

Legislative Analysis



UNEMPLOYMENT INSURANCE AGENCY AMENDMENTS

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 5528 as reported from committee
House Bill 5550 (H-1) as reported
Sponsor: Rep. Pat Outman

Analysis available at
<http://www.legislature.mi.gov>

House Bill 5549 (H-2) as reported
Sponsor: Rep. Stephen Johnson

House Bill 5551 (H-2) as reported
Sponsor: Rep. Michele Hoyenga

House Bill 5553 (H-1) as reported
Sponsor: Rep. Sarah L. Lightner

House Bill 5552 (H-2) as reported
Sponsor: Rep. Jack O'Malley

House Bill 5554 (H-1) as reported
Sponsor: Rep. Andrew Fink

Committee: Oversight
Complete to 1-26-22

BRIEF SUMMARY: House Bill 5552 would create a new act, the Unemployment Insurance Advocate Act, which would create the Office of the Unemployment Insurance Advocate and provide for the appointment of an unemployment insurance advocate who could initiate investigations into actions, determinations, or practices by the Unemployment Insurance Agency (UIA) on his or her own initiative or upon receiving a complaint. Among other things, the bill would describe the authority granted to the advocate; require certain reports to be submitted to the legislature; and allow the Legislative Council to conduct hearings as requested by the advocate, issue subpoenas and administer oaths, and examine the UIA's books and records. The bill also would require the office to maintain confidentiality regarding all matters under investigation and exempt correspondence between it and a complainant from disclosure under the Freedom of Information Act (FOIA).

House Bills 5528, 5549, 5550, 5551, 5553, and 5554 would amend the Michigan Employment Security Act to do all of the following:

- Prohibit the UIA from charging an improperly paid benefit to an employer's account or certain funds. (HB 5528)
- Require the UIA to submit to the office of the advocate a copy of any monitoring review from the U.S. Department of Labor related to unemployment benefits or taxes, along with the agency's response and corrective action plan. (HB 5549)
- Require a quarterly report by the UIA to the office of the advocate regarding appeals made by claimants and employers to an administrative law judge and appeals by the UIA to the Unemployment Insurance Appeals Commission. (HB 5549)
- Require the UIA to post the amount of money in the Unemployment Compensation Fund each month and notify the state budget director and legislative appropriations committees if the amount drops below certain levels. (HB 5550)
- Shorten, from three years to one, the time frame for the UIA to issue determinations regarding restitution for benefits a claimant was not entitled to and provide that a determination of improperly paid benefits cannot be final and the benefits cannot be recovered unless the UIA provides the claimant with notice of certain rights. However,

if fraud were suspected, the UIA could issue a restitution determination or initiate action to recover the improperly paid benefits or at any time. (HB 5551)

- Require examination and a determination of a claim within 15 calendar days (or within 20 calendar days if the claim was received during an exigent period). (HB 5553)
- Require the UIA to provide certain items relevant to a hearing before an administrative law judge (HB 5554) and require the administrative law judge to give those items to interested parties when providing notice of the hearing (HB 5553).

FISCAL IMPACT: The UIA and the Legislative Council could incur additional costs under the proposed legislation. (See **Fiscal Information**, below, for more information.)

THE APPARENT PROBLEM:

The COVID-19 pandemic has disrupted many aspects of life in Michigan. Whether due to temporary measures intended to slow the spread of the virus such as the initial shelter-in-place orders or restrictions on certain businesses, capacity restrictions for stores and restaurants, or lost sales that led to business closures, many workers saw their hours cut or lost their jobs. Others were forced to leave their jobs after contracting COVID-19, suffering its long-term effects, caring for a relative with a serious illness from COVID-19, or being unable to find child care so as to return to their jobs. The result was an unprecedented number of individuals applying for unemployment benefits at a time when many state workers, including employees of the UIA, were adjusting to working remotely. Added to the burgeoning numbers of the newly unemployed applying for benefits were people generally ineligible for state unemployment benefits, such as the self-employed, contract workers, and gig workers (e.g., Uber or Lyft drivers), who were eligible to apply for benefits through programs created under the federal CARES Act and administered by state unemployment agencies. According to written testimony provided by the UIA, 388,000 claims were filed in one week in spring of 2020, surpassing the previous all-time high for weekly claims of 77,000.

