benefits from those who received them when inquiry into receipt is only due to eligibility under an executive order

The Bad:

- Repeal work search waiver (during all recession and poor economic times, not just COVID-19)
- Backdate work search requirement (which will cause severe havoc for claimants' ability to establish continuing eligibility)
- Failure to change the law to only consider the most recent separation to disqualify from unemployment (rather than other prior jobs not causing the job loss)
- Rigid COVID-19 criteria for involuntary medical leaving eligibility
- All temporary improvements and will expire on Jan. 1, 2021
- Claimants receiving SSDI or who are already on unpaid leave are not covered by the leave of absence expansion
- Childcare is only temporarily covered and there is no protection for those on leave to protect other vulnerable family members (parents, immuno-compromised spouse/siblings, etc.)

- Employers have a year to protest a worker's receipt of benefits but there is nothing that extends a claimant's timeline or ability to appeal freely

The Confusing:

- The Agency must now check with LEO and MichiganWorks! before hiring new employees

The Good

Section 421.17(9) states that employers will not be charged for any benefits paid due to layoffs or placed on a leave of absence until after Dec. 31, 2020. This provision means that the state, and not employers, will be paying out benefits to laid-off employees, which will hopefully de-incentive employers from 1) forcing people to keep working when it is a threat to public health and 2) protesting their employees' receipt of benefits. This provision effectively relieves employers of their UI insurance burden until 2021.

Section 421.27(d) states that all claimants who file for benefits before Jan. 1, 2021 will receive between fourteen and twenty-six weeks of benefits. This provision temporarily extends Michigan's twenty-week limit to twenty-six weeks, which brings it (temporarily) in line with 40 other states who already have a twenty-six week standard. For the negative effect of the temporary nature of this expansion, see below.

Section 421.28c(2)(f) outlines what an employer must provide to participate in a workshare program and lowers the percentage of employees who would need to be laid off (from 15% to 10%) in order for the employer to be eligible. **Section 421.28c(4)** states that the Agency can approve an employer for workshare even if that employer fails to satisfy provisions (1) or (2)(b) of 421.28c until Dec. 31, 2020.

Section 421.29(a)(1) outlines the criteria for a claimant being considered to have left work involuntarily for medical reasons because of COVID-19.
For weeks beginning before Jan. 1, 2021, a claimant who left work to self-isolate or quarantine because:

- They are immunocompromised
- Displayed a commonly-recognized symptom of COVID-19 that was not also a symptom of a known medical condition
- They had contact with someone who had a confirmed case of COVID-19
- Needed to care for an individual who had a confirmed case of COVID-19
- They had a family care responsibility due to a "government directive" regarding COVID-19

This provision was also updated to state that the Agency "may" consider a claimant as being laid off if they meet any of the criteria above for all benefit weeks before January 1, 2021. For the negative implications of this enactment, see below.

The portion of **Section 421.29(e)** that outlined when an individual would be found to have refused suitable work because an offer of employment was withdrawn due to a failure or refusal

to take a drug test has been repealed. **421.29(m)** was not repealed which means that the repealing of this provision will not protect those who were already employed and fail or refuse to take a drug test but it will protect claimants who test positive during an application for work or who refuse to take a drug test from being denied for failure to accept suitable work. Because the initial provision was only in effect one year after the amendment was passed, it is unclear if this is actually a gain for claimants or simply an anticipated update to the statute.

Section 421.29(g)(11) has been enacted so a claimant is not disqualified if, between May 1, 2020 and when this bill was signed into law, they left full-time work to accept another job, even if 1) they did not actually perform any services for their new employer or 2) the job they accepted was not permanent full-time work. For claimants who fall into this category, their benefits will be paid out of the non-chargeable account. While this is good, this should always be the law - not just for the past few months.

Section 421.32(c), which was enacted to cover from May 1, 2020 to when the amendments became law, mandated that the Agency shall not issue a determination for a claimant's non-separating employers during their base period or benefit year. This provision is positive because it ensures that no claimants who fall into this category will be retroactively harmed or forced to pay back benefits. For the negative consequences for the temporary nature of this enactment, see below.

Section 421.48(3) states that any individual who claims benefits before the week of Jan. 1, 2021 who fits the criteria outlined in the 29(1) COVID-19 section and is on a leave of absence will be considered unemployed unless the claimant is otherwise on sick leave or receives a disability benefit. For a discussion of who this provision will not cover, see below.

Section 421.32c(1)-(2) prohibits the Agency from reviewing claims filed from March 15, 2020 to when the Act was amended if that review is triggered solely because an applicable executive order was later found to not have legal force. The second portion of this provision states that all claimants who filed within twenty-eight days after the last day worked will have timely filed. (2) will not be active after Dec. 31, 2020, but that does mean that, arguably, until the end of this year claimants who are laid off will have twenty-eight days to file for unemployment.

The Bad

Section 421.27(d) is a mixed bag for claimants. While the extension is better than maintaining its original twenty weeks, the temporary nature of this benefit means that if the pandemic continues into 2021, which it most likely will, claimants after Dec. 31, 2020 will not receive this benefit though their unemployment will likely stem from the pandemic. Starting Jan. 1, 2021, Michigan will no longer be eligible for any federal extensions that require states to have twenty-six weeks of benefits to receive the extension. It also means that the workers most likely to recover slowly from the economic impacts of the recession—people who are racial minorities, low-income workers, who have disabilities, or who experience more barriers in finding employment—will disproportionately experience a financial gap between when their benefits run

out and when they find new employment. This is a gap that white and more traditional workers will most likely not experience to the same degree.

