

Seasonal Unemployment Compensation: Insurance of a Known and Certain Loss

INTRODUCTION

Unemployment compensation in the United States arises out of federal excise taxes levied on the states by the Federal Unemployment Tax Act (FUTA).¹ States receive tax credits and money grants by enacting unemployment compensation programs in compliance with federal guidelines.² Currently, several states prohibit payment of regular unemployment benefits to seasonal workers during the regular off season.³

At first glance, difficulties ensue in concluding that a seasonal worker should be denied benefits during customary off seasons. The beneficent purpose of unemployment compensation legislation is to relieve the distress and hardships of unemployment due to job loss by providing benefits to those who through no fault of their own become involuntarily unemployed.⁴ In view of the unemployed seasonal worker's plight, to deny such employees benefits where they otherwise satisfy eligibility qualifying provisions of the code seems unfair.⁵

¹ 26 U.S.C.S. §§ 3301-3311 (Law. Co-op. 1993).

² *Castillo v. Jackson*, 594 N.E.2d 323, 325 (Ill. 1992).

³ See *infra* section IV. Hereafter, "seasonal" industries and employment are those which customarily operate only during regularly recurring periods of less than a year on account of seasonal conditions. See *infra* notes 97-99. Also for purposes of discussion, "seasonal employee(s)" or "seasonal worker(s)" means non-professional civilian employees engaged only in seasonal employment.

⁴ These beneficent purposes appear in codes (see, for example, CAL. UNEMP. INS. CODE § 100) and in opinions: "The act is intended to provide benefits for those who are unemployed through no fault of their own . . ." *Mohler v. Dept. of Labor*, 97 N.E.2d 762 (Ill. 1951) at 765; "The system of unemployment insurance is to provide 'benefits for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum . . .'" *Swaby v. Unemp. Ins. App. Bd.*, 149 Cal.Rptr. 336, 340, *overruled on other grounds*, 624 P.2d 244 (Cal. 1981), quoting *Zorrero v. Unemp. Ins. App. Bd.*, 120 Cal.Rptr. 855 (1975).

⁵ See *infra* section III. One judge, William J. Brennan, Jr., before sitting on the United States Supreme Court, offered a simple policy consideration behind not giving advance agreements to quit at the end of the season the effect of an advance surrender

America's seasonal workers have undoubtedly felt the ravages of the nation's recession as much as or more than any other group of workers.⁶ Employed primarily in agriculture and construction industries,⁷ there are 2 million seasonal workers in the United States and 60% are illegal or undocumented Mexican immigrants.⁸ Virtually all farm laborers in California are immigrants from Mexico.⁹ Over 40% of all farm laborers lack health insurance.¹⁰ The squalid living conditions of California's estimated 1 million migrant seasonal farm workers have gone from bad to dismal.¹¹

Of the nation's farm workers, 87% are employed only six months or less per year.¹² Very little agricultural work is not seasonal in nature.¹³ In view of their frequent unemployment, combined with low paying jobs and horrendous living conditions, seasonal workers are perhaps those who are most in need of aid.¹⁴

However, recent statistics suggest seasonal work accounts for one-fifth of all layoffs.¹⁵ Because seasonal employment causes major fluctu-

of benefits: "If an understanding as to the duration of employment were to have that effect, countless claimants would be disqualified for benefits." *Campbell Soup v. Bd. of Review*, 100 A.2d 287, 290 (N.J. 1953).

⁶ 138 CONG.REC. H 4420 (1992).

⁷ *Id.*

⁸ *Giant Sucking Sound of Porous U.S. Borders*, THE ARIZONA REPUBLIC, June 10, 1993, at A15. Undocumented or illegal aliens are ineligible for unemployment benefits under some statutory schemes. *See, e.g.*, Mich. Cod. Laws § 421.42 (1992).

⁹ Richardson, *California Farm Yields at High Water Mark*, FINANCIAL TIMES, May 11, 1993. Given the substantial agricultural work force in California, this Comment features California, without limiting discussion to it, as an example of a jurisdiction affected by seasonal employment.

¹⁰ Mary E. O'Connell, *On the Fringe: Rethinking the Link Between Wages and Benefits*, 67 TUL. L. REV. 1422, 1444 (1993).

¹¹ *See* Steven Elberg, *Agriculture and the Immigration Reform and Control Act of 1986: Reform or Relapse?*, 3 SAN J. AG. L. REV. 197 (1993); *See also* Jorge Casuso, *Migrants Suffer in Fetid Camps*, CHI. TRIB., September 15, 1991, at 3. Workers live in hastily constructed camps made of discarded debris, wood scraps and garbage bags. The camps have no electricity or running water.

¹² 135 CONG.REC. S 15244 (1989).

¹³ *Id.*

¹⁴ *See supra* note 6. *See also* Jane Younglove Lapp, *The Migrant and Seasonal Agricultural Worker Protection Act: "Rumors of My Death Have Been Greatly Exaggerated,"* 3 SAN J. AG. L. REV. 173 (1993).

¹⁵ DAILY LABOR REPORT, No. 153 (BNA Aug. 11, 1987). These figures are based on a Bureau of Labor Statistics analysis of all layoffs and plant closings in 11 states. An even more recent study of 45 states by the Bureau of Labor Statistics, completed in 1992, reveals that the most common reason for mass layoffs was seasonal and slack work, which constituted 64% of layoff actions and 63% of the workers affected. DAILY

ations in labor market activity, the Bureau of Labor Statistics regularly adjusts its employment data for publication so as not to reflect these sharp fluctuations, which may cloud other factors considered in analyzing the actual condition of the American labor market.¹⁶ Even adjusted statistics indicate percentages of unemployment over a period of years in agricultural and construction industries are higher than in any other industries.¹⁷ The conclusion that seasonal workers constitute a substantial portion of the unemployed population becomes quite reasonable.

One reason offered for statutorily denying unemployment benefits during regular off seasons, or otherwise limiting entitlement to benefits, is to "get[] at the seasonal worker who works for six months and then goes hunting and fishing."¹⁸ This is perhaps the weakest objection to allowing workers to collect benefits during the off season. Discounting simple meanness as the primary motivation for prohibiting unemployment benefits during regular spells of unemployment, other reasons appear for denying seasonal unemployment compensation.

First, seasonal employment is a "red ink" industry in terms of unemployment insurance funding. Even where seasonal employers pay into the system at their maximum rate, seasonal workers, whose situation repeats itself year after year, often draw benefits in sums far exceeding employer contributions.¹⁹ Thus, allowing maximum benefits without restrictions for seasonal employees leads to unfair financial burdens on employers.²⁰ It also acts as a subsidy for unstable employment practices, increasing seasonal and cyclical fluctuations in labor markets.²¹

REPORT FOR EXECUTIVES, 244 (BNA Dec. 18, 1992).

¹⁶ EMPLOYMENT AND EARNINGS (BLS Feb. 1993), at 227, 228. "Over the course of a year, the size of the Nation's labor force, the levels of employment and unemployment, and other measures of labor market activity undergo sharp fluctuations due to such seasonal events as changes in weather, reduced or expanded production, harvest, major holidays, and the opening and closing of schools. Because these seasonal events follow a more or less regular pattern each year, their influence on statistical trends can be eliminated by adjusting the statistics from month to month."

¹⁷ *Id.* at 22, 23.