For a variety of reasons, mistakes were made that resulted in many unemployment claims being initially paid and then later declared to be ineligible.¹ Some represented claims for which the claimant had made an honest mistake. Some were due to mistakes on how the federal programs were implemented by the UIA and were no fault of the claimants. Some claims were criminal acts of fraud by bad actors capitalizing on the overall “pandemic confusion,” and some by intentional misrepresentations by individual claimants attempting to collect more than what their circumstances allowed. One independent report estimates that although the state avoided paying about \$43.7 billion for potentially fraudulent claims, it nonetheless did pay an estimated \$8.4 to \$8.5 billion in potentially fraudulent claims.² Most of the money paid in overpayments was from the federal programs that expanded benefits to the self-employed and gig workers, but the state may have paid up to \$249.0 million in overpayments. Some of that overpayment may be recovered as investigations into claims are finalized and those convicted of fraudulent acts are ordered to make restitution.

¹ Office of the Auditor General Performance Audit Report, Establishing Pandemic Unemployment Assistance Eligibility Criteria, Unemployment Insurance Agency, Department of Labor and Economic Opportunity, November 2021. <https://audgen.michigan.gov/wp-content/uploads/2021/11/r186031921A-8294.pdf>

² Analysis conducted by Deloitte and Touche LLP regarding a fraud measurement estimation, December 2021. https://content.govdelivery.com/attachments/MILEO/2021/12/29/file_attachments/2033692/Letter%20-%20Final_.pdf

In addition, in the summer of 2021, close to 700,000 claimants were asked to recertify their eligibility for benefits under the federal Pandemic Unemployment Assistance (PUA) program—the program created for those who typically did not qualify for unemployment benefits, such as gig workers and the self-employed—and told they may need to repay the money they had received. Many of these claimants were deemed ineligible due to mistakes made by the UIA in implementing eligibility criteria established in the CARES Act and other federal guidelines. The OAG performance audit cited above reported that almost \$4.0 billion in PUA and other COVID-related federal programs represent overpayments to ineligible claimants. However, these people had previously been told they were eligible, and likely had since used the benefits to cover household needs. Current law does provide a mechanism for claimants to file a protest or to ask for a hardship waiver; if approved, the overpayment does not need to be repaid. According to a recent news article, about 331,000 of PUA recipients so far have had their protest or hardship waiver approved.³

It will take time for the UIA to investigate all of the claims that were overpaid and to process protests and requests for hardship waivers. Meanwhile, many feel that the confusion and frustration faced by many when initially filing a claim for benefits, the inability to reach UIA workers able to answer questions about how to properly complete a claim, delays in processing claims and getting payments to those out of work, and the anxiety faced by many who received letters stating that they may be required to repay benefits received because they are now deemed to be ineligible, reveal weaknesses in the unemployment system that need legislative action to fix. Legislation has been offered to address various issues that have come to light.

THE CONTENT OF THE BILLS:

House Bill 5528 would add a new section to the Michigan Employment Security Act to prohibit the UIA from charging to any of the following an improperly paid benefit described in a provision proposed by HB 5265 (which would require waiving repayment of an improperly paid benefit that meets certain conditions):

- Any account of an employer.
- The Unemployment Compensation Fund.
- The Contingent Fund.

