WITHOUT RESTORING INSOLVENT UNEMPLOYMENT TRUST FUNDS AND INCREASING FEDERAL RESERVES, THE 2007-2009 RECESSIONS MAY CAUSE THE DEPLETION OF THE UNEMPLOYMENT TRUST FUND

Student Note

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I. INTRODUCTION

In light of the recent economic situation in the United States, more individuals have become unemployed, meaning that more individuals have filed for and have obtained unemployment benefits. The purpose of the Federal-State Unemployment Insurance Program is to provide unemployment benefits to workers who are unemployed "through no fault of their own" by giving temporary financial assistance to eligible recipients who meet state law qualifications.[1] To provide temporary assistance, states usually fund unemployment compensation for individuals for twenty-six weeks.[2] However, as a result of the decline in the

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1 State *Unemployment Insurance Benefits*, UNITED STATES DEPARTMENT OF LABOR, http://workforcesecurity.doleta.gov/unemploy/uifactsheet.asp (last updated Jan. 13, 2010).

American economy, Congress extended unemployment benefits up to ninety-nine weeks to help individuals who are currently out of work.[3]

The tough economic state of this country has also provided a greater opportunity for individuals to fraudulently obtain unemployment benefits.[4] Many of those who are applying for benefits have not reported side jobs or have continued to collect benefits after returning to work.[5] This is extremely problematic during these difficult economic times because state trust funds are simply inadequate to support the drastic increases in those filing for and obtaining unemployment benefits.[6] Therefore, states have turned to the federal government to bail them out.

The problem with states turning to the federal government in light of the federal extensions is that typically the federal reserves are used to fund benefit extensions. However, in addition to using money from the Federal Unemployment Tax to pay for unemployment benefit extensions,[7] Congress has also

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[2] Vicki Needham, *Obama Pushes for Extension of Jobless Benefits as Weekly Claims Rise*, THE HILL (Nov. 4, 2010, 11:15 AM), http://thehill.com/blogs/on-the-money/801-economy/127713-obama-makes-another-push-for-extension-of-emergency-unemployment-benefits.

[3] *Id.*

[4] Joe Light, *States Struggle to* Stem *False Unemployment Claims*, WALL STREET JOURNAL (July 6, 2010), http://online.wsj.com/article/SB10001424052748703900004575324701356244886.html.

[5] Leslie Kwoh, *N.J.* Unemployment *Insurance Fund Lost $25M in Fraudlent Claims in Last 2 Years*, THE STAR LEDGER (July 5, 2010, 8:53 PM), http://www.nj.com/news/index.ssf/2010/07/nj_unemployment_insurance_fund.html (explaining that common scenarios involved individuals who took side jobs without reporting their wages).

[6] Statement of Jane Oates, Assistant Secretary for Employment and Training, U.S. Department of Labor, Before the Committee on Finance, United States Senate 15 (Apr. 14, 2010), *available at* http://www.dol.gov/_sec/media/congress/20100414_Oates.htm (last visited May 4, 2012).

[7] *Id.*

had to bail out insolvent state funds.[8] Therefore, the federal benefit extensions have added to America's immense national debt.[9]

Many Republicans have opposed the federal extensions because Congress has not paid for such extensions in the past and thereby drastically increased America's debt.[10] This note proposes that if Congress were forced to pay for unemployment benefit extensions in the future, without fixing the insolvent state funds, the Unemployment Trust Fund may cease to exist. Thus, this note will provide a background of unemployment benefit history, discuss the recent economic situation in light of the federal extensions and insolvent state trust funds, and finally suggest the possibility that this may lead to the detriment of the Unemployment Trust Fund.

II. BACKGROUND

The unemployment compensation system in the United States was set up by federal law, but is executed by state laws and state employees.[11] Federal law defines the system by promulgating guidelines, and then each state sets up its own

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8 Kevin Freking, *States Ignored Warnings on Unemployment Insurance*, CNSNEWS.COM (Feb. 21, 2011), http://cnsnews.com/news/article/states-ignored-warnings-unemployment-insurance. *See also* Statement of Jane Oates, *supra* note 6 (explaining how state reserves were low, which led to increased borrowing from the Federal government and also explaiing how Federal accounts have had to borrow to provide funds to the insolvent state funds and pay for the Federal benefit extensions).

9 Tom Murse, *How Unemployment Extensions Benefit the Economy*, ABOUT.COM (Dec. 17, 2010), http://usgovinfo.about.com/od/moneymatters/a/How-Unemployment-Compensation-Helps-the-Economy.htm.

10 Kenric Ward, *LeMieux Blocks Extension of Unemployment Benefits*, SUNSHINE STATE NEWS (Oct. 1, 2010, 4:05 AM), http://www.sunshinestatenews.com/print/1425056.

11 Gerard Hildebrand, *Part III: Federal Standards and Enforcement: Federal Law Requirements for the Federal-State Unemployment Compensation System: Interpretation and Application*, 29 U. MICH. J.L. REFORM 527, 527 (1996).

compensation system following these federal guidelines.[12] The federal-state system was chosen for three primary reasons: (1) an exclusively federal system would be cumbersome, (2) a system with the federal government in charge would provide leadership and uniformity, while state involvement would allow for diversity and experimentation in the system, and (3) a purely federal system would necessitate decisions at the outset and would result in mistakes with wider repercussions.[13] Therefore, the federal-state system was created under the New Deal.[14]

Federal and state unemployment benefit accounts are funded by taxes on employers. State unemployment taxes finance most employee benefits.[15] Federal taxes cover the program's administrative costs and finance a loan fund to cover insolvent states.[16] The federal unemployment account allows states with insolvent unemployment funds to borrow, interest free, from the federal unemployment account.[17]

42 U.S.C.S. § 1104 establishes the Unemployment Trust Fund whereby the Secretary of the Treasury of the United States is able to receive and hold all moneys deposited by a state agency from a state unemployment fund.[18] Although the fund is established as a single fund, the Secretary of the Treasury maintains a separate book account for each state agency in addition to the federal unemployment account.[19] The Secretary of the Treasury is also to pay state agencies out of the fund as

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[12] *Id.*

[13] *Id.* at 529-30.

[14] *Id.*

[15] Amy L. Henrich, *Preferential Treatment of Charities Under the Unemployment Insurance Laws*, 94 YALE L.J. 1472, 1476 n.18 (1985).

[16] *Id.* at 1475 n.17.

[17] *Id.*

[18] 42 U.S.C.S. § 1104(a) (LexisNexis through PL 112-28, approved Aug. 12, 2011).

[19] *Id.* § 1104(e).

long as the payments do not exceed the amount standing in the state's account at the time of the payment.[20]

The grants to states for unemployment compensation are set forth in 42 U.S.C.S. § 503. The statute provides that the Secretary of Labor shall not make payments to any state unless the laws of such state comply with the act.[21] Some of the significant necessary requirements that each state must comply with are: (1) methods of administration that are reasonably calculated to ensure full payment when due; (2) payment of unemployment compensation through public employment offices; (3) opportunity for a fair hearing when an individual is denied benefits; and (4) the payment states receive in their unemployment trust funds must be deposited into the federal Unemployment Trust Fund.[22]

Since all state agencies must meet all of the requirements in 42 U.S.C.S. § 503, the application process for unemployment benefits is generally similar in each state. In some states, individuals can obtain unemployment benefits from their state by filing a claim with their Department of Labor, either by telephone or on the Internet.[23] Upon filing a claim, individuals will be asked for certain information, such as the dates of their former employment and the address of their former employer.[24] Usually claims are filed in the state where the individual works, but if this state is different from the state in which the individual lives, the state Unemployment Insurance agency where one lives can provide information about how to file claims in other states.[25]

State law determines the requisite eligibility requirements for unemployment insurance and benefit amounts, in addition

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20 *Id.* § 1104(f).

21 42 U.S.C.S. § 503(a) (LexisNexis through PL 112-90, approved Jan. 3, 2012).

22 *Id.*

23 *State Unemployment Insurance Benefits, supra* note 1.

24 *Id.*

25 *Id.*

to the length of time benefits are available.[26] In order for a formerly employed individual to qualify for unemployment benefits, that individual must have earned wages for a certain time period, known as a "base period."[27] The base period is then used to calculate a worker's weekly unemployment insurance benefit rate.[28] The formula for calculating unemployment insurance benefit rates varies from state to state, but most states identify the worker's wages in a twelve-month base period.[29] They often then use the highest quarter to derive an average weekly wage and apply fifty percent to the average wage.[30] The amount of benefits received is less than an individual's salary to encourage that individual to find employment.[31] As long as the individual is unemployed through no fault of his or her own and is actively seeking employment, he or she will receive unemployment compensation.[32] Individuals who were discharged for misconduct or who left employment without good cause may be disqualified from obtaining benefits under state law.[33]

Applicants who fraudulently obtain unemployment benefits by falsely representing the wages they earned or failing to report part-time employment will be held responsible for the benefits they were overpaid.[34] In New Jersey, any individual who

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[26] *Id.*

[27] *Id.*

[28] *FAQ: Unemployment Benefits – The Basics*, UNEMPLOYEDWORKERS.ORG, http://unemployedworkers.org/sites/unemployedworkers/index.php/site/faq_basics (last visited Apr. 14, 2012).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *State Unemployment Insurance Benefits*, *supra* note 1.

[33] *FAQ: Unemployment Benefits – The Basics*, *supra* note 28.

[34] *See* 42 U.S.C.S. § 503(g) (LexisNexis through PL 112-90, approved Jan. 3, 2012) (Requiring the deduction of "unemployment benefits otherwise payable to an individual an amount equal to any overpayment made to such

received unemployment benefits that they were not entitled to is required to repay the full amount of unemployment benefits that individual received.[35] This provision is in compliance with federal law that requires States to recover improperly paid unemployment compensation benefits.[36]

III. RECENT ECONOMIC SITUATION IN AMERICA

The recent economic situation in America has been quite grim to say the least. While the economy has shown signs of improvement, the difficult economic situation caused by the severe recession that began at the end of 2007 is far from over.[37] In March 2012, according to the Bureau of Labor Statistics Establishment Survey, employer payrolls increased by 121,000 jobs, and the national unemployment rate fell to 8.2%.[38] While the unemployment rate is still high, it has decreased since 2011 when the American jobless rate was 8.9%.[39] The 2011 annual average unemployment rate was better than the rate in 2010, which was 9.6% (0.7 percentage point more than the 8.9% annual average in 2011).[40] Statistics indicate economic improvement since the period of December 2009 to March 2010, where the number of gross job losses from closing and

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individual under an unemployment benefit program of the United States or of any other State, and not previously recovered.")

