



STATE REPRESENTATIVE

SAMANTHA KERKMAN

Assembly Bill 212

Unemployment Insurance Benefit Fraud "2-Strikes"

Committee on Public Benefit Reform

Tuesday, August 18, 2015

Chairman Born and committee members: good morning and thank you for holding a hearing on Assembly Bill 212, the Unemployment Insurance Fraud "2-Strikes" bill.

This common-sense legislation creates a "2-strikes" provision for unemployment benefits fraud by making repeat unemployment insurance benefit fraudsters ineligible for UI benefits for seven years.

The legislation was prompted by findings in the Legislative Audit Bureau Report 14-15, which examined unemployment claims processing. As shown in the audit on page 31, 64,700 unemployment benefit overpayments were made to individuals who were intentionally committing fraud. Although these overpayments accounted for just 9.5% of the total number of benefit overpayments, fraudulent claims accounted for \$86.3 million (51.4%) of the total overpayment dollars.

Furthermore, additional communication with the Department indicated that the 64,700 fraudulent payments could be attributed to 44,488 unique social security numbers. An astonishing 14,543 of them were involved in two or more instances of fraud during the audit period.

Fraud is THEFT.

Although DWD has a number of methods in place to detect fraud and recover fraudulently paid benefits, there is no reason to give someone who has already committed two acts of UI fraud an additional opportunity to do so. A seven-year ineligibility period for benefits is a reasonable safeguard against individuals who have twice demonstrated their intention to defraud the system.

Individuals who unintentionally provided inaccurate information accounted for 84.7 percent of the number of overpayments DWD identified from FY 2011-12 through FY 2013-14.

As shown in Table 11, individuals who unintentionally provided inaccurate information accounted for 84.7 percent of the number of overpayments DWD identified from FY 2011-12 through FY 2013-14. These overpayments totaled \$61.8 million. Individuals who intentionally provided inaccurate information accounted for 9.5 percent of the number of overpayments that DWD identified, and these overpayments totaled \$86.3 million.

Table 11

Overpayments of Unemployment Benefits Identified by DWD, by Reason
FY 2011-12 through FY 2013-14

Reason	Number	Percentage of Total	Amount (in millions)	Percentage of Total
Individual Fault (unintentional)	577,000	84.7%	\$ 61.8	36.8%
Individual Fault (intentional)	64,700	9.5	86.3	51.4
No Fault	27,100	4.0	11.4	6.8
DWD Error	6,700	1.0	4.6	2.7
Multiple Party Errors	3,300	0.5	3.6	2.1
Other ¹	2,600	0.4	0.2	0.1
Total	681,400	100.0%	\$167.9	100.0%

¹ Includes overpayments made from a now-discontinued federal program funded by the American Recovery and Reinvestment Act of 2009.

2011 Wisconsin Act 236, which was enacted in April 2012, requires DWD to impose a 15.0 percent penalty on all overpayments made because an individual intentionally provided inaccurate information relating to his or her eligibility for benefits, wages earned, or hours worked. Act 236 required the penalties to be assessed starting in October 2012. DWD assessed \$0.7 million in penalties in FY 2012-13 and \$2.9 million in FY 2013-14.

Waivers and Write-Offs

DWD does not attempt to recoup all identified overpayments. Statutes require it to waive recoupment if an overpayment occurred because of a DWD error that was not the result of an individual intentionally providing inaccurate information that was used to determine eligibility or weekly benefit amounts. Federal law requires DWD to waive recoupment of federally funded trade adjustment assistance benefits in certain circumstances, such as when individuals unintentionally provided inaccurate information.

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Transportation Projects Commission

August 18, 2015

Testimony on Assembly Bill 212
Senator Rob Cowles

This bill is the result of a finding from Audit Report 14-15: Initial Claims Processing for Unemployment Insurance. The audit found that 64,700 claims made to the Department of Workforce Development from individuals who intentionally provided false information resulted in over \$86.3 million of overpayments. For scale, intentional fault claims (as determined by the Department of Workforce Development) accounted for merely 9.5% of the total claims made that resulted in overpayments, however in terms of total dollars, these claims accounted for over 50% (51.4%) of the overpayments.