Proposed MCL 421.62a

House Bill 5552 would create the Unemployment Insurance Advocate Act and establish the Office of the Unemployment Insurance Advocate within the Legislative Council. The council would appoint the unemployment insurance advocate, who would be the principal executive officer of the office and would serve at the pleasure of the council. Among other things, the bill would do all of the following:

- Establish procedures for approving the office’s budget, expending funds, and employing personnel.
- Authorize the advocate, on his or her own initiative or upon receipt of a complaint from a ***complainant*** concerning an ***administrative act***, to investigate the status of a claim for benefits or the status of a matter related to an employer’s unemployment taxes or to

³ <https://www.mlive.com/public-interest/2022/01/michiganders-are-still-facing-steep-bills-from-an-unemployment-agency-error-experts-worry-their-tax-returns-could-be-seized.html>

answer a claimant's question regarding eligibility for benefits, the status of a claim for benefits or payment of benefits, the status of a protest or appeal, an employer's unemployment insurance accounts, or general unemployment benefit and tax issues. The advocate would not be required to conduct an investigation of a complaint, and a complainant would not be entitled to have an investigation conducted by the advocate. (*Administrative act* would include an action, omission, decision, determination, redetermination, recommendation, practice, or other procedure of the UIA. *Complainant* would mean a claimant or employer, or a representative of either, who submits a complaint.)

- Subject to the council's approval, task the advocate with establishing procedures for receiving and processing complaints, constructing investigations, holding hearings, and reporting the findings of investigations.
- Require the UIA to grant the advocate access to all information, records, and documents in its possession necessary for an investigation, including information required to be provided to an administrative law judge under provisions of HB 5554. Access would be contingent on the advocate's providing written authorization of representation as required under the Michigan Employment Security Act.
- Allow the advocate to hold informal hearings, in person or by telephone or a virtual meeting technology, and to request that an individual appear before the advocate or at a hearing to give testimony or produce evidence relevant to an investigation. The advocate could not hold a hearing on a complaint involving a matter that had been protested or appealed and for which a final determination or decision has not been issued by the UIA, administrative law judge, or Unemployment Insurance Appeals Commission.
- Require the advocate to advise a complainant of all available administrative remedies.
- Require the UIA, upon the advocate's request, to provide a progress report on its processing of the complaint.
- After the UIA takes administrative action on a complaint, allow the advocate to conduct further investigation at the request of the complainant or on his or her own initiative.
- Require the advocate, not later than 10 days after receiving a complaint, to notify the complainant and the UIA if he or she will conduct an investigation or notify the complainant in writing with the reasons for the decision not to conduct one.
- Allow the council to hold a hearing if requested by the advocate and allow the council to administer oaths, subpoena witnesses, and examine the records of the UIA.
- Require the office to maintain confidentiality regarding all matters under investigation and prohibit disclosure of personal identifying information of a complainant, claimant, or employer to another person except as allowed under the bill as necessary for the advocate to perform his or her duties. The bill also would deem correspondence between the office and a claimant to be confidential and privileged communication and would exempt it from disclosure under FOIA.
- Require the advocate to prepare a report of the findings of an investigation if any of the following are found and submit it, along with any recommendations, to the council not later than 30 days completing the investigation:
 - A matter that should be considered by the UIA.
 - An administrative act that should be modified or canceled.
 - A statute or rule that should be altered.
 - An administrative act for which justification is necessary.
 - Any other significant concerns.

- Require the council to send a copy of the report to the UIA and the complainant.
- Require the advocate to take certain actions specified in the bill before submitting a report to the council that contains a conclusion or recommendation expressly or implicitly criticizing a person or the UIA or before publishing an opinion adverse to a person or the UIA.
- Require the advocate to submit any quarterly report from the UIA required under HB 5549 to the standing committees of the House and Senate with oversight of the UIA if the report listed one or more claims or administrative law decisions that had or had not been appealed by the UIA to the Unemployment Insurance Appeals Commission.
- Require the advocate to submit to the House and Senate oversight committees a U.S. Department of Labor monitoring review and the UIA response and corrective action plan if received from the UIA under HB 5549.
- Require the advocate to submit to the council and the legislature an annual report on the conduct of the office that includes information required by the council.
- Prohibit the annual report or a quarterly report submitted as described above from including or disclosing personal identifying information of individuals the advocate acquired information from during an investigation.
- Prohibit the UIA from penalizing a complainant for filing a complaint, providing information to the council or a legislator, or cooperating with the advocate in the investigation of a complaint.
- Prohibit the UIA or a person from willfully refusing to comply with a lawful demand of the office or hindering a lawful action of the advocate or employees of the office.
- Provide that the authority granted to the advocate is in addition to all other authority granted by law to any other agency relative to a remedy or right of appeal or objection for a complainant or a procedure for the investigation of any matter. The advocate's authority under the bill would not limit or affect any other remedy or right of appeal or objection provided by law and could not be considered to be exclusionary.