[35] Bannan v. Bd. of Review, 691 A.2d 895, 897 (N.J. Super. Ct. App. Div. 1997); N.J. STAT. ANN. § 43:21-16(d) (LexisNexis through New Jersey 214th Legislature).

[36] *Bannan*, 691 A.2d at 897.

[37] *See* Alan B. Krueger, *The Employment Situation in March*, COUNCIL OF ECONOMIC ADVISORS (Apr. 6, 2012, 9:30 AM), http://www.whitehouse.gov/blog/2012/04/06/employment-situation-march.

[38] *Id.*

[39] *Regional and State Unemployment, 2011 Annual Average Summary*, UNITED STATES DEPARTMENT OF LABOR (Feb. 29, 2012, 10:00 AM), http://www.bls.gov/news.release/srgune.nr0.htm.

[40] *Id.*

contracting private sector establishments decreased to 6.4 million from a high of 8.5 million in December 2008.[41]

Further, when comparing the economic situation reported for March 2012 to the end of the first quarter in 2010, there have been signs of significant improvement. Particularly, despite adverse shocks in the economy that have slowed economic growth, the economy has added jobs in the private sector for 25 consecutive months, for a total of 4.1 million jobs.[42] There has not been a net decrease in the amount of overall private sector jobs since March 2010.[43] The Business Employment Dynamics' (BED) findings for the first quarter in 2010 showed decreases in upward trends that began in March 2009.[44] For instance, first-quarter job gains in 2010 fell to five million at expanding establishments.[45] Also, even though closing establishments had a decrease in job losses by 0.1 million, job gains decreased by 0.2 million for opening establishments.[46] Overall, the difference between the number of gross jobs gained and gross jobs lost yielded a net change of -311,000 jobs in the private sector during the first quarter of 2010.[47] The only sector that had net increases in employment in the first quarter of 2010 was education and health services.[48] Therefore, despite slow

[41] *Business Employment Dynamics Summary*, UNITED STATES DEPARTMENT OF LABOR, at 1 (Nov. 18, 2010, 10:00 AM), http://www.bls.gov/news.release/archives/cewbd_11182010.pdf. According to the Bureau of Labor Statistics, "[t]he change in the number of jobs over time is the net result of increases and decreases in employment that occur at all businesses in the economy." *Id.* The Business Employment Dynamics statistics track these employment changes at private business units by quarters. *Id.*

[42] Krueger, *supra* note 37.

[43] *Id.* (graph showing changes in private sector employment from March 2008 through March 2012).

[44] *Business Employment Dynamics Survey*, *supra* note 41, at 2.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

economic growth, since March 2010, private sector jobs have showed overall net gains showing signs of economic improvement.[49]

Further, in comparison to the 2010 unemployment statistics, the unemployment situation in 2011 improved overall in the states. In 2011, forty-eight states had their annual average unemployment rates decline,[50] whereas in September 2010, only twenty-three states and Washington, D.C. reported a drop in unemployment.[51] In September 2010, sixteen states had unemployment rates that remained unchanged, while eleven states reported increases in unemployment rates.[52] However, many states still had unemployment rates above ten percent at the end of 2010.[53] Nevada's unemployment rate was the country's highest for five straight months in 2010, as it remained at 14.4% in August and September.[54] The September 2010 rates were, however, slightly better than the rates in August.[55] For instance, the August 2010 report showed twenty-seven states showing increases in unemployment, thirteen states showing decreases, and ten states and Washington D.C. showing no change in unemployment rates.[56] However, despite the subtle decline in unemployment rates, the national unemployment rate remained unchanged in September 2010 at 9.6%.[57] Therefore, when compared to the national

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[49] Krueger, *supra* note 37 (graph showing net increases and decreases in jobs from March 2008 through March 2012).

[50] *Regional and State Unemployment, 2011 Annual Average Summary*, *supra* note 39.

[51] Joseph Pisani, *Jobless Rates in Most States Show Little or No Improvement*, CNBC (Oct. 22, 2010, 10:55 AM), http://www.cnbc.com/id/39796051.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] Pisani, *supra* note 51.

unemployment rate of 9.6% in September 2010 and the subtle decline in unemployment rates in 2010,[58] the more significant decline in state unemployment rates and the decline in the national unemployment rate to 8.9% in 2011 demonstrate economic improvement.[59]

However, while there has been economic improvement, the difficult economic situation still lingers today in 2012, over four years after the recession began at the end of 2007. Particularly, as of December 2011, there was still a job gap of 12.1 million jobs.[60] A report from the Hamilton Project published in January 2012 indicates that if the American "economy adds about 208,000 jobs per month, which was the average monthly rate for the best year of job creation in the 2000s," it will take 12 years, or until March 2024, for the job gap to close.[61] The job gap is the number of jobs the American economy must create to restore employment to pre-recession levels, while also absorbing the 125,000 people who are new labor entrants each month.[62] If a more optimistic rate of 321,000 jobs per month are created, "which was the average monthly rate for the best year of job creation in the 1990s," by February 2017, or in five years, the economy will reach pre-recession employment levels.[63]

As the statistics above demonstrate, the recent employment situation in America, while improving, remains quite grim. Therefore, there has been a lot of pressure on the President and Congress to fix America's unemployment situation. The solution that has been adopted by the President and Congress

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[58] *Id.*

[59] *Regional and State Unemployment, 2011 Annual Average Summary*, *supra* note 39.

[60] Michael Greenston & Adam Looney, *Shrinking Job Oportunites: The Challenge of Putting Americans Back to Work*, THE BROOKINGS INSTITUTION (Jan. 6, 2012), http://www.brookings.edu/opinions/2012/0106_jobs_greenstone_looney.aspx?p=1.

[61] *Id.*

[62] *Id.*

[63] *Id.*

has been the enactment of federal unemployment benefit extensions to help combat the vast number of unemployed individuals since the Great Recession.

IV. CONGRESS' SOLUTION TO AMERICA'S UNEMPLOYMENT CRISIS

In June 2008 Congress enacted the Emergency Unemployment Compensation (EUC08 or EUC) program as part of its recognition that unemployment workers would have a significantly harder time finding employment because of the recent economic decline.[64] Initially, EUC provided for an additional 13 weeks of benefits that would be financed by the federal government for eligible individuals in states who exhausted their regular UI benefits.[65] The program was first expanded and extended in February 2009.[66] Since then, it has been renewed and expanded a number of times because of the nation's high unemployment rate.[67] EUC provides four tiers of benefits[68] to allow individuals to collect up to a maximum of 99 weeks of unemployment compensation benefits while they are unable to find work during these difficult economic times.[69] Congress passed the most recent extension of unemployment benefits on February 22, 2012 as part of the Middle Class Tax Relief and Job Creation Act of 2012 (The Act).[70] Without this extension, EUC benefits were set to expire.[71]

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64 UNEMPLOYMENT INSURANCE EXTENSIONS AND REFORMS IN THE AMERICAN JOBS ACT, EXECUTIVE OFFICE OF THE PRESIDENT 2 (Dec. 2011), *available at* http://www.whitehouse.gov/sites/default/files/ui_report_final.pdf.

65 *Id.*

66 *Id.*

67 *FAQ: Unemployment Benefits – The Basics*, *supra* note 28.

68 UNEMPLOYMENT INSURANCE EXTENSIONS AND REFORMS IN THE AMERICAN JOBS ACT, *supra* note 64, at 2.

69 Needham, *supra* note 2.

70 Advisory from Jane Oates, Assistant Secretary, to State Workforce Agencies, Unemployment Insurance Program Letter

The EUC08 Program has been extended to weeks of unemployment ending on or before January 2, 2013, meaning that individuals must exhaust an EUC08 tier before December 29, 2012 (in most states) in order to qualify for the next tier of benefits.[72] While the new extensions are similar to past EUC extensions, there are notable differences to the EUC08 tier structure.[73] Like past extensions, the new extensions under the Middle Class Tax Relief and Job Creation Act extend the filing deadlines for starting any new tier of the EUC program.[74] The changes extend the filing and payment dates for individuals who are receiving Extended Benefits.[75] The new extensions do not provide any additional weeks of unemployment insurance for individuals who have exhausted their benefits under the current federal extension program.[76] However, these new enactments differ from past extensions because they gradually reduce the number of maximum potential weeks individuals can collect benefits from 99 weeks to 93 weeks.[77] One of the most notable changes to this current EUC08 program extension is that the "phase-out" period, which previously allowed individuals who had amounts remaining in their EUC08 accounts to collect these

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No 04-10, Change 9, at 1 (March 5, 2012), *available at* http://wdr.doleta.gov/directives/attach/UIPL/uipl_4_10_change9_acc.pdf [hereinafter "Advisory"].

[71] UNEMPLOYMENT INSURANCE EXTENSIONS AND REFORMS IN THE AMERICAN JOBS ACT, *supra* note 64, at 4.

[72] Advisory, *supra* note 70, at 2 (there are new work search requirements, a requirement to participate in reemployment services and in reemployment eligibility and assessment activities).

[73] *Id.* at 2-6.

[74] *New Developments on Federal Unemployment Extensions*, NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, http://lwd.dol.state.nj.us/labor/ui/content/ui_extensions.html (last visited Apr. 18, 2012).