This bill is a outcome of the hard and thorough work of the Legislative Audit Bureau and a prime example of how the audit process can result in ways to fight waste, fraud and abuse.

It is important to note that while you may think of each claim as one individual, the actuality is that of the 64,700 claims made, this was less than 45,000 individuals (Social Security numbers). Looking at the gap of individuals and claims draws the obvious conclusion that these people, who are intentionally defrauding the state, are doing so multiple times.

This bill gives the Department of Workforce Development a new tool to address these repeat offenders. This bill makes repeat unemployment insurance benefit fraudsters ineligible for UI benefits for seven years if they commit two acts of UI fraud.

I commend DWD Sec. Reggie Newson and his team for their efforts to fight fraud and hope that this new tool will help to serve in the fight against fraud and abuse.

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COST OF LOSING A JOB

Critics: Change would make unemployment claimants guilty before proved innocent

Erika Strebek

erika.strebek@wislawjournal.com

After Megan Coronado lost three jobs in 2011, she thought the obvious next step was to file for unemployment benefits.

Four years later, she finds herself with little more than regrets after landing in the midst of a bureaucratic battle that may force her to pay back the benefits, as well as penalties and fees. If she's unsuccessful, she'll be on the hook for close to \$14,000. It's money she can ill afford to lose.

Coronado now makes \$8.40 an hour from a part-time job at a Cost Cutters hair salon and shares a one-bedroom apartment in Waukesha with her 3-year-old son. If she could, Coronado says, she would return to school in the hope of finding a better way to make a living.

Yet, as a largely behind-the-scenes battle rages over the interpretation of a crucial state statute, the 26-year-old instead has recently spent much of her free time trying to defend herself against charges of unemployment-insurance fraud. If found guilty what the law deems "concealment," she not only could be forced to pay the state the nearly \$14,000 but also would be debarred from collecting jobless benefits for six months.

Coronado is just one of dozens of benefits claimants whose fates have become intertwined in a bout over how far government officials should have to go to prove allegations of unemployment fraud. The biggest question is: Whose burden should it be to prove that misinformation was submitted by mistake, rather than as part of a deliberate attempt to defraud the state?

By and large, the disagreement comes down to the definition of concealment. According to state statute, concealment is an attempt "to intentionally mislead or defraud (the state) by withholding or hiding information or making a false statement or misrepresentation." Claimants who are found in violation lose their ability to collect unemployment for half a year and must

pay a penalty equal to 15 percent of their ill-gotten gains.

For many, the definition's essential words are "to intentionally mislead or defraud." Critics are now asserting that various state officials are pushing for a new interpretation that would do away with the need to prove intention. Claimants would instead find themselves having to overcome a presumption that misinformation had been submitted deliberately. To avoid paying back benefits, as well as various fees and fines, they would have to somehow prove that what they had turned in was in fact the result of a mistake.

No room for mistakes?

Coronado maintains that her dispute with the state originated in just that — a simple error arising from her not having understood instructions. When filling out reports she was required to submit every week in return for benefits, Coronado failed to grasp that she was really supposed to be listing her total income. She would instead report the difference between what she was actually making in a given week and what she would have been paid had she been working full time.

The misinformation was submitted throughout the entire time that she was filing for unemployment. Years passed before she learned she had been doing anything wrong.

Compounding her troubles, Coronado has a learning disability, which she noted on her unemployment application. She can read, but she needs to go over words again and again before she can glean their meaning.

The disability led to her missing a deadline to appeal the state's initial finding that she had violated the concealment statute.

"I'm not a malicious person," Coronado said. "I'm not trying to steal from anybody. I don't want to be stolen from. I wouldn't want to steal from anybody. I just didn't understand what was happening and that I was doing something wrong."

She and her mother, Teresa Caporali, have turned to Victor Forberger, a lawyer in Madison, for help with further appeals.

"I will never file unemployment again.

I urge anybody anywhere, anytime: Do not file unemployment. Because even if it looks like a great thing and they're supposed to be helping you, they won't. And if you make one wrong step, they won't even tell you. They'll just try to take your money."