¹⁸ Garey Forster, Louisiana State Representative, on a bill to change the basis for calculation of benefits from a worker's highest two quarters to four quarters, quoted in *Bad Economy Was Good for Business at the 1988 Legislative*, NEW ORLEANS CITY BUSINESS, Aug. 15, 1988, at 14.

¹⁹ Stephen D. Sugarman, *Short Term Paid Leave: A New Approach to Social Insurance and Employee Benefits*, 75 CALIF. L. REV. 465, 487 (1987).

²⁰ *Bielke v. Am. Crystal Sugar*, 288 N.W. 584, 587 (Minn. 1939): "In the category of seasonal industries, contributions and benefits might thereby be thrown into embarrassing disproportion."

²¹ *The Effects of Unemployment Compensation*, Economic Report of the President, DAILY LABOR REPORT No. 23, (BNA Feb. 1983). See also Sugarman, *supra* note 19.

This result is particularly disquieting in California, where a high number of agricultural and other seasonal workers draw on depleted state unemployment funds.²²

Additionally, payment of unemployment benefits to seasonal workers during off seasons constitutes insurance of a known, certain and recurring loss which the system is not designed to indemnify.²³ Unemployment compensation law is "designed to act as a buffer or hedge against the ravages of sudden and unexpected loss of one's livelihood."²⁴ By definition, however, seasonal unemployment is neither unexpected nor sudden;²⁵ it is a regularly recurring situation inherent in the nature of seasonal work.²⁶ Unemployment compensation is an inappropriate form of relief.²⁷

Despite funding problems,²⁸ California and most other jurisdictions today have adopted the position that seasonal workers are not subject to per se disqualification under the respective unemployment statutes.²⁹

²² Sugarman, *supra* note 19, at 487. It is undisputed that California's unemployment insurance fund has been depleted in recent years. See *afii* Bill No. AB 1585, California Committee Analysis (Information for Public Affairs, April 19, 1993).

²³ Sugarman, *supra* note 19, at 488.

²⁴ *Swaby v. Unemp. Ins. App. Bd.*, 149 Cal.Rptr. 336, 340 (1978), quoting *Zorrero v. Unemp. Ins. App. Bd.*, 120 Cal.Rptr. 855 (1975). See *Maitland v. E.D.D.*, 181 Cal.Rptr. 587 (1982). See also *Unemp. Comp. Bd. of Rev. v. Jenkins*, 350 A.2d 447, 450 (Pa. 1975): "[T]he policy of [unemployment] legislation is to relieve the economic hardship of *sudden unemployment* . . ." (emphasis in original).

With respect to seasonal school employees, see *Rogel v. Taylor Sch. Dist.*, 394 N.W.2d 32, 34 (Mich. 1986), noting the legislative intent behind the state's exclusion of regular benefits during regular off seasons was based on the opinion that such employees "know of the seasonal layoff well in advance (and may consider it an employment benefit) and are not faced with the same 'economic crunch' as those who are unpredictably laid off during the year."

²⁵ See *Castillo v. Jackson*, 594 N.E.2d 323 (Ill. 1992), and *infra* notes 96-98. See also Sugarman, *supra* note 19.

²⁶ Sugarman, *supra* note 19, at 487. See *infra* section III.

²⁷ Sugarman, *supra* note 19, at 487-488. This Comment is not intended to suggest that the welfare of seasonal workers, who by the very nature of their profession experience regular layoffs, should be ignored. To the contrary, appropriate alternatives such as higher minimum wages for seasonal employees, mandatory seasonal separation benefits, or even access to other public assistance programs may distribute the cost of such assistance more fairly and evenly. The author maintains that unemployment compensation was not created as a cushion against regular industrial layoffs, regardless of whether seasonal workers actually cause significant unemployment fund depletion.

²⁸ High unemployment and recession in the 1970's and 1980's depleted many state unemployment insurance funds. See *Statement Adopted by AFL-CIO Executive Council*, DAILY LABOR REPORT, (DLR Feb. 23, 1987), at E1.

²⁹ Legislation proscribing unemployment benefits to non-professional civilians based

Benefits to seasonal employees have been denied during the off season where claimants failed to meet general eligibility requirements under state codes, such as making a requisite showing of being "available" for work.³⁰ For example, claimants who restricted the geographic area in which they were willing to accept work during off seasons to locations providing only seasonal work (or lack thereof) have been deemed not "available" for work.³¹ Generally, however, these jurisdictions require only that seasonal employees meet general requirements applicable to all workers in determining eligibility for benefits.³²

On the other hand, several jurisdictions have statutory provisions directed specifically at seasonal employment situations.³³ These statutes, focusing on regularly recurring cycles of employment and unemployment, eliminate workers' entitlement to regular benefits based on seasonal work during the normal off season once an employer has been deemed seasonal.³⁴ The statutes also limit taxation on the employer to bring its contribution in line with the amount of benefits paid to its employees.³⁵ Statutes proscribing benefits for seasonal workers during the off season³⁶ have survived constitutional attack as not violative of equal protection or substantive or procedural due process rights.³⁷

Prohibiting unemployment compensation benefits for seasonal employees during the regular off season arguably singles out employees in agricultural, construction, perishable food processing and other seasonal industries and operates to undermine the beneficent purposes of unemployment compensation law.³⁸ A seasonal worker's knowledge in advance that his job duration is limited and agreement to cease working at the end of the season do not indicate such a worker desires to perform only seasonal labor. It follows that such an employee has not necessarily "voluntarily" terminated employment.³⁹

Even so, unemployment insurance funding problems do exist⁴⁰ and

on seasonal work exists in those states listed *infra* note 89.

³⁰ See CAL. UNEMP. INS. CODE § 1253(c) (Deering 1985 & Supp. 1994).

³¹ Mohler v. Dept. of Labor, 97 N.E.2d 762 (Ill. 1951).

³² *Id.* See *infra* section III.

³³ See *infra* section IV.

³⁴ *Id.*

³⁵ See, e.g., OHIO REV. CODE ANN. § 4141.33(B)(1) (Baldwin 1993).

³⁶ See, e.g., 43 PENN. STAT. § 802.5 (1992).

³⁷ Parker v. Dept. of Labor, 540 A.2d 313 (Pa. 1988), *affirmed*, 557 A.2d 1061 (1989).

³⁸ Parker v. Dept. of Labor, 540 A.2d 313 (Pa. 1988); Campbell Soup v. Bd. of Review, 100 A.2d 287 (N.J. 1953).

³⁹ See *infra* part III.

⁴⁰ See *supra* note 28.

seasonal workers are often targeted.⁴¹ So are fixed-term temporary employees, as evidenced by a recent trend to narrow entitlement to unemployment benefits for such workers where they express no desire to continue working beyond the predesignated term.⁴²

FUTA⁴³ proscribes payment of unemployment benefits during the off season on the basis of participation in or training for professional athletic or sporting events.⁴⁴ As such, legislation eliminating unemployment benefits for certain professional seasonal employees reaches all jurisdictions choosing to comply with federal guidelines.⁴⁵ In view of rapid depletion of funding for state unemployment programs, denying other non-professional seasonal workers unemployment benefits during off seasons serves to help preserve the integrity of the unemployment compensation system and its funding for the benefit of other unemployed workers.

