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COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
NO. 2019-SC-477-D

KENTUCKY UNEMPLOYMENT  
INSURANCE COMMISSION

APPELLANT

v.

On Appeal from the Court of Appeals  
Action No. 2017-CA-001156

MICHAEL NICHOLS, *et al.*,

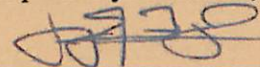
APPELLEES

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**AMICUS CURIAE BRIEF OF  
KENTUCKY CHAMBER OF COMMERCE ET AL.**

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Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify the original and ten (10) copies of this brief were filed with the Clerk of the Supreme Court, State Capitol, Room 235, 700 Capitol avenue, Frankfort, Kentucky 40601. I also certify that copies of this brief were served upon the following named individuals by mailing a copy of same on this 30th day of September, 2020, to: Hon. Audra Eckerle, Judge, Jefferson Circuit Court, Div. 7, 700 W. Jefferson Street, Louisville, Kentucky 40202; Robyn Smith, 4350 Brownsboro Road, Suite 110, Louisville, Kentucky 40207; Amy Cabbage, Sam Flynn, John Ghaelian, and Maria "Tess" Russell, Kentucky Labor Cabinet, Mayo-Underwood Building, 500 Mero Street, 3<sup>rd</sup> Floor, Frankfort, Kentucky 40601; Linda Keeton, Education and Workforce Development Cabinet, 500 Mero Street, 4<sup>th</sup> Floor, Frankfort, Kentucky 40601; Donna King Perry, Alina Klimkina, and Jeremy Rogers, Dinsmore & Shohl, LLP, 101 South Fifth Street, Suite 2500, Louisville, Kentucky 40202; and the Clerk of the Kentucky Court of Appeals 360 Democrat Drive, Frankfort, Kentucky 40601.



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## **BACKGROUND/STATEMENT OF AMICUS CURIAE**

This brief is submitted on behalf of nine *Amici* parties, representing a broad spectrum of employers and entities, all of whom join in concern about the effect of the Kentucky Court of Appeals' decision in *Michael Nichols v. Kentucky Unemployment Insurance Commission, et al.* (2017-CA-001156) which prohibits the long-established practice of non-attorneys representing employers before the Kentucky Unemployment Insurance Commission. A more detailed description of each *Amici* party appears below:

The Kentucky Chamber of Commerce is the largest business association in the state, with over 3,800-member businesses – ranging from family-owned shops to Fortune 500 companies – that employ over half of Kentucky's workforce. Its mission includes articulating a vision for Kentucky and providing information and awareness to foster business creation, recruitment, expansion, and retention.

Commerce Lexington is the association of businesses for Lexington and its neighboring communities. It includes over 1,800 members seeking to promote economic development, job creation, and overall business growth.

The Kentucky Beverage Association is the trade association for Kentucky's non-alcoholic beverage industry. Its members provide more than 4,000 jobs. Its mission is to promote the development, preservation, and operation and general welfare of the refreshing, non-alcoholic beverage industry in Kentucky.

The Kentucky Nonprofit Network is Kentucky's state association of nonprofits and exists to strengthen and advance the Commonwealth's nonprofit organizations which are essential to vibrant communities. The association has over 650 nonprofit organizations as members and addresses policy concerns that can affect the more than 20,000 registered nonprofits in the Commonwealth.

The National Federation of Independent Business serves as a voice for small business, advocating on behalf of America's small and independent business owners, both in Washington, D.C., and in all 50 state capitals. It is nonprofit, nonpartisan, member-driven, and composed of hundreds of thousands of small and independent businesses owners.

The Society for Human Resource Management (SHRM) is the world's largest HR professional society. With more than 300,000 human resource and business executive members, SHRM impacts the lives of more than 115 million workers and families globally. As the voice of all things work, workers and the workplace, SHRM is the foremost expert, convener and thought leader on issues impacting today's evolving workplaces.

The Kentucky Society for Human Resource Management (KSHRM) is the state affiliate of the SHRM. It is a leading provider of resources serving HR professionals and advancing the practice of human resource management in Kentucky.