— Megan Coronado

Fraud accusations on the rise

Forberger, who runs a clinic that helps unemployment claimants fight unfavorable decisions, said he noticed in 2013 that more and more people were calling in to complain that they were being accused of fraud. Most of them, he said, insisted they had done nothing more than make a mistake when filing for unemployment benefits.

In one extreme case, a client had taken the initiative on his own to bring an error to the attention of state officials. The unprompted admission did him little good, though.

The Department of Workforce Development — which manages the state's unemployment system — pursued him for concealment. The case came to an end only when an administrative-law judge within the department decided that someone who had voluntarily pointed out his own error would be very unlikely to be trying to defraud the state.

Cost of Losing, continued on page 18



STAFF PHOTO BY KEVIN HARNACK

Brenda Lewison, of The Law Office of Arthur Heitzer, says she has seen more concealment cases in the last year than she has over her career.

Cost of Losing, continued from page 17

Brenda Lewison, a Milwaukee employment lawyer, has likewise noticed a telling increase in the number of concealment cases that have been coming her way. The frequency picked up particularly in the past 12 to 18 months, she said. Before that, Lewison said, concealment cases were so rare that she hadn't litigated a single one since 1996.

Forberger said he thinks the DWD's goal is to conserve the money that flows into the state's unemployment fund, which is drawn on to pay out benefits. That money comes from employers, whose unemployment taxes rise when the fund dips low.

The greatest drop in recent memory came

during the latest recession, when the fund went more than \$1.7 billion into the red. As a result, employers found themselves having to pay higher taxes to cover federal loans made to ensure the state could continue paying unemployment benefits. Lawmakers, suddenly hit with a barrage of complaints, took notice.

The fund returned to solvency only late last year, helped in part by a new law requiring unemployment applicants to wait an extra week before claiming benefits.

Forberger noted that the state's disbursements have been going down — from about \$2 billion in 2011 to about \$730 million in 2014. He believes the fight against concealment will lead to even further decreases, largely because it will discourage the out-

of-work from applying for unemployment benefits in the first place.

Redefining concealment

Not surprisingly, the crackdown on concealment has brought about a corresponding increase in the appeals filed by unemployment claimants who find themselves accused of the violation. The upshot has been a standoff pitting officials at the Department of Workforce Development against the Labor and Industry Review Commission, a body that someone can turn to in order to have an unfavorable unemployment decision overturned.

Officials on each side of the dispute accuse those on the other of abandoning their long-standing interpretations of the state's

concealment statute. Both, in turn, deny having budged an inch.

"We're just doing what we've always been doing," said Tracey Schwalbe, general counsel for the review commission, which is commonly known as LIRC.

Forberger and Lewison said that LIRC's position has been consistent for decades. The Wisconsin Supreme Court, moreover, has held since 1959 that concealment cannot have occurred unless misinformation was submitted on purpose.

None of this has stopped the DWD from maintaining that it is LIRC whose stance has changed. In an email statement, Janell Knutson, director of the DWD Unemployment Insurance Division's Bureau of Legal Affairs, accused the commission of overstepping its authority.

"LIRC has essentially engaged in a policy debate on how much weight should be placed on an incorrect answer," according to the email. "This policy decision should be determined by the (state's unemployment advisory council) and Legislature."

When the DWD disagrees with a LIRC decision, its first remedy is to appeal to the circuit courts. Hence the great increase seen in appeals in the past year or so.

DWD data show that administrative-law judges within the department found fraud to be present in 151 of the cases they heard in 2014. LIRC later knocked down most of those rulings, overturning a full 123. Those results, in turn, have led the DWD to file 10 appeals in circuit court.

LIRC has so far emerged victorious in six of those cases and is waiting on decisions in two more. Only one has been remanded to the commission for further review.

Schwalbe sees the rulings in LIRC's favor as affirming its interpretation of the concealment statute. DWD officials instead argue that they are losing many of the cases not because they have stumbled into a misinterpretation but because of the great deference the courts usually give to LIRC decisions.

Some lawmakers, such as state Rep. Chris Taylor, D-Madison, have tried to learn at recent state budget hearings how much the DWD has spent pursuing the cases in court. The only answer so far, she said, is that the cost is nearly impossible to determine because the

appeals are considered part of staff lawyers' normal duties and thus are not accounted for separately.