This Comment first provides a brief history of the structure of unemployment compensation law in America. Next the Comment examines treatment of seasonal workers in jurisdictions such as California, which seems reluctant to enact statutes proscribing payment of regular benefits based on seasonal employment. An analysis of the structure and application of statutes addressing seasonal employment and a review of challenges to those statutes follow. Finally, this Comment recommends that California and other states finding themselves in a similar predicament consider enacting legislation which operates to prohibit unemployment compensation based on seasonal work during the regular off season.

⁴¹ See *infra* section IV.

⁴² Even in jurisdictions not specifically eliminating benefits for seasonal employees, there appears a recent tendency to limit a different group's entitlement to benefits: that of temporary workers. See *Lincoln v. Dept. of Empl.*, 592 A.2d 885 (Vt. 1991) (denying benefits to temporary workers where the worker requested temporary employment in light of his or her own needs); *Calkins v. Bd. of Review*, 489 N.E.2d 920 (Ill. 1986) (holding an unrefuted statement by an employer that an employee did not desire any more work than she anticipated performing will bar her claim for benefits.)

⁴³ 26 U.S.C.S. §§ 3301-3311 (Law. Co-op. 1993).

⁴⁴ 26 U.S.C.S. § 3304(a)(13) (Law. Co-op. 1993). Similar wording appears in state codes. See 19 DEL. CODE § 3315(9) (1992), and OHIO REV. CODE ANN. § 4141.33(C) (Baldwin 1993).

⁴⁵ *State of New Hampshire v. Marshall*, 616 F.2d 240, 241 (1st Cir. 1980), *dismissed*, 449 U.S. 806. The case suggested that as of the date of the decision, only New Hampshire had declined to comply with FUTA prerequisites to grants and tax credits.

I. UNEMPLOYMENT COMPENSATION IN AMERICA

In 1935, the federal government enacted the Federal Unemployment Tax Act⁴⁶ (FUTA) in response to massive unemployment which rendered states unable to provide for the essential needs of the citizens.⁴⁷ FUTA was also enacted in response to an imbalance among states in the financial burden of unemployment compensation. This imbalance resulted when many states refused to follow the leader in enacting unemployment compensation law — Wisconsin — out of fears companies would flee to other states without such legislation to avoid unemployment tax.⁴⁸

FUTA imposes an excise tax on employers based on wages paid by the employer for covered employment.⁴⁹ However, states may escape the tax burden. Employers are allowed to receive up to a 90% credit against the FUTA tax by contributing to state insurance funds, and the states may be granted money toward administrative costs of unemployment programs, provided the state is certified by the Secretary of Labor and its code conforms to the federal requirements.⁵⁰ Failure to comply with the federal code could result in loss of federal funding and tax credits.⁵¹

State code provisions for calculation of employer unemployment tax vary, but they mirror generally the FUTA provisions.⁵² These statutes provide criteria for determining employee eligibility for receiving benefits, such as being available for work,⁵³ and set forth penalty provisions disqualifying those employees based on other criteria, such as voluntary termination without cause from one's last job.⁵⁴ State codes also include enabling and directive provisions for administration of these program.⁵⁵ Currently, most states follow FUTA mandates, finding the combination of tax credits and money grants an offer too good to refuse.⁵⁶

⁴⁶ 26 U.S.C.S. § 3301-11 (Law. Co-op. 1993), *supra* note 1.

⁴⁷ *State of New Hampshire v. Marshall*, 616 F.2d 240 (1st Cir. 1980).

⁴⁸ *Id.*

⁴⁹ *Castillo v. Jackson*, 594 N.E.2d 323 (Ill. 1992).

⁵⁰ *Id.*; *State of New Hampshire v. Marshall*, 616 F.2d 240 (1st Cir. 1980); 26 U.S.C.S. §§ 3301-3311 (Law. Co-op. 1993).

⁵¹ *Castillo v. Jackson*, 594 N.E.2d 323 (Ill. 1992).

⁵² 26 U.S.C.S. §§ 3303, 3304 (Law. Co-op. 1993). See CAL. UNEMP. INS. CODE §§ 901-1243 (Deering 1985 & Supp. 1994).

⁵³ See, e.g., CAL. UNEMP. INS. CODE § 1253(c) (Deering 1985 & Supp. 1994).

⁵⁴ CAL. UNEMP. INS. CODE § 1256 (Deering 1985 & Supp. 1994).

⁵⁵ See, e.g., CAL. UNEMP. INS. CODE §§ 301-334 (Deering 1985 & Supp. 1994).

⁵⁶ *State of New Hampshire v. Marshall*, 616 F.2d 240, 241 (1st Cir. 1980).

II. TREATMENT OF SEASONAL UNEMPLOYMENT IN JURISDICTIONS LACKING STATUTES SPECIFICALLY PROSCRIBING UNEMPLOYMENT BENEFITS FOR SEASONAL EMPLOYEES

Many states have no language in their unemployment compensation legislation which specifically addresses seasonal employment⁵⁷ and which proscribes payment of benefits during regular off seasons.⁵⁸ These states use statutorily authorized general eligibility provisions which apply to all unemployed workers.⁵⁹ Eligibility criteria include having left one's last employment involuntarily,⁶⁰ availability for and ability to work,⁶¹ and an active work search.⁶²

No bright-line rule applies to measure compliance with these requirements; fulfillment of these prerequisites to compensation can be tested only on a case-specific basis.⁶³ These provisions are to be construed liberally so as to further the beneficent purposes of unemployment compensation statutes.⁶⁴ Two requirements are central to the dis-

⁵⁷ For those that do, *see infra* note 89.

⁵⁸ For example, California Unemployment Insurance Code does not address seasonal employment. "A seasonal worker is not precluded by the intermittent nature of his work from collecting unemployment benefits . . ." *Swaby v. Unemp. Ins. App. Bd.*, 149 Cal.Rptr. 336, 341 (1978). Indeed, the policy in California that unemployment insurance is designed to cushion against the impact of such industrial blights as seasonal and cyclical work idleness has been reiterated. *See Chrysler Corp. v. Cal. Empl. Etc. Com.*, 253 Pac.2d 68, 72 (1953); *Cooperman v. Unemp. Ins. App. Bd.*, 122 Cal.Rptr. 127.

⁵⁹ *Mohler v. Dept. of Labor*, 97 N.E.2d 762, 765 (Ill. 1951). The Illinois Supreme Court held that a seasonal employee is not per se ineligible for benefits during the off season. The court notes Illinois' original unemployment compensation act, enacted in 1937, "embraced the problem of benefits for those seasonally and irregularly employed" yet was repealed two years later, "manifesting a legislative intent that seasonal workers, to be entitled to benefits, must meet the same eligibility requirements as other claimants . . ."

⁶⁰ CAL. UNEMP. INS. CODE § 1256 (Deering 1985 & Supp. 1994); *see also Churchill Downs, Inc. v. Ky. Unemp. Ins. Comm'n*, 454 S.W.2d 347 (Ky. 1970) 3 at 348; *Loftis v. Legionville*, 297 N.W.2d 237 (Minn. 1980) at 238.

⁶¹ CAL. UNEMP. INS. CODE § 1253(c) (Deering 1985 & Supp. 1994); *Swaby v. Unemp. Ins. App. Bd.*, 149 Cal.Rptr. 336 (1978); *Mohler v. Dept. of Labor*, 97 N.E.2d 762 (Ill. 1951).

⁶² CAL. UNEMP. INS. CODE § 1253(e) (Deering 1985 & Supp. 1994); *Swaby v. Unemp. Ins. App. Bd.*, 149 Cal.Rptr. 336, 341 (1978) (holding that a seasonal employee must make reasonable efforts to find suitable employment and "may not sit by idly and collect unemployment benefits while awaiting his next cyclical work period.")