The Association of Unemployment Tax Organizations is composed of members who provide unemployment compensation management services to employers throughout the United States. Collectively, its members are a key stakeholder in maintaining the integrity of the unemployment insurance system.

UWC – Strategic Services on Unemployment & Workers' Compensation is a national association of employers, state and national business associations that represents employers in unemployment insurance policy and legislation.

### **INFORMATION FOR THE COURT**

The *Amici* parties concur with the legal arguments advanced by the Unemployment Insurance Commission in its Appellant Brief. In the interests of efficiency, these arguments will not be repeated in this brief. Instead, the *Amici* parties will utilize their specialized knowledge and experience in Kentucky's unemployment compensation system and experience

in other states to explain the policy rationales for continuing to allow employers to proceed without the need for attorneys before the Unemployment Insurance Commission.

Two policy considerations arise in the context of this case—(i) protecting the public from the unauthorized practice of law, and (ii) providing a quick, fair, and efficient unemployment compensation system that assists workers when they become unemployed while protecting employers and the unemployment insurance fund from non-meritorious claims. In reviewing the litany of cases from other states addressing similar questions, the analysis by the Supreme Court of Pennsylvania in *Harkness v. Unemployment Compensation Bd. of Review*, 591 Pa. 543 (2007), is one that is well reasoned and addresses these competing interests. By reviewing the history and goals of the unemployment insurance system, the protections needed for each policy, and the risks associated with not requiring attorney participation, this Court can reach the same conclusion that the far better judicial and public policy is to continue allowing employers to proceed without legal counsel.

**I. THE UNMEMEMPLOYMENT INSURANCE SYSTEM WAS DESIGNED TO BE AN INFORMAL AND EFFICIENT MANNER OF PROVIDING NEEDED RESOURCES TO OUT OF WORK EMPLOYEES.**

Unemployment insurance in the United States is a cooperative program administered by all states with primary administrative financing through federal grants and subject to oversight by the United States Department of Labor. The system was created when President Franklin D. Roosevelt signed the Social Security Act on August 14, 1935 in order to provide “protection to the average citizen and to his family against the loss of a job” while also lessening the “force of possible future depressions” and protect “future [a]dministrations against the necessity of going deeply into debt to furnish relief to the needy.”<sup>1</sup>

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<sup>1</sup> Franklin D. Roosevelt, *Statement on Signing the Social Security Act*. Online by Gerhard Peters and John T. Woolley, The American Presidency Project <https://www.presidency.ucsb.edu/node/209017> (last accessed 9/22/2020).

As part of the federal oversight, states are not to receive administrative funding from the federal government unless their laws include specific provisions. 42 U.S.C. § 503(a). These requirements include “methods of administration ... reasonably calculated to insure full payment of unemployment compensation when due,” an “[o]ppportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied,” and reporting requirements to the Secretary of Labor. *Id.* In *California Dep't of Human Res. Dev. v. Java*, the Supreme Court stated that the “congressional objective” of 42 USC § 503(a) was “getting money into the pocket of the unemployed worker at the earliest point that is administratively feasible.” 402 U.S. 121, 135, 91 S. Ct. 1347, 1356, 28 L. Ed. 2d 666 (1971). Promptness is required “at all stages of the eligibility determination and payment processes.” U.S. Dept. of Labor Directive, Unemployment Insurance Program Letter No. 04–01 [October 27, 2000].

The benefits provided by unemployment insurance programs are primarily funded by tax monies paid by employers into approved state programs, in compliance with federal law.<sup>2</sup> Administrative grants, funded through federal accounts and supported by the Federal Unemployment Tax paid by employers, “finance the bulk of the administrative costs of state unemployment insurance systems, including the appeals process.” *Id.*

As of January 1, 2020 Kentucky was 43<sup>rd</sup> in trust fund solvency among all states, D.C., the Virgin Islands, and Puerto Rico with a solvency ratio of 0.57, well below the recommended minimum adequate solvency level of 1.00, rendering Kentucky ineligible for interest-free borrowing from the federal government in order to provide benefit obligations.<sup>3</sup> This is what

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<sup>2</sup> Sharon M. Dietrich & Cynthia L. Rice, *Timeliness in the Unemployment Compensation Appeals Process: The Need for Increased Federal Oversight*, 29 U. Mich. J.L. Reform 235, 238 (1996).