House Bill 5549 would add section 32f to the Michigan Employment Security Act to require the UIA to submit a report to the Office of the Unemployment Insurance Advocate that includes, among other things, the following information for each calendar quarter:

- Certain information related to appeals made to an administrative law judge under section 32a of the act, such as the total number of appeals delineated between appeals made by claimants and appeals made by employers and the total number of appeals that the UIA appealed to the Unemployment Insurance Appeals Commission.
- The average number of days between the date of the administrative law judge's decision and the date the UIA began or resumed paying benefits to the claimant.
- The total number of administrative law judge decisions that were and were not appealed by the UIA to the Unemployment Insurance Appeals Commission.
- The total number of claims for benefits for which an administrative law judge had issued a decision on a matter related to the claim and for which the UIA had not begun or resumed paying benefits to the claimant.

No personal identifying information could be included by the UIA in the report.

No later than 30 days after a monitoring review, or a similar review or report, is issued by the U.S. Department of Labor regarding the UIA or an issue related to unemployment benefits or unemployment taxes in Michigan, the UIA would have to submit to the office of the advocate

a copy of the review, the agency's response to the review, and the corrective action plan adopted in response to the review, as applicable.

Proposed MCL 421.32f

House Bill 5550 would add section 10b to the Michigan Employment Security Act to require the UIA to post on its public website, and update monthly, the amount of money in the Unemployment Compensation Fund. The UIA would have to notify the state budget director and the House and Senate appropriations committees if either of the following occurs:

- The money in the fund falls below \$2.5 billion.
- The money in the fund falls below \$500.0 million.

Proposed MCL 421.10b

House Bill 5551 would amend section 62 of the Michigan Employment Security Act, which addresses the actions to be taken when the UIA determines that a person has obtained benefits he or she is not entitled to or when the agency or an appellate authority reverses a prior qualification for benefits.

The bill would delete a requirement that the UIA issue a determination requiring restitution within three years after the date of finality of a determination, redetermination, or decision reversing a previous finding of benefit entitlement.

Currently, with some exceptions, the act allows the UIA to recover the amount of the benefits the individual was not eligible to receive, plus interest, but requires certain determinations pertaining to restitution to be issued within a three-year time frame. The bill would shorten the period for issuance of the applicable determinations to one year. However, the bill would retain the current time frame of three years for the UIA to initiate an administrative or court action to recover improperly paid benefits if the claimant had made an intentional false statement, misrepresentation, or concealed material information. The bill also would retain the UIA's ability to issue a restitution determination after that three-year period if the agency had filed a civil action within the three-year period. In addition, if identity fraud were suspected in a case, the UIA could initiate administrative or court action to recover improperly paid benefits from an individual or issue a restitution determination at any time.

Currently, any determination made by the UIA under section 62 is final unless an application for a redetermination is filed in accordance with section 32a of the act. Under the bill, a determination that a benefit was improperly paid would not be final, and the UIA could not take action to recover an improperly paid benefit or to enforce interest, penalties, or any additional amount assessed, unless the UIA provided to the claimant notice of the claimant's rights to request a hearing, to have counsel present at the hearing, and to appeal the determination. The UIA would have to do all of the following to provide the required notice:

- Mail the notice to the claimant's last known address.
- Send the notice to the claimant through the UIA's computer system.
- Either speak with the claimant in person or by telephone about the claimant's rights or email the notice to the claimant's last known email address.

