

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, SS.**

**SUPERIOR COURT  
C.A. 10-2667-F**

**TODD BRUGMAN, on behalf of himself  
and all others similarly situated,**

**Plaintiffs,**

**v.**

**DEPARTMENT OF UNEMPLOYMENT  
ASSISTANCE and JUDITH L.  
CICATIELLO , in her capacity of  
Department of Unemployment Assistance,**

**Defendants**

## SETTLEMENT AGREEMENT

### Determinations Under G. L. c. 151A, § 69(a)

1. DUA will instruct and train its JSRs and review examiners as follows:

A determination under G. L. c. 151A, § 69(a), that an individual has failed "to pay when due any amount paid to said individual because of such individual's failure knowingly to furnish accurate information concerning any material fact" (a § 69(a) finding) must (1) identify each such material fact; (2) state the basis for the determination that there was a failure knowingly to furnish accurate information concerning each such material fact; and (3) state the basis for concluding that the individual knew, or reasonably should have known, of the failure. These three numbered requirements are referred to collectively as the "§ 69(a) requirements."

A § 69(a) finding may be made only when (1) the facts found make it more probable than not that the individual knew, or reasonably should have known, that the individual provided inaccurate information, or withheld accurate information, concerning a material fact; (2) as a result, the individual erroneously received benefits; and that (3) the individual did not repay the resulting overpayment when due.

2. Before DUA issues a notice of determination and overpayment under § 69(a), a supervisor (likely an M3 or JS II) will review the proposed determination solely for compliance with the § 69(a) requirements, but not as to content, that is, the supervisor will not review the case file or make any judgment regarding the correctness of the § 69(a) finding.
3. If the review described in Paragraph 2 shows a lack of compliance with the § 69(a) requirements, then the supervisor will direct the JSR to comply with them, including conducting any necessary additional fact-finding and modifying the finding as needed.
4. After a § 69(a) finding is made that is determined to satisfy the § 69(a) requirements, the claimant shall be sent a Notice of Redetermination and Section 69(a) Finding, specifying the reasons for the § 69(a) finding. The notice also will include notice of appeal rights under G. L. c. 151A, § 39, and the claimant's right to seek legal representation.
5. DUA will revise the notice it issues claimants that a § 69(a) finding is under consideration following a consultative process in which Plaintiffs' counsel and other interested stakeholders will be invited to participate.
6. DUA will submit to the State Advisory Council a proposed revision to 430 Code Mass. Regs. § 6.03 ("Definitions"), as follows: Fault, as used in the phrase "without fault," applies only to the fault of the overpaid claimant. Unless the claimant is without fault, fault on the part of the Department

in making the overpayment does not relieve the overpaid claimant of liability for repayment. In determining whether an individual is at fault, the Director, or the Director's authorized representative, will consider the nature and cause of the overpayment and the capacity of the particular claimant to recognize the error resulting in the overpayment, including the claimant's age and intelligence as well as any physical, mental, educational, or linguistic limitation, including lack of facility with the English language. A good faith mistake of fact by the claimant in the filing of a claim for benefits that results in an overpayment of benefits does not constitute fault. A claimant shall be at fault if the overpayment resulted from the claimant: (a) furnishing information that the claimant knew, or reasonably should have known, to be incorrect; or (b) failing to furnish information that the claimant knew or should have known to be material; or (c) accepting a payment that the claimant knew, or reasonably should have known, was incorrect.

7. Section 1462 of the Service Representatives Handbook will be revised, as follows:

**MGL c. 151A, §§ 25(j), 47, and 69(a) provide for the assessment of penalties.** Section 25(j) provides for the assessment of a compensable week disqualification of one week for each "week in which the individual fraudulently collects benefits while not in total or partial unemployment."

Section 47 provides for fines and imprisonment for "[a]ny person who knowingly makes any false or misleading statement, representation or submission or knowingly assists, abets, solicits or conspires in the making of any false or misleading statement, representation or submission in order to maintain, obtain, or increase benefits under this chapter [151A] for himself or any other individual, or who knowingly conceals or fails to disclose a material fact in order to maintain, obtain or increase benefits under this chapter for himself or any other individual[.]"

Section 69(a) assesses an interest penalty on the unpaid balance of any overpayments of Unemployment Insurance benefits, if it is established that the overpayment resulted from the individual recipient's "failure knowingly to furnish accurate information

concerning any material fact, including amounts of remuneration received,” as provided in MGL Chapter 151A, § 24(c). That section makes eligibility for benefits contingent on the claimant providing information on any wages received during the period for which benefits are claimed.

(A) Because the law provides for the assessment of interest and the application of a compensable week disqualification, it is critical that all claims adjudicators clearly substantiate any determination resulting in a finding that benefits have been overpaid for a reason stated in Section 25(j) or Section 69(a). Appropriately detailed fact finding must be conducted to determine the cause of the overpayment and the extent to which the overpayment resulted from (1) agency or claimant error or (2) the claimant's failure to furnish accurate information that the claimant knew, or reasonably should have known, was pertinent to the determination on eligibility for benefits. If it is found that the claimant failed to furnish such information, then it must be determined to what extent the claimant may have knowingly misrepresented or withheld it.

In the context of filing a claim for Unemployment Insurance benefits, fraud occurs when substantial evidence exists that a claimant has provided false information or has failed to provide information that the claimant knows, or reasonably should know, could affect the outcome of an eligibility determination. Fraud encompasses a range of actions and failures to act that includes both intentional misrepresentation of the facts and intentional concealment or non-disclosure of pertinent facts.