<sup>3</sup> U.S. Department of Labor; Office of Unemployment Insurance; Division of Fiscal and Actuarial Services, *State Unemployment Insurance; Trust Fund Solvency Report 2020* (2020), <https://oui.doleta.gov/unemploy/docs/trustFundSolvReport2020.pdf> (last visited September 23, 2020).



occurred during the Great Recession – Kentucky drained its trust fund before borrowing a total of \$972 million from the federal government to meet unemployment payment obligations.<sup>4</sup> While the fund recovered following that impact, Kentucky’s unemployment insurance trust fund has again been depleted, this time by the coronavirus pandemic; in late June the Kentucky Education and Workforce Development Cabinet requested an \$865 million loan from the U.S. Department of Labor, disclosing that it had less than \$150 million in the trust fund.<sup>5</sup> Since loans from the Department of Labor are funded by the Federal Unemployment Tax paid by employers, any additional funding of Kentucky’s unemployment insurance trust is funded either directly or indirectly by Kentucky employers.

In 2019, the average weekly benefit in Kentucky was \$360.15, and the average duration of the number of weeks of unemployment claimed was 18.7 weeks, resulting in an average total benefit of \$6,734.81.<sup>6</sup> The maximum weekly benefit in Kentucky is \$552.00, and the maximum duration is 26 weeks, making the maximum benefit available \$14,352.00. *Id.* Last year in Kentucky there were 92,363 claims determined to be monetarily eligible for unemployment insurance; 37,175 (35.92 percent) were protested by employers and of those protested claims, 18,790 (50.54 percent) were denied benefits. *Id.* The denied claims equal nearly \$125 million in potential benefit payments based on the average total benefit from 2019.

Eligibility determinations can be protested, and in 2019 the Lower Authority Appeals

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<sup>4</sup> Kentucky Education and Workforce Development Cabinet, *Unemployment Insurance Trust Fund: Annual Report* CY 2019 (2019), <https://kcc.ky.gov/Documents/2019%20Trust%20Fund%20Annual%20Report.pdf> (last visited September 18, 2020).

<sup>5</sup> Joe Sonka, “Kentucky approved for \$865 million federal loan to shore up unemployment insurance fund,” Louisville Courier Journal, June 26, 2020, <https://www.courier-journal.com/story/news/politics/ky-legislature/2020/06/26/kentucky-gets-865-million-loan-unemployment-insurance-fund/3263827001/> (last visited September 21, 2020).

<sup>6</sup> Kentucky Education and Workforce Development Cabinet, *Unemployment Insurance Trust Fund: Annual Report* CY 2019 (2019), <https://kcc.ky.gov/Documents/2019%20Trust%20Fund%20Annual%20Report.pdf> (last visited September 18, 2020).

Branch released 11,902 decisions involving protested determinations. *Id.* Claimants accounted for 9,706 of the protested cases (81.5 percent) and of those cases, 32 percent were reversed; similarly, 29.8 percent of the cases protested by employers were reversed. *Id.* There is also a Higher Authority Unemployment Insurance Commission which hears appeals from the Lower Authority – 2,178 decisions were appealed to it and it issued 2,391 decisions in 2019. *Id.* Finally, only 40 of the decisions issued by the Higher Authority Unemployment Insurance Commission were appealed to the Circuit Court which is what occurred in this instance. *Id.*

Kentucky has historically mirrored the vast majority of other states and allowed members, agents, employees, human resources professionals, or other representatives of an employer to represent employers at Unemployment Insurance hearings even if they are not licensed attorneys. (Appellant Brief, p. 13). This is partially because “Kentucky’s unemployment compensation system is set up to expeditiously award temporary, monetary benefits to a worker after loss of his or her job” and to that extent “[h]earings are generally informal and expeditious” while “[t]he rules of evidence are relaxed.” *Bd. of Educ. of Covington v. Gray*, 806 S.W.2d 400, 402 (Ky. App. 1991). Unemployment hearings are largely fact-finding exercises relating to the circumstances regarding termination rather than legal arguments over the well-established criteria for eligibility between counsel.