Stymied in its appeals attempts, the DWD is now moving beyond the circuit courts and is looking to state lawmakers. Legislation

"The Department disagrees with LIRC's statement that they have not changed their approach on the evidentiary standard and concealment cases. LIRC has essentially engaged in a policy debate on how much weight should be placed on an incorrect answer. This policy decision should be determined by the Council and Legislature."

*— Janell Knutson
Director of the DWD's
Unemployment Insurance
Division's Bureau of Legal Affairs
and non-voting chairperson of
the Unemployment Insurance
Advisory Council*

recently proposed by the department would seem to eliminate the state's current obligation to provide evidence of intent when attempting to prove concealment.

The latest draft adds language stating that concealment "does not require an intent or design to receive benefits to which the claimant knows he or she is not entitled." At the same time — in a step unlikely to clear up confusion — the statute would maintain that "conceal means to intentionally mislead."

In another proposal that is riling critics, the

change would prevent claimants from citing various specific reasons to excuse their submissions of misinformation. Among the defenses that could no longer be effectively invoked would be that inaccurate information had stemmed from a claimant's inability to read or follow instructions or from advice provided by someone other than a DWD employee.

A draft version of the proposal was presented in May to an advisory panel charged with suggesting changes to the state's unemployment-benefits policies. For the new language to take effect, it still must be approved by the full Legislature and signed by the governor.

The proposed change, according to comments made by the DWD attorney Andrew Rubsam at the advisory council's May meeting, would establish a "rebuttable presumption that the claimant misled the department when providing the false information."

Rubsam also noted that the proposal would have a small, but beneficial, effect on the state's unemployment-insurance fund.

Schwalbe responded with a memo sent to the council April 9. In it, he expressed concerns that the proposed changes would, among other things, negate decades of the state's common-law interpretation of concealment, lead to due-process troubles and expose claimants who had done nothing more than make a mistake to allegations of fraud.

Taking it to the Budget

The conflict has also made its way into the draft version of the state's next budget. In May, the state's Joint Committee on Finance — which is charged with going through budget proposals line by line — approved a proposal that would increase the fines imposed on those found in violation of the concealment statute.

If approved by the full Legislature and signed by Walker, the penalty amount would be made equal to 40 percent of a claimant's gains from fraud, up from the current 15 percent.

At the same time, the committee deleted the governor's suggestion to increase the criminal penalties that can be imposed on those found guilty of concealment.

Cost of Losing, continued on page 20

Cost of Losing, continued from page 19

In yet another swipe at LIRC, the committee approved a provision that would have more than \$400,000 of the review commission's budget transferred to the DWD for unemployment insurance "integrity purposes." The change could put Schwalbe's job at risk; if approved, the proposal would make the LIRC general counsel a direct appointee of the governor.

Although Forberger regularly appeals LIRC decisions, he finds the proposals alarming because they could sap the commission's independence and deal a blow to LIRC's legal team.

"I don't want to be winning cases simply because LIRC doesn't have the staffing," Forberger said. "I want to win based on the merits of the argument, not because LIRC doesn't have resources."

To Forberger, the endgame is obvious: To erect as high a barrier as possible between claimants and the state's unemployment fund.

The message has not been lost on Coronado. She said she has resigned herself to the likelihood that she will end up paying the full \$14,000 state officials say she owes to the unemployment fund. The DWD has already taken half of the money by withholding her latest tax refund, she said, and will probably get the rest from her 2015 refund.

What's more, a Waukesha County Circuit Court judge dismissed her case on June 18. Coronado is still deciding if she will pursue the case in the Court of Appeals, but she has made up her mind about unemployment benefits.

"I will never file unemployment again," she said. "I urge anybody anywhere, anytime: Do not file unemployment. Because even if it looks like a great thing and they're supposed to be helping you, they won't. And if you make one wrong step, they won't even tell you. They'll just try to take your money."