(B) A compensable week penalty pursuant to Section 25(j) shall not be made unless the claimant had actual notice of the requirement to report earnings and the notice shall have met the requirements of G. L. c.151A, § 62A(d)(iii).

#### **Compensable Week Determinations Under G.L. c. 151A, § 25(j)**

8. DUA will instruct JSRs and review examiners as follows:

A determination that an individual has “fraudulently collect[ed] benefits while not in total or partial unemployment” (a § 25(j) finding) must (1) identify the specific facts on which the § 25(j) finding is based and (2) state the basis for the determination that these facts establish the fraudulent collection of benefits while not in total or partial unemployment. These two numbered requirements are referred to collectively as the “§ 25(j) requirements.”

A § 25(j) finding may be made only when (1) the facts found make it more probable than not that the individual knew, or reasonably should have known, that the individual provided inaccurate information, or withheld accurate information, concerning a material fact; or (2) committed some other, specifically identified fraudulent act or acts; and (3) as a result, the individual erroneously received benefits.

9. Before DUA issues an appropriate notice under § 25(j), a supervisor will review the proposed determination solely for compliance with (a) the § 25(j) requirements and (b) G. L. c. 151A, § 62A(d)(iii), but not as to content, that is, the supervisor will not review the case file or make any judgment regarding the correctness of the § 25(j) finding.
10. If the review described in Paragraph 9 indicates that the JSR has not complied with the § 25(j) requirements, then the JSR will be directed to comply with them, including conducting any necessary additional fact-finding and modifying the finding as needed.
11. After a § 25(j) finding is made and determined to satisfy the § 25(j) requirements, the claimant shall be sent a notice specifying the reasons for the § 25(j) finding and including notice of appeal rights under G.L. c. 151A, § 39, and the claimant’s right to seek legal representation.
12. DUA will take appropriate action such that, if a § 25(j) finding that satisfies the § 25(j) requirements includes findings that also satisfy the corresponding § 69(a) requirements, such a § 25(j) finding will be given preclusive effect in the making of a § 69(a) finding.

### **Retrospective Relief**

13. As to any claimant whom DUA initially determined (from the date in 2010 when the complaint was filed to the present) to be at “fault” in a separation dispute but later determined that the record in the case did not

support a § 69(a) finding, DUA will make a redetermination in favor of the claimant. DUA will provide notice of this redetermination to affected claimants. The notice will include (1) rescission of the "fault" finding, (2) elimination of future interest payments and crediting of past interest payments toward any remaining overpayment, or, where there is no remaining overpayment, refunding of any past interest payments made by the claimant, and (3) notification to the claimant that the claimant may apply for a waiver of any remaining overpayment and a copy of the waiver application. DUA will provide Plaintiff's counsel with a sample copy of the notice or notices being sent to affected claimants. If DUA determines that more than ten percent of the "fault" findings in 2010 cases were justified, then DUA will provide Plaintiff's counsel with redacted copies of randomly selected files for twenty of those cases. In order that legal services offices in the state be better able to anticipate issues arising out of this retrospective relief, DUA will provide plaintiff's counsel with a list of the zip codes of the claimants for whom this retrospective relief is provided.

#### **DUA Self-Monitoring Period**

14. For the first year following dismissal of the lawsuit, DUA will monitor, on a monthly basis, the numbers of § 69(a) findings it issues in cases where the issue is the reason for the separation and will inform Plaintiff's counsel of that number.
15. Plaintiffs' counsel may request meetings with DUA during the first year following the dismissal of the lawsuit, not more than once per quarter, to discuss concerns regarding the substance of this agreement. Plaintiffs' counsel will submit their concerns in writing, in as much detail as reasonably possible, at least thirty days before each meeting.

#### **Attorneys' Fees**

16. Defendants shall pay \$ 75,000 in attorney's fees to Plaintiff, which Plaintiff and Plaintiff's counsel will accept as payment in full for all services performed and costs incurred through the dismissal of Plaintiff's complaint and during the first year thereafter.

#### **Conditions of Settlement**

17. The following settlement conditions apply:

- a. No later than the execution of a settlement agreement embodying the terms of this document (the settlement agreement), Plaintiff's counsel shall deliver to DUA's counsel a notice of dismissal, fully-executed by Plaintiff's counsel (in the form attached), dismissing the case with prejudice and without costs. DUA's counsel shall hold the stipulation until (1) Plaintiff's counsel receives the attorney's fees agreed upon in Paragraph 16, (2) DUA has amended the SRH as provided in paragraph 7, and (3) DUA certifies to DUA's counsel that it has delivered to Plaintiff's counsel the materials specified in Paragraph 13. Upon completion of the three preceding conditions, DUA's counsel shall file the notice of dismissal with the court.
- b. If the court does not dismiss the action or enters an order or judgment incorporating any of the terms of the settlement agreement, then the settlement agreement shall terminate, Plaintiff's counsel shall return all payments and materials received under the settlement agreement, and the parties shall have no obligations thereunder.
- c. Because the parties agree that the relief provided in this agreement resolves all outstanding matters, no provision of this document or any agreement executed pursuant to this document, including but not limited to the settlement agreement, is intended to provide Plaintiff or his counsel with monitoring or enforcement rights.
- d. Execution of a settlement agreement will not admit or concede any wrongdoing or violation of law, and the fact that a party executes a settlement agreement shall not be evidence of wrongdoing or violation of law. The settlement agreement shall not be admissible in any proceeding, whether judicial, administrative, or rulemaking, as evidence of liability, of wrongdoing, or for any other purpose.