The Kentucky Court of Appeals previously envisioned how formalizing the unemployment insurance commission appeals process might affect the system. In declining to allow the doctrine of offensive collateral estoppel to stem from an unemployment insurance hearing, the Court of Appeals noted that doing so might place an “untenable burden” on the system. *Bd. of Educ. of Covington*, 806 S.W.2d at 403 (quoting *McClanahan v. Remington Freight Lines*, 517 N.E.2d 390, 395 (Ind. 1988) (noting that allowing hearings to serve “as a basis for offensive collateral estoppel ‘might well force the parties to convert such proceedings

into longer and more expensive ones.”).)

This Court also recognized these concerns in *Berrier v. Bizer*, 57 S.W.3d 271 (Ky. 2001), noting that the informal procedures utilized in unemployment compensation proceedings are not designed to afford any party a full opportunity to litigate issues, or even encourage any meaningful participation in the process. *Id.* at 281. The Court directly addressed the policy impacts of allowing the informal nature of unemployment proceedings to serve as grounds for collateral estoppel:

Issues presented will be contested strongly, and the hearings will become lengthy and more detailed, and will no longer be suited to the prompt resolution of unemployment compensation claims. Judicial economy would be frustrated, rather than improved, as many unemployment compensation hearings become forums in which claims for unlawful or unconstitutional discharge are tried.

*Id.* (quoting *Bd. of Educ. of Covington*, 806 S.W.2d at 403). These issues previously identified by this Court mirror the same concerns addressed in this Brief.

## **II. REQUIRING EMPLOYERS TO BE REPRESENTED BY COUNSEL WOULD HAVE SIGNIFICANT IMPACTS ON THE GOALS OF THE UNEMPLOYMENT COMPENSATION SYSTEM.**

The unemployment compensation system is designed with several policy goals in mind. It is designed to be efficient and speedy; to provide quick and fair compensation to displaced workers who are truly deserving, while allowing for a process to challenge non-meritorious claims in order to protect the funds available for merited claims and keep employer contributions at an appropriate rate; and to provide access to both employees and employers in order to further these goals. A rule or policy requiring representation by counsel for any party, whether claimant or employer, undermines these goals and could significantly impact the viability of Kentucky’s unemployment compensation system.

### **A. Requiring Employers to be Represented by Counsel Would Undermine the**

### **Speed of the Kentucky Unemployment Compensation System.**

The Secretary of the U.S. Department of Labor issued regulations requiring the laws of each state's unemployment compensation system to "include provision for such methods of administration as will reasonable insure the full payment of unemployment benefits to eligible claimants **with the greatest promptness that is administratively feasible.**" 20 C.F.R. 640.3(a) (emphasis added). The same standard is also imposed on the appeals process. 20 C.F.R. 650.1(a) ("[t]he standard seeks to assure that all administrative appeals affecting benefit rights are heard and decided with the greatest promptness that is administratively feasible."). Additionally, Section 303(a)(1) of the Social Security Act, codified at 42 U.S.C. § 503(a)(1), requires states to provide in their laws for "[s]uch methods of administration . . . reasonably calculated to insure full payment of unemployment compensation when due" as a condition for receiving grants. The phrase "when due" means "at the earliest stage of unemployment that such payments [are] administratively feasible after giving both the worker and the employer an opportunity to be heard." *California Dep't of Human Res. Dev.*, 402 U.S. at 131 (1971).