MCL 421.62

House Bill 5553 would add section 32g to the Michigan Employment Security Act to establish a time frame within which the UIA must examine a claim and make a determination. Currently, the UIA must designate representatives who are required to *promptly* examine claims and make a determination on the facts. Instead, notwithstanding any other provision of the act, the bill would require the UIA to examine a claim for benefits and make a determination on the facts not later than 15 calendar days after receiving the claim and not later than 20 calendar days if the claim was received during an exigent period (a period of one or more weeks when there are at least 50% more claims than during an immediately preceding baseline week).

If a determination could not be made within the required time frames because the claimant or employer did not provide the UIA with necessary information as required by the act, the UIA would have to immediately notify the claimant that a determination could not be made and the reasons why.

Administrative law judges conduct hearings under the act, such as an appeal from a redetermination. Under the bill, when providing notice of a hearing to the interested parties, the administrative law judge also would have to provide the items regarding the matter that he or she had received under proposed section 33e (HB 5554). If a new or updated item were received, he or she would have to immediately provide it to all interested parties.

MCL 431.32 and 431.33 and proposed MCL 431.32g

House Bill 5554 would add section 32e to the Michigan Employment Security Act to require the UIA, notwithstanding other provisions of the act, to provide certain items to an administrative law judge who is conducting a hearing under the act. The UIA would have to provide all of the following in its possession that relate to the matter before the judge:

- All correspondence between the UIA and the interested parties, including, but not limited to, letters, determinations, redeterminations, and recordings of telephone calls.
- The original and all amended applications for benefits submitted by the claimant.
- All information submitted by the claimant to verify his or her identity.

The UIA could provide an item not listed above that is related to the matter before the administrative law judge. In addition, if the UIA failed to provide the required items, the administrative law judge conducting the hearing would have to immediately notify the unemployment insurance advocate of the violation.

Proposed MCL 421.32e

Tie-bars

A bill cannot take effect unless each bill to which it is tie-barred is also enacted. The following bills are tie-barred to one another:

- House Bill 5528 is tie-barred to HB 5265.⁴
- House Bills 5549 and 5554 are each tie-barred to HB 5552.
- House Bill 5552 is tie-barred to both HBs 5549 and 5554.
- House Bill 5553 is tie-barred to HB 5554.

⁴ House Bill 5265, which was reported from the House Oversight committee, would amend the Michigan Employment Security Act to require repayment to the UIA of an improperly paid benefit if certain conditions apply. <https://www.legislature.mi.gov/documents/2021-2022/billanalysis/House/pdf/2021-HLA-5265-7C7EFB16.pdf>

FISCAL INFORMATION:

House Bill 5528 would not have a fiscal impact on the UIA, housed within the Department of Labor and Economic Opportunity (LEO), or any other unit of state or local government.

House Bill 5549 would not have an appreciable fiscal impact on the UIA. The bill would require the UIA to submit quarterly reports and to complete other reporting, but the costs for producing such reports would likely be sufficiently offset by existing departmental resources.

House Bill 5550 would not have an appreciable fiscal impact on the UIA. The reporting required under the bill would likely be sufficiently offset by existing departmental resources.

House Bill 5551 would have an indeterminate net fiscal impact on the UIA. The bill's impact on UIA revenues is indeterminate because the net impact of changes to the time limits when the UIA could pursue recoveries of improperly paid benefits would be indeterminate. The impact from lowering the time limit in some cases and eliminating the limit in cases of identity fraud would depend on case volumes and other factors, which cannot be ascertained at present, as they depend on future events. The notification requirements under the bill would likely create additional costs for UIA. However, the magnitude of those costs would largely depend on case volumes, which are presently indeterminate.

House Bill 5552 would increase costs for the Legislative Council by an unknown amount and would have no fiscal impact on local units of government. The amount of increased costs to the Legislative Council would depend on factors concerning the Office of the Unemployment Insurance Advocate, such as how many staff members will be required by the legislature and any other legislative expectations. Specifically, increased costs would result from staff salaries, benefits, office space, office supplies, travel, and any other costs incurred for the operation and administration of the Office of the Unemployment Insurance Advocate. For context, the FY 2021-22 appropriations for the Legislative Corrections Ombudsman total \$1,022,000, and the office currently includes eight staff members. The Michigan Veterans Facility Ombudsman is appropriated \$319,900 in FY 2021-22, and the office currently has one staff member.