Current concealment statute: Wis. Stat. 108.04(11)

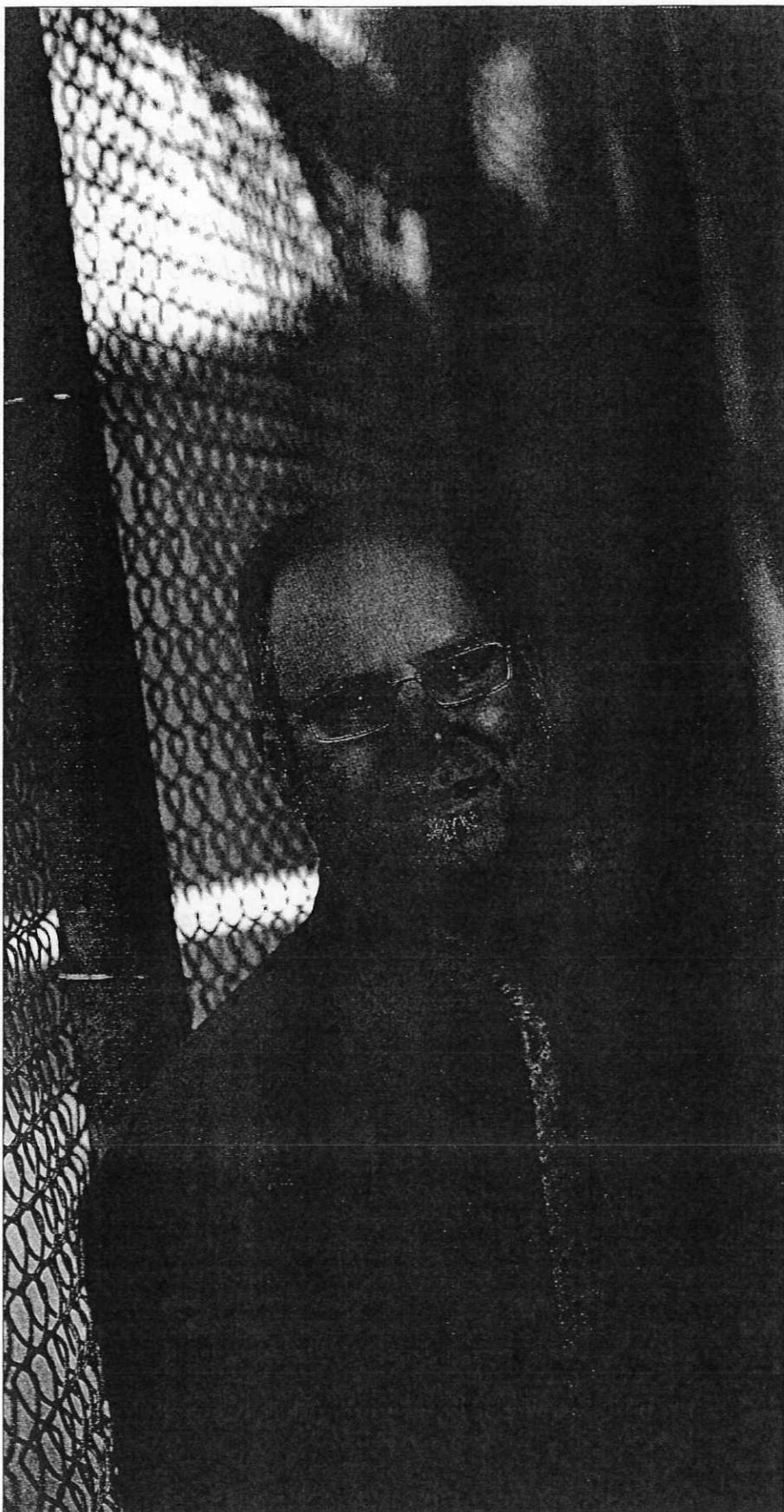
(g)

(11) Fraudulent claims

(a) If a claimant, in filing his or her application for benefits or claim for any week, conceals any material fact relating to his or her eligibility for benefits, the claimant is ineligible for benefits as provided in par. (b).

(b) If a claimant, in filing a claim for any week, conceals any of his or her wages earned or paid or payable or hours worked in that week, the claimant is ineligible for benefits as provided in par. (be).