[75] *Id.*

[76] *Id.*

[77] *Id.*

amounts after the program extension stopped, is eliminated.[78] This means that no EUC08 First, Second, Third, or Fourth-Tier payments can be made after the program expires on January 2, 2013.[79]

The EUC08 program is available in all states to individuals who have exhausted their regular state unemployment benefits.[80] Individuals whose EUC Tier 1 accounts are established before September 2, 2012 will be eligible for up to 20 weeks of benefits or 80% of their maximum regular Unemployment Compensation (UC) entitlement, whichever is less.[81] For those who file Tier 1 claims after September 2, 2012, individuals will be eligible for up to 14 weeks of benefits, or 54% of their maximum regular UC entitlement, whichever is less.[82] Those whose EUC08 Tier 1 accounts are established before the reduction of the maximum entitlement amount, will continue to receive the balance of their EUC08 First Tier until either the exhaustion of their benefits, or the final payable week of EUC08, whichever occurs first.[83]

Once an individual exhausts Tier 1 benefits, Tier 2 extensions kick in.[84] Tier 2 benefits are available for 14 weeks or 54 percent of the maximum entitlement, whichever is less, in all states for

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[78] Advisory, *supra* note 70, at 2

[79] *Id.*

[80] *Emergency Unemployment Compensation 2008 (EUC) Program*, UNITED STATES DEPARTMENT OF LABOR (Feb. 27, 2012), http://www.ows.doleta.gov/unemploy/pdf/euc08.pdf.

[81] Advisory, *supra* note 70, at 3.

[82] *Id.*

[83] *Id.*

[84] *See Unemployment Benefit Extensions*, NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, http://lwd.dol.state.nj.us/labor/ui/content/ui_benefit_extensions.html (last visited Apr. 18, 2012) (explaining that there is no need for individuals to apply for EUC Tier 2 claims, for once they exhaust their Tier 1 benefits, their EUC Tier 2 claim is automatically filed on their behalf by the Division of Unemployment Insurance).

weeks of unemployment ending before June 1, 2012.[85] After unemployment weeks ending June 1, 2012, Tier 2 extensions will only be available for states with a three-month seasonally adjusted total unemployment rate (TUR) of at least six percent.[86] If an individual qualifies for EUC Tier 2 benefits before June 1, 2012 in a state that no longer qualifies for EUC08 Tier 2 benefits when the trigger becomes effective, they can continue to collect their remaining Tier 2 balance until this balance is either exhausted or until the final payable week of EUC08 benefits.[87]

After the extension of EUC Tier 2 benefits, EUC Tier 3 benefits are available for weeks of unemployment ending before June 1, 2012 for up to 13 weeks or the lesser of 50 percent of the maximum regular UC entitlement.[88] Tier 3 benefits are only available for weeks of unemployment before June 1, 2012 in states with either a 13-week insured unemployment rate (IUR) of at least four percent, or a three-month seasonally adjusted TUR of at least six percent.[89] After June 1, 2012 and on or before September 2, 2012, 13 weeks or the lesser of 50 percent of an individual's maximum UC entitlement will be available for individuals in states with a three-month seasonally adjusted TUR of at least seven percent.[90] For weeks of unemployment ending after September 2, 2012, the maximum entitlement will be reduced to the lesser of nine weeks or 35 percent of the maximum regular UC entitlement in states with a seasonally adjusted TUR of at least seven percent.[91] Individuals whose EUC Tier 3 accounts were augmented before the maximum entitlement reduction will be able to receive the balance of these

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85 Advisory, *supra* note 70, at 4.

86 *Id.* at 2.

87 *Id.*

88 *Id.* at 4.

89 *Emergency Unemployment Compensation 2008 (EUC) Program*, *supra* note 80.

90 Advisory, *supra* note 70, at 3; *Emergency Unemployment Compensation 2008 (EUC) Program*, supra note 80.

91 Advisory, *supra* note 70, at 4.

benefits until exhaustion or the final payable week of EUC08, whichever occurs first.[92]

EUC Tier 4 claims for weeks of unemployment ending before February 22, 2012 are available for up to six weeks or 24 percent of the maximum regular UC entitlement, whichever is less,[93] for states with a 13-week IUR of at least six percent, or a three-month seasonally adjusted TUR of at least 8.5 percent.[94] For states that are in an Extended Benefit (EB) period, EUC08 Tier 4 are available for either six weeks or the lesser of 24 percent of the maximum entitlement for weeks of unemployment after February 22, 2012 and before June 1, 2012.[95] For states that are not in an EB period, the maximum entitlement is increased for unemployment weeks ending after February 22, 2012 and before June 1, 2012 to up to 16 weeks of benefits for states that meet the 13-week IUR of at least six percent or the three-month seasonally adjusted TUR of at least 8.5 percent.[96] If an individual who is receiving EUC Tier 4 benefits in a state that was in an EB period on February 22, 2012, but later triggers off of this period, that individual is not eligible to collect the additional maximum entitlement benefits that individuals in states who were not in an EB period on February 22, 2012 are entitled to receive.[97] Also, individuals who exhaust Tier 4 benefits with respect to weeks of unemployment ending before February 22, 2012 are not eligible to have the additional amounts of EUC08 Tier 4 added to their accounts.[98] However, in states whose EB periods will end before June 1, 2012, all individuals with new EUC08 Fourth Tier entitlement could

[92] *Id.*

[93] See *id.*

[94] *Emergency Unemployment Compensation 2008 (EUC) Program*, supra note 80.

[95] Advisory, *supra* note 70, at 4.

[96] *Emergency Unemployment Compensation 2008 (EUC) Program*, supra note 80.

[97] Advisory, *supra* note 70, at 4.

[98] *Id.*

qualify for the increased maximum entitlement beginning the first week after the EB period expires.[99]

For weeks of unemployment ending on or after June 1, 2012, a three month seasonally adjusted TUR of at least nine percent is necessary for EUC08 Tier 4 claims to be available in states.[100] For all states that meet these qualifications, whether or not they are in an EB period, for weeks of unemployment ending on or after June 1, 2012 and on or before September 2, 2012, Tier 4 benefits are available for either 24 percent of the maximum regular UC entitlement or for six weeks.[101] Individuals in states not in an EB period whose accounts were augmented with Tier 4 amounts before the maximum entitlement was reduced may continue to receive the balance of their Tier 4 benefits until exhaustion or the expiration of EUC08, whichever occurs first, provided they are otherwise eligible to receive these benefits.[102] For weeks of unemployment ending after September 2, 2012 and on or before January 2, 2013, the maximum entitlement is increased in all states to ten weeks or 39 percent of the maximum UC entitlement, whichever is less.[103] Individuals who established an EUC08 Tier 4 claim with respect to weeks of unemployment ending before September 2, 2012 are not able to have the additional amounts of EUC08 Tier 4 benefits added to their account.[104]

The 2012 extension of the EUC Program also changed the Extended Benefits Program.[105] As of March 4, 2012, states must pay any EUC08 entitlement before they pay any EB entitlement.[106] Although usually a federal-state funded

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[99] *Id.* at 3.

[100] *Id.*

[101] *Id.* at 5.

[102] *Id.*

[103] Advisory, *supra* note 70.

[104] *Id.* at 5-6.

[105] *Id.* at 8.

[106] *Id.*

program, the Federal government will continue to reimburse states 100 percent of the costs of the sharable program for weeks of unemployment beginning before December 31, 2012.[107] The phase out period for states to receive 100 percent reimbursement has also been extended.[108] If an individual received EB with respect to one or more weeks of unemployment beginning after February 17, 2009 and before December 31, 2012, the Federal government will provide 100 percent of the EB benefit costs for the weeks of unemployment ending before June 30, 2013.[109] States are allowed to continue using a three-year "look back" to determine whether they remain in an EB period through December 31, 2012.[110] Also, states can continue to allow individuals without an overlap in their benefit year and the EB period to qualify for EB after they exhaust EUC08, even if the benefit year of those individuals ended, for weeks of unemployment beginning after February 17, 2009 and before December 31,2012.[111] The suspension of the prohibition of Federal sharing for the first week of EB if a state allows individuals to be compensated for the first week of regular benefits at any time or under any circumstances is also extended by the Act to the week of unemployment ending on or before June 30, 2013.[112]

The enactment of the EUC program and its extensions has often been the subject of immense debate and discussion. Those who argue for extending unemployment compensation say that it helps to stimulate the economy during the recession by lessening the recession's effect on Americans.[113] For instance, providing unemployment benefits to the unemployed provides a multiplier effect because a dollar spent on unemployment

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[107] *Id.*

[108] *Id.*

[109] Advisory, *supra* note 70, at 8.

[110] *Id.* at 9.

[111] *Id.* at 8.

[112] *Id.* at 8-9.

[113] *FAQ: Unemployment Benefits – The Basics*, supra note 28.

benefits has greater circulation than a dollar spent on other parts of the government's stimulus package.[114] Those against unemployment benefits argue that providing unemployment insurance to unemployed workers can actually be a disincentive for some workers to aggressively search for employment or accept an available job offer.[115] The sides split along political lines with Republicans favoring the slashing of the duration of unemployment compensation and Democrats favoring extended payments.[116]

The debate has been ongoing and is nothing new, for Republicans argue that unemployment benefit extensions should be paid for and that slashing the duration of benefits is the solution to getting people back to work whereas Democrats push for federal extensions,[117] some even beyond the 99 weeks currently available.[118]

The debates that took place in Congress in 2010 about whether to extend EUC benefits are demonstrative of each side's arguments. Extension of benefits in 2010 was pushed for by Democrats, but held up by congressional Republicans.[119] Republicans refused to vote to extend unemployment

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[114] *Id.*

[115] *Unemployment Insurance Extensions and Reforms in the American Jobs Act*, *supra* note 64, at 8.

[116] 158 CONG. REC. S891 (daily ed. Feb. 17, 2012) (statement of Senator Reed).

[117] *See* 158 CONG. REC. H912 (daily ed. Feb 17, 2012) (statement of Rep. Levin).