The UIA would likely incur costs responding to complaint investigations. These costs would be directly correlated to the complexity of any complaint. Whether the actions of the office would result in any state fiscal impact subsequent to the resolution of a complaint cannot be estimated and would depend on the nature of the complaint and the agency response.

House Bill 5553 may create additional costs for the UIA. However, the magnitude of such costs is presently indeterminate. The agency may be required to make additional expenditures to meet the time requirements for claim reviews established under the bill, although the magnitude of such expenditures would depend on factors including future claims volumes, UIA staffing levels, and the UIA's information technology environment.

House Bill 5554 would not have a significant fiscal impact on the UIA.

ARGUMENTS:

For:

As a whole, the bill package seeks to ease the process when a claimant files for unemployment benefits, shorten the time frame for the UIA to make a determination of eligibility, ensure that an administrative law judge has all information pertinent to a case before him or her at a hearing, and shorten the time frame for the UIA to issue certain determinations for restitution of overpayments (except in cases involving fraud). The legislation would require monthly updates regarding the balance of the Unemployment Compensation Fund, which is funded by employers, to be posted on the UIA website so they can be aware of potential increases in the amount required to be paid per employee should the fund balance dip below a certain amount. Reportedly, this information has not always been easy for employers to find. Protection would be afforded to employers to hold them harmless for the mistakes made by the UIA that resulted in overpayments, much of which is likely not to be recoverable. Creation of an independent advocate office would mean that there is a knowledgeable person and staff to help resolve difficult issues regarding claims or an employer's unemployment taxes. Various reporting requirements the advocate must fulfill would provide extra eyes on the UIA that could help identify recurring issues and spur recommendations that could improve overall customer service or correct deficiencies.

Against:

According to the UIA, some of the shortened time frames in the bills do not align with other time frames under state and federal law. For example, the UIA could not issue a determination for restitution after a year, yet employers would still have up to three years to issue a notice of assessment. In addition, considering the number of claims that the UIA handles in any given year, the one-year limitation could make it difficult for the agency to identify cases of overpayment for which restitution should be ordered. The unintended consequence of the shortened time frame could be the creation of an incentive for unscrupulous applicants to not be forthcoming with all required information knowing that the state could not reclaim that overpayment if they were not caught within the one-year limit. The burden of such overpayments could fall on employers, according to UIA testimony, as the money to claimants comes from the fund that employers pay into. If overpayments eligible for restitution cannot be identified within the shortened time frame, it could hasten depletion of the trust fund. Moreover, the agency's recently adopted reforms addressing identified weaknesses and the recommendations made in the OAG audit may be sufficient to address many of the concerns.

In addition, some wondered whether the office of the advocate would duplicate features of existing appeals and objection processes and whether state resources to address issues in the unemployment system might be better used to end the practice of hiring contract workers, who handle a limited number of tasks, and instead hire more full-time employees who can be trained to handle all aspects of a claim and therefore be more productive wherever needed.

POSITIONS:

A representative of the National Federation of Independent Business (NFIB) testified in support of HBs 5528 and 5550. (12-2-21)

The Michigan Health and Hospital Association indicated support for HBs 5549 to 5554. (1-13-22)

The following entities indicated support for HBs 5528 and 5550:

- Michigan Chamber of Commerce (12-2-21)
- Michigan Manufacturers Association (1-13-22)

A representative of the Unemployment Insurance Agency testified with a neutral position on HBs 5549, 5550, and 5552 and in opposition to HBs 5551, 5553, and 5528. (12-2-21)

The Michigan Interfaith Coalition indicated opposition to the bills. (1-13-22)

The Unemployment Insurance Agency indicated opposition to HB 5554. (1-13-22)

The Michigan Association for Justice indicated opposition to HBs 5553 and 5554. (1-13-22)

Legislative Analyst: Susan Stutzky
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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.