(g) For purposes of this subsection, "conceal" means to intentionally mislead or defraud the department by withholding or hiding information or making a false statement or misrepresentation.



Madison-based lawyer Victor Forberger has represented a number of unemployment claimants who say they have made honest mistakes in their weekly fillings but are being prosecuted by the state.

STAFF PHOTO BY KEVIN HARRACK

Filing a Weekly Claim Certification

The system tells you which week(s) you can claim by giving the beginning and ending dates of the week. If the last 2 weeks can be claimed, the system takes your claim for the earliest week first. After you claim for the earliest week, the system tells you how to claim the most recent week. The system also tells you if no weeks can be claimed.

You will need to answer several questions about the week(s) that you are claiming. Take time to answer all questions completely and correctly. **You could be penalized if you give false information to get benefits.**

Important Points to Remember

- **All questions apply to the specific calendar week for which you are claiming.** For example, when asked if you quit a job, you are being asked if you quit during the week you are claiming. If you did not quit during that week, answer "NO."
- When you are asked to speak an answer into the telephone, please speak slowly and clearly, and spell any words that have an unusual spelling.

YOU ARE ASKED THE FOLLOWING QUESTIONS WHEN YOU FILE A WEEKLY CLAIM CERTIFICATION:

1) **Were you able to work full-time and available for full-time work?**

- Answer "YES" if you could have and would have worked full-time if work had been available for you.
- Answer "NO" if you could not work full-time because you were physically unable to work or you were unavailable for work. For example, you could not accept work with an employer (including your regular employer) because you were sick or injured, on vacation, didn't have a way to get to work, didn't have childcare arrangements, etc.

2) **Did you contact at least four employers during the week to try to find work?** (This question is not asked if your work search is waived.)

3) **During the week, did you refuse work that was offered to you?**

- Answer "YES" to this question only if you refused an offer of work from an employer you were not working for at the time.

4) **During the week, did you miss work that was scheduled for you?**

- Answer "YES" if you did not work all of the hours that were available for you with your current employer.

5) **During the week, did you quit a job or were you fired?**

- Answer "YES" if you quit, voluntarily terminated, ended your employment for any reason OR you were terminated, discharged, or fired by the employer for any reason other than lack of work.
 - Next you will be asked if you quit a job, answer "YES" if you quit.
 - Next you will be asked if you were fired from a job, answer "YES" if you were fired.
- Answer "NO" if you were laid off due to lack of work from a job.

6) **During the week, did you work or did you receive or will you receive sick pay, bonus pay or commission?**

- If yes, you will be asked if you worked for or receive/will receive sick pay, bonus pay or commission from more than one employer during the week.
- Then you will be told to enter the **gross amount of income** from **each employer, including**, sick pay, bonus pay and commissions. Do not include holiday, vacation or dismissal pay as wages.)
- After your income has been entered, you will be told to enter the **number of hours and the additional minutes** for which you received or will receive pay from **each employer**.
- You will usually be asked to speak the complete name and address of each employer.

7) **Did you receive, or will you receive, holiday pay, vacation pay or dismissal pay for the week?**

- If yes, you will be asked to enter the gross amount of **each type of pay** from **each employer**.

- After the gross amount of each type of pay is entered, you will be told to enter the number of hours and the additional minutes for which you received or will receive that type of pay from each employer.
- You will usually be asked to speak the complete name and address of each employer.

8) **Are you receiving any disability benefits from Social Security?**

- Answer "YES" ONLY if you are receiving payments for Social Security Disability Insurance (SSDI).
- Answer "NO" if you are not receiving SSDI payments OR you have only applied for SSDI.

9) **Were you self-employed?**

- Answer "YES" if you are self-employed or operating your own business, i.e. farming, partnership, LLC or corporation.
- Answer "NO" if you are selling Avon, Amway, Tupperware, etc. This is normally considered employment and you would report the income as wages. (However, if you feel this is self-employment, answer "YES" and the Department will contact you for further information.)

If your address has not changed, press 1. If you have changed your address and have not reported the new address to us, press 2. (If you press 2, you will be asked to enter your zip code and telephone number. Then you will be asked to speak your new address.)