The Department of Labor tracks the timeliness of a variety of core measures for every state, D.C., Puerto Rico, and the Virgin Islands, including first payments in 14/21 days, nonmonetary determinations in 21 days, and average age of pending lower and higher authority appeals.<sup>7</sup> In 2018, Kentucky was 43<sup>rd</sup> in both first payments 14/21-day timeliness and nonmonetary determinations 21-day timeliness, 26<sup>th</sup> in average age of pending lower authority appeals, and 19<sup>th</sup> in average age of pending higher authority appeals. *Id.* These trends were similar in 2019 with Kentucky near the bottom for the first two timeliness measurements and then slightly quicker than the average age for pending appeals. *Id.* These problems will only

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<sup>7</sup> U.S. Department of Labor: Employment and Training Administration, *State Ranking of Core Measures*, <https://oui.doleta.gov/unemploy/ranking.asp> (last visited September 21, 2020).

become worse for 2020, as the number of unemployment claims has grown significantly due to the coronavirus pandemic, with over 240,000 initial claims filed in the first quarter of 2020.<sup>8</sup>

Inserting attorneys into the unemployment compensation system will lengthen the process. An attorney's presence would make the process more formal. An attorney is also another party that must be consulted when making logistical decisions like when the hearing can be held. Finally, an attorney is required to be a zealous advocate for their client. Formality, increased logistics, and zealous advocacy all lend themselves to creating a process that takes more time. As this Court has previously noted, “[i]ssues presented will be contested strongly, and the hearings will become lengthy and more detailed, and will no longer be suited to the prompt resolution of unemployment compensation claims.” *Berrier, supra*.

This is the same conclusion reached by the National Commission on Unemployment Compensation when it addressed this issue in 1980.<sup>9</sup> The Commission was formed as a result of the Unemployment Compensation Amendments of 1976, Public Law 94-566, and was designed to provide a comprehensive and thorough review of the unemployment system following its first 45 years. *Id.* at iii. The Commission was composed of Congressional members, union leadership, businesses leaders, and public representatives. *Id.* at vii-viii. In its review, the Commission looked at the issue of representation by counsel and concluded that non-attorney representation “often leads to speedier and more complete development of relevant facts.” *Id.* at 119. As a result, the Commission recommended that participants be able to proceed with representatives who were not licensed attorneys. *Id.* at 120.

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<sup>8</sup> U.S. Department of Labor: Employment and Training Administration, *Regular Benefits Information by State for CYQ – 2020.1*, [https://oui.doleta.gov/unemploy/data\\_summary/SummaryTables.pdf](https://oui.doleta.gov/unemploy/data_summary/SummaryTables.pdf) (last visited September 23, 2020).

<sup>9</sup> National Commission on Unemployment Compensation. “Unemployment Compensation: Final Report.” Washington, DC: U.S. Government Printing Office, July 1980, <https://books.google.com/books?id=6P7PgAxFL0kC&pg=PR1#v> (last visited September 22, 2020).

States that do not comply with the timeliness requirements expose themselves to issues and liabilities from a variety of sources. The Secretary of Labor can sanction states for failing to comply with regulatory and statutory requirements including the “when due” mandate.<sup>10</sup> One such sanction is not recertifying the payment to states for their administrative funding, costing the state millions. *Id.* It would have the additional effect of depriving that state’s employers of the credit against federal unemployment taxes that employers are able to claim based off their payments into the state’s unemployment insurance trust fund. *Id.* A state’s failure to comply with the timeliness requirements also potentially exposes the state to class action suits based on due process protections tied to Section 303(a) of the Social Security Act.

Another troubling issue with a reduction in timeliness is not the regulatory or statutory consequences, but how these delays would affect the very people the system is designed to serve – those who are unemployed due to no fault of their own. Inserting attorneys into the process and creating a more formal system will slow down the hearings, the determinations, and ultimately the speed at which the unemployed can receive their benefits. The system was designed with speed in mind as unemployed individuals are in a precarious situation in which time is of the essence. Ultimately, delays in the system affect them the most as they are whom the system was designed to serve.

**B. Requiring Employers to be Represented by Counsel Would Undermine the Efficacy of the Kentucky Unemployment Compensation System.**

The maximum unemployment benefit available to an individual in Kentucky is \$14,352.00 with the average award of \$6,734.81 in 2019.<sup>11</sup> While these can be substantial sums

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<sup>10</sup> Sharon M. Dietrich & Cynthia L. Rice, *Timeliness in the Unemployment Compensation Appeals Process: The Need for Increased Federal Oversight*, 29 U. Mich. J.L. Reform 235, 259 (1996).