⁶³ *Mohler v. Dept. of Labor*, 97 N.E.2d 762, 764 (Ill. 1951). *See also Calkins v. Bd. of Review*, 489 N.E.2d 920, 923 (Ill. 1986).

⁶⁴ *See, e.g., Campbell Soup v. Bd. of Review*, 100 A.2d 287, 289 (N.J. 1953). The policy of liberally construing unemployment statutes in favor of the claimant is often

cussion of the eligibility of seasonal employees for regular benefits: whether the worker left the seasonal job involuntarily and whether the worker is available for suitable work.

A. *Involuntary Unemployment*

To obtain unemployment benefits, seasonal employees, as all employees, must first show they left their seasonal jobs involuntarily, or voluntarily with cause.⁶⁵ The New Jersey high court asserted that no one would suggest voluntary acceptance of a job known to be temporary in nature constitutes a voluntary leaving for the purposes of a then-applicable New Jersey statute disqualifying those who leave work involuntarily without cause.⁶⁶ In a Kentucky opinion, however, a dissenting judge suggested just that.⁶⁷ Nevertheless, courts generally agree that advance knowledge of the temporary nature of a job before acceptance when coupled with an agreement to leave at the end of a term does not constitute an involuntary leaving for the purposes of the several statutory schemes.⁶⁸

Nebraska's high court held that one who accepts employment knowing in advance the employment is temporary is not deemed to leave that employment voluntarily when the job ceases to exist, even where the employee signs an agreement in advance specifying when the term of employment is to end.⁶⁹ The Court of Appeals of Kentucky agreed.⁷⁰

repeated.

⁶⁵ See, e.g., CAL. UNEMP. INS. CODE § 1256 (Deering 1993). Central to the discussion of seasonal employment, or employment the term of which is limited by contract, is whether, by accepting and/or agreeing to employment known in advance to be for a limited duration, the employee voluntarily leaves that job without cause so as to be ineligible for benefits. See *Churchill Downs, Inc. v. Ky. Unemp. Ins. Comm'n*, 454 S.W.2d 347 (Ky. 1970); *Campbell Soup v. Bd. of Review*, 100 A.2d 287 (N.J. 1953); *Kentucky Unemp. Ins. Comm'n v. Am. Nat'l B. & T. Co.*, 367 S.W.2d 260 (Ky. 1963); *Loftis v. Legionville*, 297 N.W.2d 237 (Minn. 1980); *Walker Mfg. v. Pogreba*, 316 N.W.2d 315 (Neb. 1982).

⁶⁶ *Campbell Soup v. Bd. of Review*, 100 A.2d 287, 290 (N.J. 1953).

⁶⁷ *Churchill Downs, Inc. v. Ky. Unemp. Ins. Comm'n*, 454 S.W.2d 347, 350 (Ky. 1970) (Steinfeld, J., dissenting). See also *Wilmington Country Club v. Unemp. Ins. App. Bd.*, 301 A.2d 289, 290 (Del. 1973) (holding where an employee accepts a job which he is aware is for a specific limited term, he leaves the job voluntarily at the end of the term.)

⁶⁸ *Churchill Downs, Inc. v. Ky. Unemp. Ins. Comm'n*, 454 S.W.2d 347 (Ky. 1970); *Campbell Soup v. Bd. of Review*, 100 A.2d 287 (N.J. 1953); *Kentucky Unemp. Ins. Comm'n v. Am. Nat. B. & T. Co.*, 367 N.W.2d 260 (Ky. 1963).

⁶⁹ *Walker Mfg. v. Pogreba*, 316 N.W.2d 315, 317 (Ne. 1982).

⁷⁰ *Kentucky Unemp. Ins. Comm'n v. Am. Nat. B. & T. Co.*, 367 N.W.2d 260, 262

So did the Vermont Supreme Court, at least where the employer controls the length of the term of employment.⁷¹ Voluntariness of the employee's conduct was tested not at the time of acceptance of the job offer, but instead at the time of severance. The question is whether the employee would have continued to work if his services were needed when the temporary job ceased to exist.⁷²

In determining whether an employee has left his most recent job voluntarily, a Kentucky appellate court examined volition on the part of the employee by asking whether the employee exercises any choice when leaving his seasonal job.⁷³ The court held that seasonal employees have no choice whether to continue working once the work season is over because seasonal work will terminate at the end of the regular season, regardless of any agreement on the part of the employees or their union.⁷⁴ Finally, one court suggested the most obvious reason for holding that such an employee has not left the job voluntarily: the job has left the employee.⁷⁵

A few states have adopted the opposite position on the issue of voluntariness. An Illinois court considering the issue for the first time held that advance knowledge of the fixed duration of a job and an agreement to leave when work ends constitute a voluntary leaving.⁷⁶ This decision made no hard-and-fast rule, however, and held that the facts and circumstances of each case must be considered.⁷⁷

Thus, several courts reaching the issue in states without unemployment legislation directed toward seasonal employees have held that the termination of employment at the end of the work season will be deemed involuntary on the part of the employee, even though the employee knew the job was for a fixed term and entered into an agree-

(Ky. 1963).

⁷¹ *Adams v. Dept. of Empl. Security*, 430 A.2d 446, 447 (Vt. 1981). The court also points out at page 448 that a contrary result "would exclude from benefits almost all seasonal workers," an exclusion not in accord with the legislature's intent in Vermont, where seasonal workers "have always been considered eligible for benefits"

⁷² *Id.*; see also *Kentucky Unemp. Ins. Comm'n v. Am. Nat. B. & T. Co.*, 367 N.W.2d 260 (Ky. 1963); *Lincoln v. Dept. of Empl.*, 592 A.2d 885 (Vt. 1991).

⁷³ *Churchill Downs, Inc. v. Ky. Unemp. Ins. Comm'n*, 454 S.W.2d 347, 348 (Ky. 1970).

⁷⁴ *Id.*: "Their ceasing to work at the close of each meet was not a matter of negotiation or bargaining—it was simply an inevitable feature of the nature of the work."

⁷⁵ *Id.* at 349.

⁷⁶ *Calkins v. Bd. of Review*, 489 N.E.2d 920, 923 (Ill. 1986) (approving the holding of the Peoria County Circuit Court that an agreement to be laid off upon the return of a regular employee constitutes a voluntary leaving by a temporary employee/claimant.)

⁷⁷ *Id.*

ment to quit at the end of the term.⁷⁸

B. Availability for Suitable Work

Another statutory requirement frequently litigated in jurisdictions not expressly disqualifying seasonal workers from receiving regular benefits is that one seeking benefits be available for suitable employment.⁷⁹ In California, a seasonal employee who cannot find work in his usual occupation during the off season should seek other work for which he is qualified to be considered "available" for work.⁸⁰ He must make himself available to a substantial field of employment by engaging in a reasonable search to secure suitable work.⁸¹ A seasonal agricultural worker who limits his work search to the same location and type of employment undergoing seasonal layoffs is ineligible for benefits because he has made himself unavailable for work.⁸²

In Illinois, the state's Supreme Court applied the state's section on availability even more narrowly against seasonal workers in the asparagus and corn pack industries where employment lasted between ten and fourteen weeks each year.⁸³ Even though the seasonal employees in this consolidated case had not expressly placed any restrictions or limits on their employability, they were not attached to the labor market and were "unavailable" under the code by remaining during the off season

⁷⁸ It seems unlikely California courts would hold that pre-hire knowledge of the seasonal nature of a job constitutes voluntary termination without cause upon layoff. As indicated *supra* at note 58, the policy behind unemployment insurance in California is to cushion against the impact of seasonal idleness. See CAL. UNEMP. INS. CODE § 611, which specifically identifies agricultural labor as "employment" compensable under the statutes. Given that most agricultural labor is likely to be seasonal in nature, this suggests a policy against limiting benefits solely because an employee knows in advance her job is temporary.