[118] 158 CONG. REC. H138 (daily ed. Jan. 24, 2012) (statement of Rep. Lee) (urging conferees to consider adding 14 weeks of Tier 1 benefits to the 99ers who have exhausted their benefits). The expansion of benefits beyond 99 weeks has been proposed before, for in 2010, Congressional Democrats proposed an expansion of the EUC Program that would have added a fifth tier of UI benefits in states with unemployment rates above 7.5 percent. Ward, supra note 10. This proposal would have added an additional twenty weeks of UI benefits to workers who exhausted their EUC benefits. *Id.* However, this proposal was rejected and blocked by Republicans. *Id.*

[119] Needham, *supra* note 2.

compensation unless it was paid for.[120] Historically, Congress has approved unemployment benefit extensions without providing for their payment.[121] The concern was that the government, which was in $13 trillion worth of debt, would never get out of debt unless Congress started to pay for things such as unemployment extensions.[122] The 2010 extension would add another $34 billion to the national debt.[123] Many Republicans wanted to direct unnecessary funds from the stimulus plan into more beneficial areas to help those who are chronically unemployed.[124]

Particularly, with respect to the extension of the EUC program, Democrats argued that the Republicans do not want to help those who are unemployed through no fault of their own.[125] Democrats contended that extending unemployment benefits would lead to more jobs, higher wages, and a stronger economy.[126] They also reasoned that the government should be able to say to American workers, "You have played by the rules. You have worked hard. You have lost your job through no fault of your own. You have these benefits, but we must do more to create jobs, to create more jobs."[127]

However, with respect to this 2010 proposal, Republicans expressed their concerns that the focus should be on creating

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[120] *Id.*

[121] *Id.*

[122] 156 CONG. REC. H5940 (daily ed. July 22, 2010) (Statement of Rep. Boustany).

[123] *Id.*

[124] *Id.*

[125] 156 CONG. REC. H5940 (daily ed. July 22, 2010) (Statement of Rep. Pelosi).

[126] *See id.* (arguing that the Economic Policy Institute released a report that demonstrated that the money given to the unemployed would be spent on necessities injecting demand into the economy and creating approximately 1.4 million jobs).

[127] 156 CONG. REC. H5941 (daily ed. July 22, 2010) (Statement of Rep. Pelosi).

jobs as opposed to extending unemployment benefits without paying for them.[128] For instance, Congressman Linder pointed out that the stimulus plan did not create 3.7 million jobs as it promised.[129] Congressman Linder also argued that unemployed workers want real jobs as opposed to two years of unemployment benefits.[130] Ultimately, however, if unemployment benefits, according to Congressman Linder, "are the most stimulative thing we can do," then the economy should cut other less-effective stimulus spending and use that money to pay for unemployment benefits.[131] Congressman Linder urged others to refuse to support more spending for EUC extensions unless they were paid for.[132]

The new extensions adopted in February 2012 reflect and address some of the concerns that were expressed by Republicans in previous years for unemployment benefit extension and expansion. For instance, unlike past extensions, Congress is paying for these EUC extensions by allowing the federal government to auction off public airwaves that are currently used for television and by increasing the contributions new federal workers must make to their pensions.[133] Further, as explained above, these extensions gradually reduce the number of weeks of benefits in the different tiers.[134] Many congressional Democrats are extremely displeased with these two measures,[135] especially the decision to increase the contributions of new

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[128] 156 CONG. REC. H5942 (daily ed. July 22, 2010) (Statement of Rep. Linder).

[129] *Id.* at H5941.

[130] *Id.* at H9542.

[131] *Id.*

[132] *Id.*

[133] *Lucy Madison, Congress Passes Extension of Payroll Tax Cut, Unemployment Benefits*, CBS NEWS (Feb. 17, 2012, 3:41 PM), http://www.cbsnews.com/2102-503544_162-57380261.html?tag=contentMain;contentBody.

[134] Advisory, *supra* note 70, at 3-4.

[135] *See, e.g.*, Madison, *supra* note 133.

federal employees. For instance, Congressman Hastings argued, "Republicans don't think twice about limiting Federal workers' ability to support their families but are more than willing to shut down the government when bankers are asked to pay their fair share of taxes on their bonuses."[136] He further asked, "How much can we continue to pick on Federal workers?"[137] Congressman Hastings added that these workers who are going to have to pay more to foot this extension are postal workers, social workers, police officers, teachers, nurses, etc. who have already had their pay frozen for two years and whose bank accounts have already been broken.[138] As pointed out by Congressman Hoyer, no one else—no millionaire, billionaire, carried-interest beneficiary, or oil company—has been asked to pay, other than Federal employees.[139]

Meanwhile, Republican House Representatives like Congressman Camp focused on the positives stemming from this recent extension.[140] Most notably, Speaker Camp pointed out that the unemployment program has added almost $200 billion to America's national debt over the past four years, and that paying for this extension is setting a clear precedent "that Congress must live within its means, no more spending unless its [sic] paid for. Period."[141]

Despite all of the politics surrounding unemployment benefit extensions, the recent economic situation in America as noted is still grim. As of the fourth quarter of 2011, the United States'

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136 158 CONG. REC. H908 (daily ed. Feb. 17, 2012) (statement of Rep. Hastings).

137 *Id.*

138 *Id.*

139 158 CONG. REC. H913 (daily ed. Feb. 17, 2012) (statement of Rep. Hoyer).

140 158 CONG. REC. H911 (daily ed. Feb. 17, 2012) (statement of Rep. Camp).

141 *Id.*

national debt was approximately $15.5 trillion.[142] Thus, providing means to finance current benefit extensions is something that should be of bipartisan concern and priority. While unemployment benefits may be one of the only options to keep families on their feet and prevent them from falling below the poverty line during these difficult economic times,[143] we must ask how these extensions that have been available for four years and that have not been paid for in the past, coupled with the recent revelations of the vast amount of people fraudulently collecting unemployment benefits, will impact the unemployment trust fund.

V. FRAUDULENT COLLECTION OF UNEMPLOYMENT BENEFITS

In addition to seeing increased numbers in unemployment insurance claims, states have also seen increases in the number of fraudulent unemployment claims filed during this recession.[144] In 2010, $17 billion was paid out in fraudulent unemployment benefits, according to federal officials.[145] Almost 30 percent of the wrong payments made in 2010 went to individuals who continued to claim benefits after they returned to the workforce.[146] This was nearly five times more than claims paid in 2009, where the Department of Labor reported that nearly $3 billion was lost to fraudulent unemployment benefit claims in 2009.[147] This is roughly twice the amount of money

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[142] Kimberly Amadeo, *The U.S. National Debt and How It Got So Big*, ABOUT.COM, http://useconomy.about.com/od/fiscalpolicy/p/US_Debt.htm (last updated Mar. 3, 2012).

[143] UNEMPLOYMENT INSURANCE EXTENSIONS AND REFORMS IN THE AMERICAN JOBS ACT, *supra* note 64, at 7.

[144] Light, *supra* note 4.

[145] *States Crack* Down *on Unemployment Insurance Fraud*, FOXNEWS.COM (July 4, 2011), http://www.foxnews.com/politics/2011/07/04/states-crack-down-on-unemployment-insurance-fraud.

[146] *Id.*

[147] Light, *supra* note 4.

that was lost to fraudulent claims in 2008.[148] The increase in money paid out in fraudulent claims occurred despite the decrease in the rate of fraud in 2009—which was 2.14 percent as opposed to 2.8 percent in 2008—as there was an overall jump in unemployment payments from $48.6 billion in 2008 to $140 billion in 2009.[149] The higher amount of benefits paid resulted in higher levels of funds lost to dishonesty.[150]

The most common type of unemployment fraud involved people who were previously unemployed but continued to collect unemployment benefits after finding work.[151] The reason people are tempted to continue collecting unemployment checks after finding a job is related to America's recent economic situation. For instance, "[m]any newly re-employed people accumulated debts during unemployment and took lower-paying jobs than they once had," said Ohio fraud investigator Mickey Ford.[152] Also, according to Gary Burtless, an economist for the Bookings Institution, the larger potential intake of unemployment benefits made possible by the recent federal extensions of unemployment benefits lured people into committing fraud.[153]

The reason so many people have been able to get away with fraudulent unemployment claims is that state agencies do not have the detection resources to keep up with the increase in suspect claims.[154] For instance, in 2010, Florida had only eleven field investigators, which was only one more than the department had in 2008, while the number of unemployment insurance payments in the state more than doubled during that time.[155] This caused the state to run out of money to pay claims,

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

153 Light, *supra* note 4.

154 *Id.*

155 *Id.*

and forced state officials to borrow over $1.6 billion, as of 2010, to keep up with the number of claims filed.[156] George Wentworth, a policy analyst for the National Employment Law Project, an advocacy organization for low-wage workers and the unemployed, investigated the issue and found that "states ha[d] known about this [fraud] for a while, but most agencies weren't prepared for the volume of claims they've had to handle, making the problem worse."[157]

Other problems included wider overpayments made erroneously to ineligible employees laid off for cause and payments made to those who received benefits calculated on the basis of faulty information from an employer.[158] State auditors estimated that about 9.3 percent of the claims that states paid out in 2009 from regular unemployment reserves should not have been paid.[159]

Investigators were only able to detect continued benefit collection after re-employment when they matched the rolls of benefit collectors to a national database of new hires.[160] However, it can take months before the suspect is contacted.[161] In 2010 employers reported the month rather than the day that an individual was hired.[162] Therefore, investigators had to take additional steps to see if there was an overlap in the time the individual was still receiving benefits and began working.[163] On average, as of July 2010, state investigators were able to detect a little more than half of the claims that would be detectable under normal measures.[164] However, states like Oregon and

156 *Id.*

157 *Id.*

158 *Id.*

159 Light, *supra* note 4.

160 *Id.*

161 *Id.*

162 *Id.*

163 *Id.*

164 *Id.*

Arkansas were missing nearly eighty percent of fraudulent claims as of July 2010, according to the Department of Labor.[165] Plus, even though some states detected a considerable amount of fraudulent claims, because of their limited resources, many state departments that detected improper payments only focused on claims that involved large amounts or that were easy to catch.[166]

Moreover, detecting more sophisticated schemes, such as when an employee is paid off the books or works as an independent consultant without reporting his income, is even more difficult for state labor departments to spot.[167] State fraud investigators described this situation as "hit and miss at best."[168]

Even after state labor officials detect fraud, more work is required to get the money back.[169] Many individuals who are caught do not have the money to pay back the benefits.[170] Most benefits are recovered years later "by offsets against future unemployment benefits, garnishing state and federal tax refunds, or through property liens."[171]

One of the states hit the hardest by fraudulent unemployment claims was New Jersey. During the years 2008 and 2009, the New Jersey unemployment insurance fund lost $25 million in fraudulent claims paid.[172] In fact, from 2006 to July 2010, the state's fund lost nearly $100 million.[173] From

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165 Light, *supra* note 4.