<sup>11</sup> Kentucky Education and Workforce Development Cabinet, *Unemployment Insurance Trust Fund: Annual Report CY 2019* (2019), <https://kcc.ky.gov/Documents/2019%20Trust%20Fund%20Annual%20Report.pdf> (last visited September 18, 2020).

to individuals, the average amount and limited nature of the potential award are viewed differently when placed in the broader context of an employer's financial decision-making. One effect of informal and expeditious hearings is that the costs to participate in the hearing are suppressed. An employer can contest the potential payment of unemployment benefits and ensure only deserving parties receive benefits at minimal costs to the employer. This can often be accomplished with human resources professionals or other representatives who are familiar with the facts relating to the employee's termination and the standard eligibility criteria. Requiring employers to be represented by counsel would impose an additional, unnecessary cost and reduce the efficacy of the entire unemployment compensation system.

The National Commission on Unemployment Compensation reached a similar conclusion, stating that provisions requiring attorney participation deny claimants from receiving a fair hearing. *National Commission Report* at 120 (limiting representation to attorneys "contributes nothing to the appeals process and deprives claimants and employers of the assistance that friends, paralegals, employees, business agents, relatives, and others could otherwise provide.") The Commission was abundantly clear on this point in Recommendation No. 4 to the Secretary of Labor: "*Nonlawyer Representatives*. The Secretary should require, as a condition for a fair hearing, that all States permit all parties to a hearing to have representatives of their own choosing, irrespective of whether such representatives are members of the bar." *Id.* (italics in original). It was shortly after this in 1984 that the General Assembly codified this recommendation as KRS 341.470(3). (1984 Ky. Acts ch. 12, sec. 1, effective July 13, 1984).

Employers often treat whether to, and how to, interact with the unemployment compensation system like they do many other things – as a business decision. Requiring an employer to hire an attorney to protest a determination that a former employee is eligible for

unemployment insurance increases that transaction cost. It stands to reason that when weighing these decisions, employers would be more likely to pay out non-meritorious claims instead of protesting them when the cost of protesting the claims increases. As an example, the average award is around \$6,734.81, much less than amounts at issue in civil actions or even workers compensation proceedings. Even with the bare minimum in preparation and attendance at the hearing, a substantial percentage of that amount (if not more) would be expended on attorneys' fees, with no guaranty of success. On a pure cost-benefit analysis, employers may choose not to challenge claims, independent of how meritorious the underlying claim may be. Finally, if it became known that employers were less likely to protest awards of unemployment benefits then employees with non-meritorious claims might be more likely to file for benefits and place greater administrative and financial burden on the system.

These changes to how employees and employers interact with the unemployment compensation system could have deep consequences. Kentucky's 2019 unemployment compensation system statistics can provide an example of these consequences. In 2019, employers protested 37,175 claims and of those claims, 18,790 were initially denied benefits.<sup>12</sup> Claimants protested 9,706 of these determinations and 32 percent of the determinations were reversed (3,104 decisions in favor of claimants). *Id.* Thus, 15,686 claims were denied and never paid (either because they were not appealed or affirmed on appeal). Applying an average award of \$6,734.81 to these 15,686 claims results in \$105 million in claims that were prevented from being improperly paid out in 2019 alone. If employers did not contest these claims, the financial impact would be significant.

### **C. Requiring Employers to be Represented by Counsel Would Undermine the**

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<sup>12</sup> Kentucky Education and Workforce Development Cabinet, *Unemployment Insurance Trust Fund: Annual Report* CY 2019 (2019), <https://kcc.ky.gov/Documents/2019%20Trust%20Fund%20Annual%20Report.pdf> (last visited September 18, 2020).



### **Accessibility of the Kentucky Unemployment Compensation System.**

The unemployment compensation process' design is intended to make it accessible. Informal processes such as the relaxed rules of evidence, quick resolution, referees who are not judges and do not even have to be attorneys, and hearings conducted telephonically (even before the implementation of social distancing) all create a system that is much more friendly and accessible to a layperson than traditional legal processes such as lawsuits.