⁷⁹ CAL. UNEMP. INS. CODE § 1253(c) (Deering 1985 & Supp. 1994), for example, allowing benefits to workers in any week in which they are unemployed, "able to work and available for work for that week."

⁸⁰ *Garcia v. Cal. Empl. Stability Comm'n*, 161 P.2d 972, 974 (Cal. 1945).

⁸¹ *Swaby v. Unemp. Ins. App. Bd.*, 149 Cal.Rptr. 336, 340-341 (1978).

⁸² *Swaby v. Unemp. Ins. App. Bd.*, 149 Cal.Rptr. 336, 341 (1978). The claimant was employed as a seasonal grape field worker in the Coachella Valley who during the off season only maintained contact with his union hall (which only had one contract with one grower whose maximum employment period was seven months). The claimant declined to travel to San Bernardino, an area equidistant from his home, to perform the same type of work he usually performed. The court, focusing on what it termed self-imposed restrictions by the claimant, found the worker had made himself available to "an economically insubstantial field of employment" and as such had voluntarily withdrawn from the labor market.

⁸³ *Mohler v. Dept. of Labor*, 97 N.E.2d 762 (Ill. 1951).

in a labor market consisting exclusively of seasonal work.⁸⁴ Although there was no public transportation to areas where employment was available, rendering the workers' situation not of their own making,⁸⁵ the court nonetheless found claimants voluntarily detached from the labor market. The court even went so far as to comment on the claimants' mental states, pointing out the "habit, born over a long period of years, of working only seasonally is indicative of a mental attitude of contentment to remain out of the labor market during the off season of the canning industry."⁸⁶

Hence, aside from any mental attitude or fault on the part of seasonal workers, claimants' attachment to a labor market with existing employment opportunities during the off season and their willingness or ability to accept such work, where suitable, are required in several jurisdictions when examining a seasonal employee's availability for work as a prerequisite to eligibility for benefits. One purpose of this requirement especially significant in seasonal employment situations is to ensure that benefits not be paid to persons who could be working.⁸⁷ In these states, a seasonal worker's job search must extend beyond the seasonal work arena, but if only seasonal employment is obtained after searching, benefits will not be denied solely on the basis of seasonal work habits.⁸⁸

The reasoning behind requiring that a seasonal employee be treated as any other employee may be sound, at least with respect to involuntary termination and work availability as prerequisites to compensation. However, jurisdictions such as California have quite noticeably ignored that regular, predictable seasonal unemployment falls outside the scope of loss against which unemployment compensation law is designed to insure: unexpected and sudden job loss.

III. STATE STATUTES EXPRESSLY PROSCRIBING UNEMPLOYMENT COMPENSATION BASED ON SEASONAL WORK

At least ten states have eliminated the need to determine seasonal workers' eligibility for benefits during regularly recurring off seasons.⁸⁹

⁸⁴ *Id.* at 765.

⁸⁵ *Id.*

⁸⁶ *Id.* at 765-766. The claimants had resided for 27 years only in areas with no labor markets outside of seasonal work and no transportation facilities.

⁸⁷ *Gutierrez v. Empl. Dev. Dept.*, 18 Cal.Rptr.2d 705, 707 (1993).

⁸⁸ *Swaby v. Unemp. Ins. App. Bd.*, 149 Cal.Rptr. 336 (1978); *Mohler v. Dept. of Labor*, 97 N.E.2d 762 (Ill. 1951).

⁸⁹ See OHIO REV. CODE ANN. § 4141.33(a) (Baldwin 1993); COLO. REV. STAT. 8-

Avoiding the burden of insuring against known and certain losses, state legislatures have implemented statutes which define seasonal employment,⁹⁰ empower agencies to administer seasonal determination programs⁹¹ and allow employers to seek such a determination.⁹² These statutes expressly disqualify seasonal workers from receiving benefits for unemployment occurring outside of the normal operating season once their employer has been deemed seasonal.⁹³ Employers' reserve accounts are not charged for benefits paid during the off season for work credits gained in non-seasonal work.⁹⁴

A. Defining and Determining Seasonal Employment

These state statutes generally define seasonal employment as that which customarily occurs only during regularly recurring seasons of certain time periods because of seasonal conditions,⁹⁵ and seasonal employers or employees as those who engage in such employment.⁹⁶ The terms of these definitions vary, from the fairly narrow and concrete, specifically identifying those industries which are to be deemed seasonal,⁹⁷ to the general.⁹⁸ Also, the length of a "season" varies widely.⁹⁹

73-104 (1992); 43 PENN. STAT. § 802.5 (1992); W. VA. CODE § 21A-6-1a (1992); N.M. STAT. ANN. § 51-1-5(i) (1992); 19 DEL. CODE § 3315(1) (1992); IND. CODE ANN. § 22-4-14-11 (Burns 1992); N.C. GEN. STAT. § 96-16 (Michie 1992); MINN. STAT. § 268.07(2a) (1992); MASS. ANN. LAWS CH. 151A, § 24A (1993). This type of legislation is by no means new; *see infra* note 100 and accompanying text. Its implementation, and the forces behind it, however, have surfaced as recently as 1992. *See infra* notes 162, 163 and accompanying text.

⁹⁰ *See, e.g.*, 43 PENN. STAT. § 802.5(h)(3-5).

⁹¹ IND. CODE ANN. § 22-4-14-11(f) (Burns 1992): "The board shall adopt rules applicable to seasonal employers for determining their normal seasonal period or periods."

⁹² *See, e.g.*, 43 PENN. STAT. § 802.5(b).

⁹³ *See, e.g.*, COLO. REV. STAT. § 8-73-104 (1992).

⁹⁴ OHIO REV. CODE ANN. § 4141.33(B)(1) (Baldwin 1993).

⁹⁵ *See, e.g.*, 43 PENN. STAT. § 802.5(h)(3-5).

⁹⁶ OHIO REV. CODE ANN. § 4141.33(A); N.C. GEN. STAT. § 96-16(j)(6).

⁹⁷ MINN. STAT. § 268.07(2a) (1992), ("Seasonal employment" means employment with a single employer in the recreation or tourist industry which is available with the employer for 15 consecutive weeks or less each calendar year . . ."); 43 PENN. STAT. § 802.5(g)(3) (1992), ("Seasonal industry" means an industry, establishment or process within an industry which, because of climatic conditions making it impractical or impossible to do otherwise, customarily carries on fruit or vegetable food processing operations, or both, only during a regularly recurring period of one hundred eighty (180) days of work in less than a calendar year.")