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.*

170 *Id.*

171 Light, *supra* note 4.

172 Bob Holt, *N.J. Unemployment Hit Hard by Fraudulent Claims*, NEWJERSEYNEWSROOM.COM (July 6, 2010, 4:57 PM), http://www.newjerseynewsroom.com/economy/nj-unemployment-hit-hard-by-fraudulent-claims.

173 *Id.*

2006 to 2008, fraudulent claims in New Jersey rose forty percent. [174] In 2009, the number of fraudulent claims dropped, but in the first quarter of 2010, fraudulent claims rose again with $7.25 million being paid out.[175] Deputy Attorney General Scott Patterson, who oversees the prosecution of labor-fraud cases, reported in 2010, "[m]ost people we talk to say, 'Yeah, I know I wasn't entitled to those benefits, but I really needed the money.'"[176]

In July 2010, the department reported that, "it depend[ed] largely on tipsters and quarterly cross-checking of records" to reveal unemployment fraud.[177] The most common scenarios involved laid off workers who failed to report new employment or who took side jobs without reporting their wages, and disabled workers who filed for unemployment even though they were only eligible for disability benefits.[178]

State labor officials reported in 2010 that because of the time and difficulty involved in detecting violations, approximately one-third of fraudulent claims are never recovered.[179] In most instances, officials can recoup the loss by sending a letter to the claimant and requesting payment.[180] New Jersey law actually requires "the full repayment of unemployment benefits received by an individual who, for any reason, regardless of good faith, was not actually entitled to those benefits."[181] The purpose of

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[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] Kwoh, *supra* note 5.

[178] *Id.*

[179] Holt, *supra* note 172.

[180] Kwoh, *supra* note 5. *See also* 42 U.S.C.S. § 503(g)(1) ("A State shall deduct from unemployment benefits otherwise payable to an individual an amount equal to any overpayment made to such individual under an unemployment benefit program of the United States or of any other State, and not previously recovered."); N.J. STAT. ANN. § 43:21-16(d) (allowing state officials to reduce the fraudulent amount from any future benefits payable to such individual).

[181] *Bannan*, 691 A.2d at 897.

the recoupment provision is to protect the public's interest in preserving the Unemployment Trust Fund.[182]

However, despite the purpose of the recoupment provision, it is only useful if an individual applies for unemployment benefits after the individual has fraudulently received benefits. If an individual does not apply for benefits again and cannot repay the benefits, "the department has the authority to withhold wages, income tax credits or assets from property sales."[183] If this fails, the department will refer the case to the Attorney General's Office to prosecute the claim, but this process can take several years.[184] In particular, in 2010, the department reported that it only recently closed cases that were initiated before the recession.[185]

However, in 2010, labor officials defended the way they handled benefits, blaming the increased fraud mostly on the recession.[186] New Jersey state labor officials reported that the fraudulent benefits paid constituted less than one percent of the $3.5 billion paid in unemployment benefits in 2009.[187] In particular, as of 2010, the Department noted that it had nearly doubled its call center work force to 220 full and part-time employees since the recession began in order to handle the increased number of claims.[188]

Even though the Department increased its workforce, there were more than 7,300 fraudulent claims detected in 2009, which, according to labor officials, "reflect[ed] the desperation of cash-strapped workers as they struggle through the recession."[189] Most claimants knew they were doing something

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[182] *Id.*

[183] Kwoh, *supra* note 5.

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] Holt, *supra* note 172.

[188] *Id.*

[189] Kwoh, *supra* note 5.

wrong, but they justified their actions as victimless crimes hoping not to get caught.[190] Jeff Henninger, an attorney in Tinton Falls, New Jersey who was swamped with inquiries from claimants said in July 2010, "All they know is today they're feeding their family."[191] The high incidence of fraud came at a time when New Jersey and other states have been struggling to decrease the shortage in their jobless funds.[192] At the end of June 2010, New Jersey's unemployment insurance fund faced a $1.8 billion deficit.[193]

Due to the vast increase in unemployment claims and the immense number of fraudulent benefit claims states have been discovering, the Unemployment Trust Fund may eventually cease to exist without repair to the way states handle fraud prevention, detection and prosecution. Recently, the Federal government through the Middle Class Tax Relief and Job Creation Act of 2012, coupled with initiatives by the United States Department of Labor, has taken action to help states improve their fraud prevention, detection, and prosecution methods.

First, the Middle Class Tax Relief and Job Creation Act of 2012 amended 42 U.S.C.S 503(g)(1) from "may deduct" to "shall deduct," and thus requires states to deduct from unemployment benefits an amount equal to the amount that individual was overpaid under an unemployment benefit program of the United States or any other state that had not been previously recovered.[194] This includes the recovery of fraudulent benefits collected by individuals receiving EUC08 benefits as well.[195] Under the Act, states are now required, in accord with the procedures they use to recover regular benefits paid by the state, to recover any EUC08 overpayments by offset for eligible

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[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] 42 U.S.C.S. §503(g)(1) (LexisNexis through PL 112-106 approved Apr. 5, 2012).

[195] Advisory, *supra* note 70, at 7.

individuals.[196] The previous law allowed state to recover these overstatements by offset but this was capped at 50 percent of the weekly benefit amount.[197] The offset is no longer capped; however, states cannot recover these overpayments until individuals are given an opportunity for a fair hearing and a determination becomes final.[198]

Further, in March 2012, the U.S. Department of Labor (DOL) provided states with new resources to help them detect, prevent, and recover fraudulent unemployment benefits by giving the states The Fraud Tips and Leads Gateway.[199] This new online tool provides the public with a portal to report fraud and will help states aggressively investigate tips and leads as well as prosecute those who commit fraud.[200] The DOL has also begun to publish new, consumer-friendly materials to highlight the most common mistakes that claimants make and ways businesses can avoid negative tax implications of improper payments.[201] States are working with the Department to put these materials on display in public areas and post them on the Internet.[202]

This new online tool introduced by the DOL is just one of the ways the DOL has responded to the improper payment of unemployment insurance. In 2011, the DOL partnered with eleven "High Impact" states to aggressively address the improper payment of benefits.[203] In late September/early

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[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *DOL Unveils New Online Tool Targeting Unemployment Insurance Fraud*, IFAWEBNEWS.COM (Mar. 15, 2012), http://ifawebnews.com/2012/03/15/dol-unveils-new-online-tool-targeting-unemployment-insurance-fraud/.

[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] *Unemployment Insurance (UI) Improper Payments*, UNITED STATES DEPARTMENT OF LABOR, http://www.dol.gov/dol/maps/strategies.htm (last updated Sept. 30, 2011).

October 2011, all states participated in a virtual institute that these initial eleven "High Impact" states completed in June 2011 to develop strategic plans to combat improper payments.[204] The DOL began identifying states with persistently high improper UI payments as "High Priority" in September 2011.[205] Each year it will identify such states and work closely with them to identify the impediments, action steps, and technical assistance strategies to improve performance.[206] The specific focus is on prevention.[207] The DOL identified nine core strategies that states can use to lower the amount of benefit payments they make that are improper.[208] One of the most notable is the National Directory of New Hires (NDNH) Recommended Operating Procedures (ROP).[209] The DOL has been encouraging states to use NDNH for several years to help them identify and reduce improper UI payments.[210] Initially developed for child support enforcement, the NDNH allows for improved access to wage data and data from other states regarding new hires.[211] The DOL has also encouraged the use of the Treasury Offset Program (TOP), administered by the Treasury Department, which allows states to recover improper payments from Federal income tax funds.[212]

One of the states that has most recently benefited from TOP is Pennsylvania, for it recouped $6.5 million in fraudulent

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[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Unemployment Insurance (UI) Improper Payments*, *supra* note 203.

[210] *Id.*

[211] *Id.*

[212] *Id.*

unemployment benefits.[213] PA's Labor and Industry department started notifying claimants whose federal tax refund may be affected in November 2011, and by February 2012, nearly 9,400 people were notified, totaling overpayments in the amount of $50.8 million.[214] As of March, PA used TOP to reclaim $6.5 million from the 2,391 federal income tax refund interceptions.[215] Claimants whose refunds are intercepted receive notice from Labor & Industry.[216] They are given contact information for the department's Benefit Payment Control Section if they require clarification as to why their refund was intercepted.[217]

Additionally, New Jersey took its own initiative to battle unemployment insurance fraud. Specifically, in March of 2011, as part of Governor Christie's strategy to eliminate government waste, New Jersey instituted an unprecedented anti-fraud effort at the state Department of Labor and Workforce Development (LWD).[218] In the first five months of its enactment, the program protected taxpayers in NJ against what is conservatively estimated at $56 million in fraudulent payments.[219] Instead of focusing its attention on recoupment efforts as it had done in the past, the department focused on stopping fraud before it

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213 *Pennsylvania Recoups $6.5 Million in Unemployment Benefits from Fraudulent Claimants' Federal Tax Refunds*, YAHOO! NEWS (Mar. 8, 2012), http://news.yahoo.com/pennsylvania-recoups-6-5-million-unemployment-benefits-fraudulent-200706453.html.

214 *Id.*

215 *Id.*

216 *Id.*

217 *Id.*

218 Brian T. Murray, Oct-26-11 Christie Administration's Unemployment Insurance Anti-Fraud Program Saves More Than $56 Million in Tax Dollars in Five Months, New Program Wins U.S. Department of Labor Innovation Award, NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT (Oct. 26, 2011), http://lwd.dol.state.nj.us/labor/lwdhome/press/2011/20111026_Fraud.html.