Requiring employers to be represented by an attorney would alter the unemployment compensation hearing process and potentially elevate it to such a level that a layperson would be unable to effectively participate. If an employer decides to contest a determination and proceed with counsel, it will likely have significantly greater resources than the claimant. This will lead to one of two possible scenarios, either an unfair playing field for the claimant or the need for the claimant to hire counsel for her or himself. Effectively requiring those seeking unemployment benefits to hire an attorney to match an attorney on the employer side could discourage unemployed individuals from pursuing legitimate claims if they are unable to afford an attorney. Additionally, hiring an attorney would take away from an employee's ultimate recovery if they had to pay an attorney for representation throughout the unemployment compensation system. This is another example of how injecting transaction costs into the system can negatively alter how the parties interact with the system and lead to inefficient outcomes that undermine the primary purpose of the system.

### **III. PARTICIPATION IN UNEMPLOYMENT HEARINGS DOES NOT CONSTITUTE AN UNAUTHORIZED PRACTICE OF LAW OR IMPACT THE POLICIES PROHIBITING THE UNAUTHORIZED PRACTICE OF LAW.**

While the impacts of requiring representation are great, the threat to the policies behind the prohibition against the unauthorized practice of law are minimal, if any exist at all. The

practice of law is defined as “any service rendered involving legal knowledge or legal advice whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services.” SCR 3.020. The primary concern regarding the unauthorized practice of law is the public interest:

The basic consideration in suits involving unauthorized practice of law is the public interest. Public interest dictates that the judiciary protect the public from the incompetent, the untrained, and the unscrupulous in the practice of law.

*Frazee v. Citizens Fid. Bank & Tr. Co.*, 393 S.W.2d 778, 782 (Ky. 1964), *as modified* (1965).

Stated another way, the unauthorized practice of law places “the rights of the public in jeopardy.” *Kentucky State Bar Ass'n v. Holland*, 411 S.W.2d 674, 675 (Ky. 1967).

Allowing employers to represent themselves without legal counsel does not constitute the unauthorized practice of law as it does not involve legal knowledge or advice and does not threaten the public interest. Unemployment hearings are distinguished from legal proceedings for a variety of reasons. They are fact-finding appeals, the rules of evidence are not applicable, there is no pre-hearing discovery, the parties have no right to a jury trial and the referee doesn't have to be a judge, let alone an attorney. The court in *Harkness* noted these key distinctions:

First, we find that the activities performed by an employer representative in an unemployment compensation proceeding are largely routine and primarily focus on creating a factual basis on which a referee will award or deny unemployment compensation benefits.

*Harkness* at 551. After describing the role of employer representatives as largely supplying factual information to the referee, the Court continued:

These individuals are more akin to facilitators rather than legal practitioners. The purpose of their presence is not to engage in the analysis of complex and intricate legal problems, but rather as an adjunct to the employer (or claimant) in offering their respective viewpoints concerning the events at issue.

*Id.* As further evidence of the nature of unemployment hearings, the hearing officers and referees who preside over them are not judges or oftentimes not even licensed attorneys. If Appellant is correct and employers must be represented, the referee very well may also be considered to be practicing law as they are rendering a decision based on legal arguments.

Ultimately, the public interest is better served by allowing employers to represent themselves for the reasons enumerated above. As the Supreme Court of Pennsylvania noted, “in determining what constitutes the practice of law, [courts] must keep the public interest of primary concern, both in terms of the protection of the public as well as in ensuring that the regulation of the practice of law is not so strict that the public good suffers.” *Harkness* at 551.

### CONCLUSION

Given the policy considerations above, non-attorneys should be allowed to represent employers before the Unemployment Insurance Commission if the employer so chooses. While there may be certain cases that an attorney is warranted or preferred, requiring employers to be represented by attorneys would thwart many policy goals of the unemployment compensation system including speediness, efficacy, and accessibility. At the same time, given the nature of unemployment hearings, representation in those hearings does not constitute the practice of law or pose any threat to the public.

Respectfully submitted,



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