⁹⁸ N.C. GEN. STAT. § 96-16(a) (Michie 1992), ("[a] seasonal pursuit is one which, because of seasonal conditions making it impractical or impossible to do otherwise, cus-

Some state codes require that employers apply for and receive seasonal status through an administrative agency before disqualifying provisions are triggered.¹⁰⁰ Predictably, application of these statutes almost immediately led to discussion of the meaning of the terms "customary," "seasonal or climatic condition," "impractical" and "operate."¹⁰¹ In 1941, Oregon's high court, interpreting an unemployment statute¹⁰² similar in wording to Ohio's current statute defining seasonal work and limiting benefits to seasonal workers,¹⁰³ suggested a three-prong test to establish whether an employer's operation is seasonal: the agency charged with administering the provisions must find (1) operation for an entire year is highly impractical or impossible; (2) the employer customarily operates only during one or more regularly recurring periods of less than one year in length; and (3) these limitations are on account of seasonal conditions.¹⁰⁴

The Minnesota Supreme Court held that whether year round operation is "impractical" turns on whether it is not feasible to operate all year, following commonly accepted methods in the industry in question.¹⁰⁵ Even though an operation can possibly be carried out throughout the year, where cost is so prohibitive as to make year-round operation economically infeasible, the first prong of impracticability is met.¹⁰⁶ If, on the other hand, operation can, for practical purposes, be carried on throughout the year, seasonal status may not be conferred.¹⁰⁷

A determination of seasonal status also depends on whether the employer "customarily" operates only during a regularly recurring sea-

tomarily carries on production operations only within a regularly recurring active period or periods of less than an aggregate of 36 weeks in any calendar year"); OHIO REV. CODE § 4141.33(A) (Baldwin 1993) (" '[S]easonal employment' means employment of individuals hired primarily to perform services in an industry which because of climatic conditions or because of the seasonal nature of such industry")

⁹⁹ N.C. GEN. STAT. § 96-16, *supra* note 89 (36 weeks); Ohio Rev. Code Ann. § 4141.33, *supra* note 89 (40 weeks); COLO. REV. STAT. § 8-73-104, *supra* note 89 (26 weeks); MINN. STAT. § 268.07, *supra* note 89 (15 weeks); 43 PENN. STAT. § 802.5, *supra* note 89 (180 days), for example.

¹⁰⁰ *See, e.g.*, 43 PENN. STAT. § 802.5(b).

¹⁰¹ *Beers v. Commonwealth*, 546 A.2d 1260 (Pa. 1988), *overruled in part*, *Vanmeire v. Unemp.*, 564 A.2d 540 (Pa. 1989); *Layman v. State*, 117 P.2d 974 (Or. 1941); *Application of Land O' Lakes*, 68 N.W.2d 256 (Minn. 1955).

¹⁰² Oregon apparently no longer has legislation prohibiting benefits based on seasonal employment.

¹⁰³ OHIO REV. CODE ANN. § 4141.33(A).

¹⁰⁴ *Layman v. State*, 117 P.2d 974, 977 (Or. 1941).

¹⁰⁵ *App. of Land O' Lakes*, 68 N.W.2d 256, 260-261 (Minn. 1955).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

son.¹⁰⁸ For a practice to be considered customary over a period of years, the Oregon court held, the practice need not be engaged in every year, but where the employer engages in the practice in as many years as not, "there is no custom one way or the other."¹⁰⁹ The Supreme Court of Minnesota expanded on this point, equating the term "customary" to "usual and habitual."¹¹⁰ Minor and infrequent periods of operation exceeding the period described in a limiting statute¹¹¹ should not strip an employer of its seasonal status.¹¹²

The definition of "seasonal operation" also has been debated; concerns center on employers whose operations are not all seasonal in nature.¹¹³ One court held that anything less than an absolute shutdown or cessation of operations should result in denial of seasonal status.¹¹⁴ Where an employer undergoes only a reduction in labor force, leaving a substantial number of workers in service, it will still be deemed to be in operation for purposes of the statute.¹¹⁵

Another court rejected claimants' argument that an employer's operations must consist of exclusively seasonal activity to fall under the umbrella of the statute. It held even though a portion of an employer's operations may be of a non-seasonal nature, the remainder of the operation may be deemed seasonal. Employees of those seasonal operations may be denied benefits in accordance with the statute, at least where that non-seasonal portion is incidental and insignificant compared with the seasonal portion of the operations.¹¹⁶

A Pennsylvania court found evidence that certain equipment was used exclusively in the vegetable processing operations for which seasonal status was sought and evidence that a number of employees worked only in those same operations a sufficient showing of a separate seasonal operation.¹¹⁷ The court pointed to a statute expressly allowing employers to seek seasonal status for portions of their operations upon a showing that the portion for which the status is sought is "functionally

¹⁰⁸ See 43 PENN. STAT. § 802.5(g)(3).

¹⁰⁹ *Layman v. State*, 117 P.2d 974, 979 (Or. 1941).

¹¹⁰ *App. of Land O' Lakes*, 68 N.W.2d 256, 259 (Minn. 1955).

¹¹¹ MINN. STAT. ANN. § 268.07(5) (*repealed*, 1975).

¹¹² 68 N.W.2d at 259 (Minn. 1955).

¹¹³ *App. of Land O' Lakes*, 68 N.W.2d 256 (Minn. 1955); *Beers v. Commonwealth*, 546 A.2d 1260 (Pa. 1988); *Layman v. State*, 117 P.2d 974 (Or. 1941).

¹¹⁴ *Layman v. State*, 117 P.2d 974, 981 (Or. 1941). This court observed, however, that "operations" do not include repair, construction and maintenance work.

¹¹⁵ *Id.*

¹¹⁶ *App. of Land O' Lakes*, 68 N.W.2d 256, 259 (Minn. 1955).

¹¹⁷ *Beers v. Commonwealth*, 546 A.2d 1260, 1269 (Pa. 1988).

distinct."¹¹⁸

Finally, seasonal status depends on whether regularly recurring operational shutdowns of operation are caused by "seasonal conditions."¹¹⁹ Weather conditions typically occurring in particular seasons of the year are "seasonal conditions."¹²⁰ In construing the statutory term "climatic conditions," one court took judicial notice that production and freezing of fruits and vegetables, to keep them fresh, must be carried out promptly;¹²¹ thus, lapses in agricultural product processing were recognized as occurring on account of seasonal conditions.¹²²

B. Disqualifying Seasonal Workers

Once seasonal status is conferred, unemployment benefits based on work for the seasonal employer will be denied to workers during the regular off season.¹²³ Pennsylvania's statute, however, prohibits payment of benefits during the off season only in the event there is a likelihood the worker will return to the seasonal job in the next normal work season.¹²⁴ The apparent reason for this requirement is where such an assurance or contract exists, the worker is "unavailable" for

¹¹⁸ See 43 PENN. STAT. § 802.5(h)(4) (1992). A functionally distinct operation is one that is identifiable, under usual and customary practice in the industry, as distinguishable from the employer's other non-seasonal operations.

¹¹⁹ See, e.g., N.C. GEN. STAT. § 92-16 (Michie. 1993).

¹²⁰ *Layman v. State*, 117 P.2d 974, 979 (Or. 1941): "[W]e think it obvious that 'seasonal conditions' include conditions of the weather peculiar to a particular season of the year."

¹²¹ *Beers v. Commonwealth*, 546 A.2d 1260, 1268 (Pa. 1988).