219 *Id.*

happens.[220] To do this, the department reorganized its Fraud and Risk Prevention Unit in the beginning of 2011.[221] It became the only agency in the nation to use an aggressive campaign of cross-matching government hiring data to prevent the most common type of fraud, which occurs when individuals who return to work continue to collect unemployment benefits.[222] According to LWD Commissioner Harold J. Wirths, "[W]e realized that a person could fraudulently collect Unemployment Insurance for weeks before it would be detected, and then the state would have to spend time and money trying to track down the person to recover what we could."[223]

Between April 16, 2011 and September 3, 2011, the anti-fraud program prevented an estimated 35,000 people from continuing to collect benefits after they returned to work.[224] The state estimated that if these 35,000 people had been free to collect an average of $400 for four weeks each, the system would have paid out $56 million in fraudulent benefits.[225] Because of this new system, when individuals try to certify online or by phone to collect unemployment benefits, a flag goes up if the system detects a new hire date.[226] The person is then required to meet with a department representative to resolve the discrepancy, or else they will no longer be paid.[227]

Cross-checking new hire dates is only one of the several measures launched by the NJ LWD's revamped Fraud and Risk Assessment Unit.[228] The LWD also began using the

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[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] Murray, *supra* note 218.

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *Id.*

Unemployment Insurance State Information Data Exchange System.[229] This system "automates and standardizes the collection of information from employers or their administrators on the circumstances under which an employee left a job."[230] This prevents another common type of fraud, which occurs when employers fail to properly indicate that a worker was terminated for cause or voluntarily quit.[231] Termination for cause and quitting disqualify individuals from collecting benefits.[232]

Finally, while these are definitely steps in the right direction, more work needs to be done to save an unemployment system that has remained relatively the same since it was enacted in the 1930s. If more is not done, as the following section demonstrates, laid-off American workers will be left with nothing to fall back on if our economy enters another Great Recession.

DEPLETION OF THE UNEMPLOYMENT TRUST FUND

In the beginning of March 2012, a panel discussion was held by the Urban Institute in Washington, D.C. to discuss the country's unemployment insurance system.[233] Experts concluded that America's unemployment insurance system was too outdated and underfunded to handle the needs of the individuals struggling in this current economic climate.[234] "If you look at the 50 states plus the District of Columbia, since the onset of the Great Recession, 35 of the 51 jurisdictions have had to take loans from the U.S. Treasury to continue to make benefit

229 *Id.*

230 Murray, *supra* note 218.

231 *Id.*

232 *Id.*

233 Steven Ross Johnson, *Unemployment System Outdated for Current Economy, Experts Say*, PROGRESS ILLINOIS (Mar. 14, 2012, 3:21 PM), http://progressillinois.com/quick-hits/content/2012/03/14/federal-unemployment-system-outdated-current-economy-experts-say.

234 *Id.*

payments," said Urban Institute Senior Fellow Wayne Vroman.[235] Twenty-nine states currently have outstanding federal unemployment compensation loans that total more than $39 billion.[236] Vroman noted that many states were not financially prepared to pay unemployment compensation for as long as they have since the 2007 recession.[237]

State officials had plenty of warning, however, as there have been two national commissions and a series of government audits about the dwindling money in state unemployment insurance funds.[238] However, despite such warnings, states depended less and less on employer taxes to pay for benefits.[239] This weakened the relation between previous work and earnings, and unemployment benefits.[240]

The cause of the depletion of the Unemployment Trust Fund can be attributed to a plethora of things, but in many cases, states reduced unemployment insurance taxes.[241] "[F]or years many states have inadequately financed their UI funds, both by keeping their taxable wage base for UI too low relative to inflation-adjusted dollar values, and by taking a dangerous 'pay-as-you-go' approach, which failed to build adequate reserves during periods of economic growth."[242] Also, there is no

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[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] Freking, *supra* note 8. *See generally*, Arthur Padilla, *The Unemployment Insurance System: Its Financial Structure*, MONTHLY LAB. REV., Dec. 1981, at 32, *available at* http://www.bls.gov/opub/mlr/1981/12/art4full.pdf (discussing the problem in the early 1970s where insolvency resulted from reserves and tax receipts failing to meet benefit costs).

[239] Padilla, *supra* note 238, at 32.

[240] *Id.*

[241] States *Paying Steep Price for Benefit-fund Storage*, BATTLE CREEK ENQUIRER (Feb. 22, 2011, 10:21 PM), http://www.battlecreekenquirer.com/article/20110223/OPINION01/102230301/States-paying-stee-price-for-benefit-fund-shortage.

difference in the unemployment premiums paid by different types of employers.[243] This clearly is not going to work.[244]

Even though the reduction of taxes gained favor with the employers who have to pay the unemployment insurance tax, the reduction of taxes also hastened insolvency when the recessions hit.[245] For instance, according to Vroman, even though past recessions resulted in insolvent unemployment trust funds, the numbers were much worse this time around because the recession was more severe and the trust funds were already low when the recession hit.[246] The amount of money borrowed has been so much, that as of 2011, three states have triggered automatic unemployment tax increases on employers.[247]

Michigan is a great example of a state lowering its unemployment insurance tax. For example, from 1994 to 2001, Michigan lowered its unemployment tax rates at a time when the auto industry and the state's economy were booming.[248] In addition to the decrease in unemployment insurance tax, the state increased weekly unemployment benefits from $300 to $362.[249] Michigan also passed legislation to lower the amount of wages subject to unemployment taxes from $9,500 to

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[242] Mitchell Hirsch, *A Practical Plan to Strengthen the Unemployment Insurance System (UPDATED)*, UNEMPLOYEDWORKERS.ORG (Feb. 17, 2011), http://unemployedworkers.org/sites/unemployedworkers/index.php/site/blog_entry/a_practical_plan_to_strenghten_the_unemployment_insurance_system.

[243] *See id.* (stating that "the employer of a dishwasher pays the same unemployment premium as the employer of a banker").

[244] *Id.*

[245] Freking, *supra* note 8.

[246] *Id.*

[247] Hirsch, *A Practical Plan to Strengthen the Unemployment Insurance System (UPDATED)*, *supra* note 242.

[248] *States Paying Steep Price for Benefit-Fund Storage*, *supra* note 241.

[249] Freking, *supra* note 8.

$9,000.[250] However, as a result of the increase in benefits and decrease in taxes, the state's trust fund dropped from $1.2 billion to $112 million by 2006.[251] In September 2006, Michigan was the first state that began borrowing money from the federal government to support its unemployment trust fund.[252]

Moreover, Michigan was not the only state that reduced its unemployment insurance taxes.[253] In Georgia, employers were given "a four-year tax holiday" from 1999 to 2003.[254] Although employers saved over $1 billion, trust fund reserves fell approximately forty percent to $700 million.[255] Even though the state has since raised its unemployment insurance taxes, the trust fund had not yet been restored as of February 2011.[256] In December 2009, Georgia too began borrowing from the federal government, and as of 2011 owed approximately $588 million to the federal government for supporting its unemployment insurance trust fund.[257] As of April 26, 2012, Georgia owed the Federal Unemployment Account approximately $760 million.[258]

Furthermore, not only has unemployment insurance fraud trimmed New Jersey's unemployment insurance trust fund, but the state also added to this depletion by using a combination

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[250] *Id.*

[251] *States Paying Steep Price for Benefit-Fund Storage*, *supra* note 241.

[252] Freking, *supra* note 8. However, as of April 26, 2012, Michigan was not on the list of states that currently has an outstanding loan from the Federal Unemployment Account. *UI Budget, Trust Fund Loans*, UNITED STATES DEPARTMENT OF LABOR (Apr. 26, 2012), http://www.workforcesecurity.doleta.gov/unemploy/budget.asp#tfloans.

[253] Freking, *supra* note 8.

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] *UI Budget, Trust Fund Loans*, *supra* note 252.

approach.[259] For instance, the New Jersey Legislature expanded unemployment insurance benefits while it simultaneously cut taxes.[260] The state also took $4.7 billion out of trust fund revenues to reimburse hospitals for indigent health care.[261] This led to the state's unemployment trust fund dropping from $3.1 billion in 2000 to $35 million by the end of 2010.[262] As of 2011, New Jersey had to borrow $1.75 billion from the federal government to keep its unemployment benefit insurance program running.[263] As with Georgia and Michigan, the state was unable to offer any explanation for the sudden depletion of its unemployment insurance fund.[264] Phillip Kirschner, president of the New Jersey Business and Industry Association in 2011 said:

> It was a real abdication of responsibility and a complete misunderstanding of how you finance an unemployment insurance fund – to make sure you have sufficient money in bad economic times . . . . In good economic times you build up your bank account, but in New Jersey, they said, 'Well, we have all this money, let's spend it.'[265]

California and Texas were among other states that took actions that led to the insolvency of their unemployment trust funds.[266] In California, lawmakers kept payroll taxes the same while doubling the maximum weekly benefit to unemployed

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259 *See* Freking, *supra* note 8.

260 *Id*.

261 *Id*.

262 *Id*.

263 *Id*. This number has slightly risen, for as of April 26, 2012, New Jersey owed approximately $1.8 billion to the Federal Unemployment Account. *UI Budget, Trust Fund Loans*, *supra* note 252.

264 Freking, *supra* note 8.

265 *Id*.

266 *Id*.

workers to $450.[267] This was $150 over the average benefit paid to unemployed workers in 2011, which was $300 per week for twenty weeks of benefits.[268] Texas, on the other hand, operates a "pay-as-you-go" policy where the state keeps the majority of money with the businesses rather than having businesses pay high unemployment insurance taxes.[269] This approach resulted in Texas having to borrow $1.3 billion in 2009 from the federal government to sustain its unemployment benefit program.[270]

Not only have states lowered their unemployment insurance taxes, but "[s]ince 1983, the federal minimum states could tax wages has been $7,000,"[271] meaning that regardless of the amount of inflation in wages, the Federal government has remained the same since this time. States that stayed close to the federal minimum of $7,000 were among the nation's biggest borrowers, and these states, as a result of taxing wages too low, have seen their trust funds depleted.[272] However, states that taxed wages at higher rates either did not have to borrow from the Federal government, or have borrowed significantly less.[273] Washington is an example of a state that taxes the first $38,000 of a worker's wage instead of the low federal minimum of $7,000,[274] and according to the Department of Labor's data for outstanding loans from the Federal Unemployment Account, as

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[267] *Id.*

[268] *Id.* As of April 26, 2012, California owed over $10.8 billion to the Federal Unemployment Account. *UI Budget, Trust Fund Loans*, *supra* note 252.