Section 421.17(9), when taken with **421.32(f)**—the new provision that employers have one year to protest the receipt of benefits that are charged to their account between March 15, 2020 and Jan. 1, 2021— means that all eligible employers who experienced layoffs can protest those benefits and have the charges redirected to the non-chargeable account. This year-long protest window could potentially mean that claimants will be forced to relitigate issues many months after they began receiving benefits. It also extends a benefit to employers that will harm claimants without any commiserate benefit to claimants, whose thirty-day protest window has not been extended Beyond that, there was *no* extension for claimants—not for COVID-related claims nor for claimants who are still trying to reopen MiDAS False Fraud Scandal cases. This is an example of how employers consistently benefit from the Legislature's amendments, while claimants do not receive even remotely equal treatment.

Section 421.28(4)'s repeal will force claimants to look for jobs during recessions—even when no suitable work is available. This provision stated that a waiver for a claimant seeking work under 28(1) was not applicable to weeks of unemployment during which an individual was claiming extended benefits. Extended benefits are only enacted during economic recessions or when unemployment is exceptionally high. If there is not work available, repealing this provision could actually render claimants ineligible since claimants have to prove they are searching for work and applied to different jobs in order to obtain benefits. Additionally, repealing this provision during the current public health crisis will force claimants to apply for jobs when doing so may be a threat to their health. What's worse—this was already a repeal of an active part of the statute that protected claimants from the "red tape" requirements of work search during high levels of unemployment. This was a crucial section of the statute to keep the economy afloat and to assist the Agency in processing a high volume of claims effectively. With its repeal, many claimants will not be able to receive benefits and the Agency's backlog will grow considerably.

The effective date of 421.28(6) was set at April 2, 2020. Backdating the work search date could have severe and negative consequences for claimants because the executive order waived the work search requirement during the state of emergency. By setting this provision to apply as of April 2, there is a high chance that the Agency will audit people's work search certifications from this time period even though claimants had been instructed by the Agency and by the Governor that there was no need to be actively searching for work. Claimants will likely be forced to pay back the benefits they received retroactively—even though these constituents received these benefits through no fault of their own. The Legislature's actions here effectively rendered most of the claims that it tried to make "valid" due to the executive orders actually invalid—and the effect will be disastrous for the Agency to administer (pausing tens of thousands of claims) and also for claimants (as they will have to pay back the money they properly received at the time).

Section 421.29(a)(1) outlines the criteria for a claimant being considered to have left work involuntarily for medical reasons because of COVID-19. The statutory provision as written may

be construed by the Agency as requiring documentation regarding a claimant's medical condition be submitted in order to verify their claim. Additionally, the provision as enacted leaves a lot of room through which claimants with less clear cut claims could fall through the cracks. For example, claimants who left work because their loved ones were immunocompromised aren't explicitly protected nor are workers who left work because coworkers who they were not in direct contact with were testing positive. Additionally, it makes no mention of employees who left work because they were caring for older parents or more vulnerable family members. Presumably for these individuals, they will have to show that they left work involuntarily under the non-medical leaving provision.

While **Section 421.29(g)(11)'s** temporary provision is a gain to claimants who have already received benefits as of May 1, this change's impermanence means that now, claimants will be denied unemployment benefits even though the reason for their denial was outside of their control and has nothing to do with why they are unemployed. This arbitrary roadblock was one of the major issues claimants reported having during legislator-led townhalls, which means that state legislators were fully aware of how nonsensical this provision is. Temporarily suspending, but not repealing this requirement, means that Michigan workers are less likely to receive benefits than if they were in another state and experienced the exact same scenario. There is no reason thata Michigan workers who leave to accept a new job should be thus penalized.

Section 421.32(c), which was enacted to cover from May 1, 2020 to when the amendments became law, mandated that the Agency shall not issue a determination for a claimant's non-separation employers during their base period or benefit year. This provision ought to have been made permanent because it unnecessarily disqualifies a high percentage of jobless workers who are unemployed through no fault of their own. It is also an administrative nightmare because the Agency has to obtain reports from all employers during the last 18 months for each claimant and make separate decisions about each separation. This easily multiplies the Agency's workload while also punishing claimants who had multiple employers in their work history.

An example makes the problem with this provision clearer: say a worker, "Sam" decides to quit Job A to look for a new job. Sam quickly finds Job B. However, Job B has to lay off Sam due to COVID-19. Sam now files for benefits. But because Sam quit Job A, the Legislature's rule disqualifies Sam from any unemployment benefits—even though Job A is not why Sam is now unemployed.

Section 421.48(3) will cover claimants who are furloughed because of COVID-19 but the criteria for being eligible for COVID-19 relief is still narrowed to the point that some claimants whose situations are less traditional or common (i.e., caring for elderly parents or immunocompromised children) will likely not benefit from this provision. This provision also renders claimants who receive SSDI benefits ineligible, even though SSDI recipients are allowed, and indeed encouraged, to work if they are able. Additionally, this provision will still leave claimants on indefinite unpaid medical leave with no way of receiving benefits because the provision doesn't differentiate between paid and unpaid sick leave. The Legislature had a chance to make this

section be effective for workers on unpaid leave beyond the COVID-19 setting, but instead it chose to render many workers ineligible for benefits.

Section 421.32(c) will not protect any claimants outside of the protected months from this year.

The Confusing

Section 421.32d mandates that the Agency must consult with LEO and Michigan Works! before hiring a new employee to see if any of the employees in those organizations can be utilized instead. This provision is not time-barred and is an entirely new addition to the statute. Presumably it is to ensure that during times of emergency Agency hiring, employees already on the government's payroll will be considered first. However, there is no limiting definition of employee so it seems like any time the Agency hires anyone, it first needs to consult with LEO and MichiganWorks!, which is a private entity only sometimes affiliated with the local government in the area it serves.