¹²² *Id.* 43 PENN. STAT. § 802.5, the section discussed, defines a seasonal industry as one in fruit or vegetable processing operations which, because of climatic conditions, customarily operates during a regularly recurring season of less than 180 days. This suggests both fruit and vegetable processing and climatic conditions are among the necessary elements of a seasonal determination in Pennsylvania. *Layman v. State*, 117 P.2d 974 (Or. 1941), suggests any fruit or vegetable processing which customarily occurs only during a regularly recurring season of less than 180 days is presumed to be, or perhaps per se, on account of "climatic conditions."

¹²³ See, e.g., N.C. GEN. STAT. § 96-16(f)(1) (Michie 1992): "A seasonal worker shall be eligible to receive benefits based on seasonal wages only for a week of unemployment which occurs, or the greater part of which occurs within the active period or periods of the seasonal pursuit . . ."

¹²⁴ 43 PENN. STAT. § 802.5(a) proscribes payment of benefits "provided there is a contract or reasonable assurance that such seasonal worker will perform services in that seasonal industry in his next normal seasonal period." OHIO REV. CODE ANN. § 4141.33(C) separately proscribes off-season benefits to any employee whose "services" consist of participating in seasonal sporting events, but only where there is a reasonable assurance that the claimant will perform in the next sport season.

other work since other employers would be reluctant to hire one who plans on returning to a seasonal job.¹²⁵ Under this scheme, even where a contract or reasonable assurance¹²⁶ of a return to work with the beginning of the next normal season exists and as such the seasonal employee is denied benefits during the off season, benefits will be paid retroactively to the time payment would have commenced but for operation of the statute, if in fact the worker is not offered an opportunity to resume work at the beginning of the next labor season.¹²⁷

These statutes also typically require that employers post official notices in conspicuous places for employee inspection regarding any such determination, once an employer is deemed seasonal.¹²⁸ These notices must include the estimated dates of the normal seasonal period.¹²⁹

Thus, statutes like Pennsylvania's differentiate seasonal employment situations from non-seasonal employment. These statutes proscribe payment of regular benefits based on seasonal employment to seasonal workers during off seasons regularly recurring on account of seasonal conditions. Seasonal employees in these jurisdictions can no longer count on regularly recurring benefits.

IV. CONSTITUTIONAL CHALLENGES TO STATUTES WHICH LIMIT BENEFITS TO SEASONAL EMPLOYEES

In a class action, one group of claimants attacked the constitutionality of a Pennsylvania statute which defined seasonal employment and proscribed payment of benefits to seasonal employees during the off season¹³⁰ as violative of equal protection, procedural due process and substantive due process rights protected by both state and federal constitutions.¹³¹ A Pennsylvania appellate court, exercising original jurisdiction, dealt with each of these claims and upheld the constitutionality of the state statute.¹³²

¹²⁵ See *Parker v. Dept. of Labor*, 540 A.2d 313, 325 (Pa. 1988).

¹²⁶ See OHIO REV. CODE ANN. § 4141.33 (C)(1), defining "reasonable assurance" as a written, verbal or implied agreement that the claimant will perform the same services in the next sport season.

¹²⁷ *Id.*

¹²⁸ See, e.g., N.C. GEN. STAT. § 96-16(c).

¹²⁹ 43 PENN. STAT. § 802.5(c).

¹³⁰ 43 PENN. STAT. § 802.5, *supra* note 89.

¹³¹ *Parker v. Dept. of Labor*, 540 A.2d 313 (Pa. 1988). Claimants sought declaratory and injunctive relief. See also *Beers v. Commonwealth*, 546 A.2d 1260 (Pa. 1988); *Vanmetre v. Unemp.* 564 A.2d 540 (Pa. 1989); *Carey v. Unemp. Comp. Bd.*, 569 A.2d 371 (Pa. 1988).

¹³² *Parker v. Dept. of Labor*, 540 A.2d 313 (Pa. 1988).

A. Equal Protection

The court began by tackling the equal protection claim, under which claimants alleged they were treated differently from similarly situated workers both in and outside the fruit and vegetable food processing industry.¹³³ The panel held the "rational basis" test, rather than strict or heightened scrutiny, to be the appropriate standard of review, noting that the claimants were not in any suspect or sensitive class nor asserting a fundamental or even important right in the constitutional sense.¹³⁴

For the statute to withstand a constitutional attack based on equal protection, the court held, it must bear a rational relationship to a legitimate state end.¹³⁵ According to the court, statutes such as Pennsylvania's advance two legitimate government objectives: 1) conservation of the unemployment fund and 2) preservation of existing fruit and vegetable food processing jobs.¹³⁶ The court rejected claimants' argument that the statute did not further any objective because it did not equally limit other employees similarly situated.¹³⁷

The equal protection claim was also based upon allegations of preferential treatment given to similarly situated employees within the same fruit and vegetable industry and even in the same plant but in other

¹³³ *Id.* at 325.

¹³⁴ *Id.* at 324. The court makes no mention, nor do other cases examine, whether this standard would be appropriate in all jurisdictions, such as those in which the seasonal work force is substantially comprised of Hispanic or other minority groups perhaps "suspect" or "sensitive." In this case, however, the court determined that the food processing industry in itself is not suspect, nor is entitlement to unemployment compensation benefits a fundamental or even important constitutional right. The court concluded the statute must be upheld if it bears some rational relationship to a legitimate state end.

¹³⁵ *Id.* "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it," *quoting* *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

¹³⁶ *Id.* at 324. The court notes that denial of benefits to those who would otherwise be eligible under the code preserves the fund, and does so at the expense of those persons who, because of a reasonable assurance of returning to work at the beginning of the next season, are not available for suitable work. Jobs are preserved by operation of the statute, according to the court, because otherwise, companies engaged in seasonal industries might jump to other states with limiting provisions so as to enjoy the benefits of those provisions. *See also* *Beers v. Commonwealth*, 546 A.2d 1260 (Pa. 1988).

¹³⁷ *Parker v. Dept. of Labor*, 540 A.2d 313, 324 (Pa. 1988): "The fact that the classification may be underinclusive, however, does not invalidate the statute, since the legislature is not constitutionally required to eradicate an entire problem, but may proceed on a piecemeal basis." This seems to suggest that the scope of the statute may broaden to include other types of industries.

operations determined not to be seasonal.¹³⁸ The court held that advancing the same legitimate state interests of preserving the fund and jobs justifies different treatment of employees in seasonal work and those in non-seasonal operations.¹³⁹

Further arguments regarding the equal protection claim concerned the possibility that some employers,¹⁴⁰ while entitled to a seasonal determination, might fail to apply for one, thus allowing payment of benefits to those employees and resulting in differential treatment.¹⁴¹ The court also rejected this argument; any differential treatment afforded results from the decisions of various companies, and not by operation of the statute, which affords all employers an opportunity to apply for seasonal status.¹⁴²

B. Procedural Due Process

Claimants also attacked the constitutionality of the statute for an alleged violation of their procedural due process rights.¹⁴³ These claims revolved essentially around two issues: employees' right to be heard at proceedings to determine the seasonal status of the employer; and their right to notice of those proceedings and their subsequent determinations.¹⁴⁴ The court held that in order to prevail, claimants must first establish that a determination by the regulatory agency of seasonal status constituted an adjudication of their right to benefits.¹⁴⁵ However, because seasonal status of the employer is but one of the issues relevant to a claimant's eligibility and by itself in no way affects the workers' entitlement to benefits, the state and federal constitutions do not require the workers be given an opportunity to be heard at any status determination hearing.¹⁴⁶ For the same reason, seasonal workers have no inter-

¹³⁸ *Parker v. Dept. of Labor*, 540 A.2d 313, 325 (Pa. 1988).