[269] Freking, *supra* note 8.

[270] *Id.* As of April 26, 2012, Texas did not have any outstanding loans to the Federal Unemployment Account. *UI Budget, Trust Fund Loans*, *supra* note 252.

[271] Johnson, *supra* note 233.

[272] *Id.*

[273] *Id.*

[274] *Id.*

of April 26, 2012, Washington was not on the list of states that owes the Federal government money.[275]

As these examples demonstrate, states ignored the reports from the 1980's warning of the eventual depletion of the Unemployment Trust Fund, and sadly the ramifications from this ignorance will be felt for years.[276] In particular, states are currently faced with the task of finding the money to pay the interest on the loans they borrowed.[277] This will likely involve a special tax on businesses that would last until the loan is repaid.[278] Other states may tap general revenues.[279] However, this may lead to the depletion of funding for other areas such as education, roads, and other state services.[280] In the long term, states are faced with the challenge of replenishing the unemployment trust funds they have helped to deplete.[281] This typically has meant higher payroll taxes and less money for companies to invest.[282]

Therefore, as these results demonstrate, state unemployment trust funds are already being depleted because states failed to adequately maintain their trust funds to support the increase in unemployment benefit applicants and the reinstatement of the EB program. This, coupled with situations like the one in New Jersey, where the state has paid out over $25 million dollars during the years 2008 and 2009 in fraudulent unemployment benefits,[283] does little to assure that the unemployment insurance trust fund will subsist. It also does not help that

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275 *UI Budget, Trust Fund Loans, supra* note 252.

276 *See* Freking, *supra* note 8.

277 *Id.*

278 *Id.*

279 *Id.*

280 *Id.*

281 *Id.*

282 Freking, *supra* note 8.

283 *Supra* note 172 and accompanying text.

many states contributed to the depletion of their unemployment insurance funds by cutting unemployment insurance taxes while increasing the amount of unemployment benefits paid out.[284] However, we must ask what will happen to the Federal Unemployment Account as a result of lending so much money to state governments in order to fund state unemployment benefit plans.

As a result of the recession, money in the federal reserves plummeted. For instance, when businesses pay a federal and state payroll tax, the federal tax primarily covers administrative costs, whereas the state tax pays for the regular benefits given to employers.[285] The Department of Treasury then manages the trust funds that hold each state's taxes.[286] Each state is responsible for determining whether its particular trust fund has enough money.[287] In 2000, states had approximately $54 billion in combined reserves, but this dropped to $38 billion by the end of 2007, which was the start of the recession.[288] By 2009, the reserves in state trust funds dropped drastically to $11.1 billion.[289] This was lower than at any time in the program's history, when accounting for inflation.[290]

As of April 26, 2012, the total amount of outstanding loans taken out by the states from the Federal Unemployment Account was approximately $42 billion.[291] The Federal accounts have also had to borrow from the General Fund to supply states with money to pay their benefits and to pay for EUC and EB extensions, as opposed to using money from the

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284 *E.g.*, *supra* note 8 and accompanying text.

285 Freking, *supra* note 8.

286 *Id*.

287 *Id*.

288 *Id*.

289 *Id*.

290 *Id*.

291 *UI Budget, Trust Fund Loans*, *supra* note 252.

FUTA tax to pay for such extensions and loans.[292] Therefore, as the states' unemployment benefit trust funds are becoming insolvent, so is the federal account used to support states' portions of EB programs and benefit extensions.[293] Even though federal EUC extensions are unlikely to drastically harm the already insolvent state unemployment trust funds,[294] these extensions have resulted in even greater federal debt. For instance, Congress did not pay for the extension passed by President Obama on July 22, 2010, which cost $34 billion and added to the $13.3 trillion national debt.[295] While the Act expanding benefits in February 2012 was paid for, the unemployment program added nearly $200 billion to America's national debt over the past four years.[296]

Therefore, Congress must act fast or else, as these results demonstrate, Americans will be left without any unemployment benefits. For instance, if states keep depleting their own unemployment trust funds by paying out excessive amounts of money in fraudulent benefits, in addition to decreasing unemployment insurance taxes and increasing benefits, states will have to borrow more money that the federal government does not have. This, coupled with the federal extensions of unemployment benefits, may eventually lead to the complete depletion of the Unemployment Trust Fund, in addition to increasing the vast amount of federal government debt. Therefore, the next section will discuss the potential solutions to the insolvent unemployment trust funds, which will in turn help

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[292] *Statement of Jane Oates, supra* note 6.

[293] *See generally id*.

[294] Even though it has been suggested that the federally mandated extensions of unemployment benefits have contributed to the depletion of state unemployment trust funds in past recessions, this is a fully funded federal program. Padilla, *supra* note 238. at 34. Therefore, the extensions do not add any greater financial burden to state systems. *Id*. Also, even though these extensions lengthen duration and increase program costs slightly, regular UI benefits have historically exceeded the costs associated with the extended benefits programs. *Id*.

[295] Murse, *supra* note 9.

[296] 158 CONG. REC. H911 (daily ed. Feb. 17, 2012) (statement of Rep. Camp).

prevent the federal government from depleting its unemployment trust funds and decreasing the amount of national debt.

VI. SOLUTIONS TO UNEMPLOYMENT TRUST FUND INSOLVENCY

Both Congress and President Obama have offered solutions to the insolvent state trust funds. President Obama suggested the following proposal in his FY2013 budget to improve the solvency of the Unemployment Trust Fund.[297] Many of these proposals are the same as the solvency measures that were proposed for FY 2012.[298] The proposal reiterates the President's intent to strengthen the UI safety net, for it provides short-term relief to states that face interest on the loans they have taken out from the Federal government.[299] It also includes relief for employers in states facing mandatory federal tax increases to pay back the principle of the loans taken out by states from the federal government.[300] For example, the President's proposal suspends interest accrual on trust fund loans for FY 2012 and 2013, and does the same for automatic Federal tax increases.[301] President Obama also proposed to help improve state solvency by raising the taxable wage base (TWB) from $7,000 to $15,000 beginning in the year 2015.[302] After 2015, the President proposes to index the TWB to keep pace with future wage growth.[303] Also, the proposal includes lowering the federal tax

[297] Rebecca Dixon & Mike Evangelist, *The President's FY 2013 Labor Department Budget: Keeping the Focus on America's Workers*, NATIONAL EMPLOYMENT LAW PROJECT (Mar. 23, 2012), *available at* http://www.nelp.org/page/-/UI/2012/FY2013.Budget.Report.final.pdf?nocdn=1.

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] *Id.*

[302] *Id.*

[303] Dixon & Evangelist, *supra* note 297.

rate on this higher taxable wage to promote the goal of raising state UI revenue.[304]

Congress has also offered solutions to help restore unemployment trust funds. Senator Richard Durbin (IL), Senator Jack Reed (RI), and Senator Sherrod Brown (OH) introduced the Unemployment Insurance Solvency Act of 2011.[305] This proposed act "offers immediate tax relief to cash-strapped states and employers, preserves UI benefit levels, and creates strong incentives for states to restore their UI programs to solvency . . . ."[306] It is similar to President Obama's proposal. For example, the Unemployment Insurance Solvency Act of 2011 changes the applicable wage base amount from $7,000 to $15,000 in 2014.[307] However, as of January 1, 2015, the applicable wage base amount shall be determined by the amount of average wage growth for the year and the applicable wage base amount for the preceding calendar year.[308]

Additionally, the proposed Act allows states to enter into voluntary agreements to abate their principals on federal loans.[309] The agreement would allow states to apply to the Secretary of Labor to devise a plan to meet repayment and solvency goals.[310] The Secretary of Labor would calculate the principal abatement and the states would then certify the following: (a) not to modify the method governing the computation of unemployment compensation in a manner so that the average weekly benefit paid during the period of agreement is less than the amount paid under the state law as in effect on the date of the agreement; (b) not to modify state law

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304 *Id.*

305 Hirsch, *A Practical Plan to Strengthen the Unemployment Insurance System (UPDATED)*, supra note 242.

306 *Id.*

307 Unemployment Insurance Solvency Act of 2011, S. 386, 112th Cong. §5 (1st Sess. 2011).

308 *Id.*

309 *Id.* at §6.

310 *Id.*

so that any unemployed individual who would be eligible for regular unemployment compensation would then be ineligible during the period of the agreement; and (c) not to modify state law to decrease the maximum amount of unemployment benefits.[311] The agreement also holds states liable for failing to comply with any of the certifications for any principal previously abated.[312]

During the abatement agreement period, a transfer of the annual amount of principal abatement is made to the state's account in the unemployment trust fund in which the agreement is executed as long as the state complies with the agreement's terms.[313] For each subsequent year that the state is in compliance, the amount of principal abatement is accredited to its outstanding loan balance.[314] If the loan balance reaches zero while the state has a remaining abatement amount, this amount is transferred as a positive amount into the state's specific account.[315]

Moreover, the Act also rewards states that manage their UI trust funds effectively.[316] The Act does this in two ways. First, it increases interest for solvent states.[317] It also lowers tax rates for solvent states.[318] Therefore, the proposed act creates incentives for states to have solvent unemployment trust fund

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[311] *Id.*

[312] *Id.*

[313] S. 386, §6.

[314] *Id.*

[315] *Id.*

[316] *Id.* at §7.

[317] *See id.* (augmenting the separate accounts by 0.5 percent over the rate of interest when the state maintains reserves in the account that "equal or exceed an average high cost multiple of 1.0 as defined by the Secretary of Labor . . . .").

[318] *See id.* (lowering the tax rate for states that maintain reserves that equal or exceed the average high cost multiple of 1.0 by substituting 6.0 percent for 6.2 percent, or 5.68 percent for 5.78 percent, depending on which paragraph of the Internal Revenue Code applies).

accounts. However, while the bill was introduced into Congress on February 17, 2011, no action has been taken since its introduction.[319]

Not only have Congress and President Obama provided solutions for states to restore their unemployment trust funds to solvency, but in 2011 the National Employment Law Project (NELP) and the Center on Budget and Policy Priorities also proposed a solution.[320] The plan is similar to the proposed plans by Congress and the President in the following respects. The NELP's plan would gradually raise the amount of worker's wages that are subject to federal unemployment tax, which would increase the amount of taxable wage bases in the states.[321] This, in turn, would help states rebuild their trust funds.[322] The NELP's plan also calls for the federal government to postpone tax increases required to recoup the loan principal from borrowing states for two years.[323] Like Congress' plan, the NELP's plan would offer immediate rewards and incentives for states that maintain adequate trust fund levels.[324] Also, the plan would allow states to maintain current unemployment benefit and eligibility levels.[325] Finally, like Congress' voluntary abatement agreements, the plan proposes that the federal government would excuse states from repaying part of its loans under certain circumstances.[326] To qualify, states would have to

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319 *S.386: Unemployment Insurance Solvency Act of 2011*, GOVTRACK.US, http://www.govtrack.us/congress/bills/112/s386 (last visited Apr. 18, 2012).

320 Hirsch, *A Practical Plan to Strengthen the Unemployment Insurance System (UPDATED)*, supra note 242.

321 The state taxable wage bases, by law, cannot be lower than the federal wage base. *Id.*

322 *Id.*

323 *Id.*

324 *Id.*

325 Hirsch, *A Practical Plan to Strengthen the Unemployment Insurance System (UPDATED), supra* note 242.

326 *Id.*

enter into "a flexible contractual agreement with the U.S. Labor Department to rebuild its trust fund" for a number of years, and agree "to maintain UI eligibility, benefit levels, and an appropriate tax rate over the loan-reduction period."[327]

The NELP predicted that the plan would help employers, as they would not have to pay higher federal UI taxes until the beginning of 2014, which would save them $5 billion to $7 billion while the economy remains weak.[328] Also, partial loan forgiveness for states willing to build adequate unemployment trust funds would also save employers approximately $37 billion by the end of the decade.[329] Additionally, adequate trust funds would presumably stabilize unemployment insurance rates over time.[330] This would help to avoid the "roller-coaster tax rates" states have currently adopted,[331] thereby helping businesses and the economy as opposed to adding further detriment during difficult economic times.[332] Finally, and most importantly, the NELP predicted that the federal deficit would not further increase as a result of this proposal.[333]

The next section will analyze these proposals, in addition measures taken to prevent and detect unemployment insurance fraud, and how they may help prevent the depletion of America's Unemployment Trust Fund.

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327 *Id.*

328 *Id.*

329 *Id.*

330 *Id.*

331 Hirsch, *A Practical Plan to Strengthen the Unemployment Insurance System (UPDATED), supra* note 242 (referencing states who reduce unemployment insurance tax rates during healthy economic times and then raise tax rates during recessions).

332 *See id.*

333 *Id.*

VII. FINAL ANALYSIS AND CONCLUSION

The recession that spanned from 2007 to 2009 weakened both the United States economy and the federal and state unemployment trust funds. States were ill prepared to deal with the vast increases in individuals applying for unemployment benefits. The increase in individuals applying for benefits led to more focus on unemployment benefit applications. This then weakened the resources available to states to detect unemployment benefits being fraudulently received by individuals. The increase in individuals applying for benefits also led to the insolvency of the unemployment trust funds in many states, as many state funds were not equipped with enough cash to support the vast increase in Americans applying for unemployment benefits. Therefore, states were forced to borrow from the federal government because their trust funds were cash-strapped and depleted due, in part, to the fraudulent collection of unemployment benefits, the failure to maintain adequate funds in these accounts during good economic times, and increases in individuals applying for benefits.

However, the federal government too was cash-strapped and ill prepared to handle the recession. The federal government responded to the recession by enacting the EUC08 Program, which increased the length of time individuals are able to collect unemployment benefits. The problem with this extension was that the federal government could not adequately support both the extensions and the insolvent state unemployment funds. Therefore, as Congress has done in the past, it failed to pay for these benefit extensions thereby increasing the national debt by over $15 trillion. Congress had no choice, for if Congress would have paid for the federal unemployment extensions using the money in the Unemployment Trust Fund, which cost the federal government billions of dollars, the Unemployment Trust Fund would have been completely depleted. The federal tax collected from employers is used to pay for extended benefits and is also used to provide states with loans in periods of insolvency.[334] However in early 2011, there were only $11.1 billion left in the Unemployment Trust Fund for state reserves.[335] Since Congress

[334] Henrich, *supra* note 15, at 1475 n.17.

[335] Freking, *supra* note 8.

has had to lend state governments roughly $42 billion (as of April 2012) to support the regular collection of unemployment benefits,[336] Congress would have surely depleted the fund had it paid for the unemployment benefit extensions using fund money.[337]

Even though Congress may not have had the ability to pay for unemployment benefit extensions, many congressional Republicans opposed further extending unemployment benefits as Congress kept adding to the national debt by doing so.[338] Therefore, the most recent extension adopted in February 2012 was paid for. However, not everyone was pleased with the way these extensions are being paid for, for the Federal Unemployment Account is not being used, and other means such as selling Federal government airwaves and increasing the pension contribution from Federal workers will provide the financial support for the past extension. The Federal Unemployment Account exists to pay for benefit extensions in times of financial despair, and it also exists to loan insolvent states money when their trust fund reserves are running low. However, changes must be made to the American UI system in order to be able to sustain future economic recessions. As Matt Harvill, vice president for unemployment compensation with Kelly Services, Inc. put it, "The reality is that if you're going to truly turn solvency into the system, a $7,000 taxable wage base with a maximum rate of 6.2 percent is not going to get you there to solvency."[339]

The proposals offered by the Obama Administration, Congress, and the NELP would definitely help states aim to achieve this goal. However, the proposals aimed at assuring solvent state trust funds should be considered with caution. For instance, the proposals offered by Congress and the NELP aim at reducing the interest states pay on their loans and forgiving

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336 *See UI Budget, Trust Fund Loans, supra* note 252.

337 *See* Statement of Jane Oates, *supra* note 6 (discussing how the Federal government had to borrow from the general reserves to pay for past unemployment benefit extensions and to lend insolvent state funds money).

338 *See* Needham, *supra* note 2.

339 Johnson, *supra* note 233.

some of the states' loans.[340] While this approach will benefit state economies, it will also result in less money being put back into the Federal Unemployment Account. Also, the plans call for increasing the applicable wage base, allowing states to increase their employer tax rate without changing the federal tax rate.[341] The President's proposal even calls for the reduction of the Federal tax when the economy recovers.[342] While again, this will help states restore their insolvent trust funds, the approach fails to outline protective measures that would help restore the federal account faster.[343] Therefore, while these options benefit the states, they may adversely impact the federal account and Congress' ability to pay for any future unemployment benefit extensions if such measures fail in producing adequate state trust funds.

Additionally, even though these proposals may help strengthen state unemployment trust funds, there have been many initiatives taken by the Department of Labor and state governments to increase fraud prevention and detection. While these measures have shown drastic improvement in fraud detection and prevention since they were initiated, they also may increase the administrative costs of the unemployment program,[344] which is something future initiatives should be mindful of when considering which policy initiative is best to get back to solvency.

Although there are negatives to the proposals offered by the NELP, Congress, and the Obama Administration, the positives

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340 *See* Hirsch, *A Practical Plan to Strengthen the Unemployment Insurance System (UPDATED)*, *supra* note 242.

341 *See id*.

342 Dixon & Evangelist, *supra* note 297.

343 *See generally* Hirsch, *supra* note 242 (the proposal does not suggest increasing federal taxes to increase the amount of money in the federal reserves).

344 *See Unemployment Insurance (UI) Improper Payments*, *supra* note 203 (explaining that the Department of Labor has awarded approximately $192 million in supplemental budget funding as of 2011 to 42 states for projects related to program integrity and performance to address the root causes of overpayment).

outweigh the negatives, for such proposals are necessary to cure the current defect in our unemployment system. The initiatives to eliminate fraud brought about by the Middle Class Tax Relief and Job Creation Act as well as those recently adopted by the Department of Labor and the states have made states better equipped to detect and prevent the fraudulent payments of unemployment benefits. Also, the proposals that would help restore state insurance solvency are beneficial to states as they forgive portions of state loans. More importantly, however, these proposals allow states to eventually increase employer taxes, thereby enabling them to build up their insolvent funds quicker.

Moreover, these proposals are likely to help prevent the total depletion of the federal reserves in the following ways. First, by building up state UI trust funds and doing more to prevent and detect the fraudulent collection of unemployment benefits, the programs help ensure that there is less of a chance of such funds becoming insolvent. With the federal government having to pay out less to the states during periods of economic strife, as states would presumably have maintained adequate funds to deal with future recessions, the federal government would be able to adequately provide for programs like the federal unemployment extensions. Therefore, such programs would likely get passed quicker as there would be less of a reason for opposition[345] because the programs would not be adding any more debt to our colossal national deficit. Therefore, even though the proposals to build up state trust funds do not appear to take into account the necessity of building up the federal reserves, in fact, quite the opposite is true.

Finally, employees are not the only ones who have suffered from the recent economic recessions; employers have also taken huge hits. A proposal that would dually increase the state and federal taxes employers would have to pay would be detrimental to the economy as such a proposal would prevent employers from using any available funds to create more jobs. Thus, while the following proposals may not appear to be perfect, such actions are necessary to ensure that both the state unemployment trust funds and the federal unemployment

[345] *See generally* Needham, *supra* note 2 (discussing Republican opposition to the extension of unemployment benefits).

account exist for future Americans. Without taking more steps to restore the Unemployment Trust Fund, the Great Recession will deplete what has been a lifeline for millions of Americans.