¹³⁹ *Id.*

¹⁴⁰ Employers were in seasonal fruit or vegetable production industries customarily operating in regularly recurring periods of less than 180 days per year.

¹⁴¹ *Parker v. Dept. of Labor*, 540 A.2d 313, 325 (Pa. 1988).

¹⁴² *Id.*

¹⁴³ *Beers v. Commonwealth*, 546 A.2d 1260 (Pa. 1988); *Parker v. Dept. of Labor*, 540 A.2d 313 (Pa. 1988); *Vanmetre v. Unemp.*, 564 A.2d 540 (Pa. 1989). All three cases are written by the same judge (Barry); all were unanimous decisions.

¹⁴⁴ *Beers v. Commonwealth*, 546 A.2d 1260 (Pa. 1988); *Parker v. Dept. of Labor*, 540 A.2d 313 (Pa. 1988); *Vanmetre v. Unemp.*, 564 A.2d 540 (Pa. 1989).

¹⁴⁵ *Parker v. Dept. of Labor*, 540 A.2d 313, 329 (Pa. 1988).

¹⁴⁶ *Id.* at 329-330. The court points out that the employees still may be able to collect benefits by making the requisite showing after they apply for benefits, even if their employer is deemed seasonal by the agency.

est in any appeal taken by their employers on a seasonal determination.¹⁴⁷

The Pennsylvania court suggested just a few months after *Parker v. Department of Labor*¹⁴⁸ that claimants have standing to appeal an agency's ruling on an employer's application for seasonal status.¹⁴⁹ The court quickly reversed direction, however, citing and siding with the restrictive rationale of *Parker*.¹⁵⁰ Thus, in Pennsylvania at least, it would appear employees lack standing entirely at hearings for seasonal determination on an employer's application or appeal from such a determination.¹⁵¹

Employees also claimed the statutory procedure for providing notice to workers of an application for and ruling on seasonal determination¹⁵² violated their rights to procedural due process because the notices were lacking in content, not placed conspicuously, nor placed in a timely manner reasonably calculated to provide notice so as to allow the employees an opportunity to participate in the proceedings.¹⁵³ This argument failed on the same rationale rejecting the "right to be heard" claim.¹⁵⁴

¹⁴⁷ *Id.* at 330-331.

¹⁴⁸ See *supra* note 37.

¹⁴⁹ *Beers v. Commonwealth*, 546 A.2d 1260 (Pa. 1988), *overruled*, *Vanmetre v. Unemp.*, 564 A.2d 540 (Pa. 1989).

¹⁵⁰ *Vanmetre v. Unemp.*, 564 A.2d 540, 544-545 (Pa. 1989). *Cf.* *Beers v. Commonwealth*, 546 A.2d 1260 (Pa. 1988).

¹⁵¹ The court notes an employee may attack such a determination only at proceedings made on an employee's application for benefits. *Parker v. Dept. of Labor*, 540 A.2d 313 (Pa. 1988), at 331; *Vanmetre v. Unemp.*, 564 A.2d 540, 544 (Pa. 1989). Indiana's code expressly provides "interested" parties may appeal a seasonal determination (IND. CODE ANN. § 22-4-14-11) but does not define "interested party"; North Carolina, on the other hand, provides such a determination becomes effective unless an "interested party" files an appeal (N.C. GEN. STAT. § 96-16(d)), and broadly defines the term as anyone affected by the determination (§ (j)(7)). Massachusetts is exact: "Any employer notified of a seasonal determination may file an appeal regarding a seasonal determination . . ." MASS. ANN. LAWS CH. 151A, § 24A(c) (1993).

¹⁵² See, e.g., 43 PENN. STAT. § 802.5(b-c).

¹⁵³ *Parker v. Dept. of Labor*, 540 A.2d 313 (Pa. 1988), at 330; See also *Beers v. Commonwealth*, 546 A.2d 1260 (Pa. 1988); *Vanmetre v. Unemp.*, 564 A.2d 540 (Pa. 1989).

¹⁵⁴ See *Parker v. Dept. of Labor*, 540 A.2d 313, 330 (Pa. 1988); *Vanmetre v. Unemp.*, 564 A.2d 540 (Pa. 1989).

C. Substantive Due Process

Workers further complained that substantive due process was lacking. Once again, the court used the test of whether limiting legislation has a rational relationship to a valid state objective¹⁵⁵ and confirmed that such a statute advances the state goals of conserving the unemployment compensation fund and preservation of jobs.¹⁵⁶

Violation of claimants' substantive due process rights was also based on improper delegation of power.¹⁵⁷ Employees based their claim on the theory that the employer's conclusions on number of days of operation, number of days actually worked and the type of work performed enabled employers to affect employees' status as seasonal or non-seasonal, and consequently affected their entitlement to benefits.¹⁵⁸ In addition, workers claimed the employer's decision whether to apply for seasonal status also affected the employees' eligibility for benefits.¹⁵⁹ Therefore, according to the employees, the employers created law binding on the workers and were improperly delegated legislative-type power.¹⁶⁰ Because the legislature, and not the employers, articulated the basic policy choices involved in this particular use of authority, no threat of abuse of discretion or unauthorized or irresponsible policy choices were found.¹⁶¹

V. RECOMMENDATIONS

Regularly recurring periods of unemployment constitute known, certain losses which unemployment insurance programs are not designed to compensate.¹⁶² Denying seasonal unemployment benefits may be an ideal way to restore solvency to depleted state unemployment insurance funds, while encouraging equitable apportionment of the cost of aiding seasonal workers during regular off seasons.

Massachusetts recently enacted a law designed to restore solvency to its unemployment insurance trust fund, including provisions defining seasonal employment and prohibiting payment of benefits for periods falling outside the operating period of the seasonal employment.¹⁶³ It

¹⁵⁵ See *supra* note 135.

¹⁵⁶ *Parker v. Dept. of Labor*, 540 A.2d 313, 326 (Pa. 1988).

¹⁵⁷ *Id.* at 331-332.

¹⁵⁸ *Id.* at 331.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Sugarman, *supra* note 19, at 488.

¹⁶³ MASS. ANN. LAWS CH. 151A, § 24A(c) (1993).

was declared to be an emergency law, necessary for the immediate preservation of public convenience.¹⁶⁴ While refraining from placing any blame on seasonal workers for their position, but recognizing as well that unemployment compensation is not designed to provide benefits for regular, predictable periods of unemployment, a viable partial solution for California and other states finding themselves with similar unemployment insurance funding woes is to proscribe payment of unemployment benefits to seasonal employees during the regular off season.

CONCLUSION

Seasonal unemployment constitutes a very large portion of all unemployment in America. By definition, it regularly recurs. As such, it drains heavily on unemployment compensation funds in states without legislation disqualifying seasonal workers, particularly in those states with high numbers of agricultural and other seasonal industries. This puts society at large at risk of uncompensated job loss.

Although unemployment compensation is designed to benefit those who lose their jobs through no fault of their own, the stability and soundness of the unemployment compensation insurance funds of the several states are critical, for without funding, all unemployed individuals suffer. The unfortunate predicament of seasonal unemployment is best addressed through appropriate and equitable channels.

REX WILLIAMS

¹⁶⁴ 1992 Mass. H.B. 5909(10), (10A) (1992).