

# PROPOSED CLASS-ACTION SETTLEMENT AGREEMENT

## I. INTRODUCTION AND GENERAL AGREEMENTS

- A. The parties wish to settle *Flores de Vega, et al v. OED, et al*, Multnomah County Circuit Court Case No. 20CV23377 (the Action).
- B. Petitioners are: (1) a main class consisting of all individuals who have been partially or totally unemployed between March 1, 2020 and the Effective Date of this Agreement; have applied or attempted to apply for unemployment benefits distributed by the Oregon Employment Department; and have been waiting longer than four weeks since applying or attempting to apply without receiving either payment, or a denial, for at least one week of benefits other than the initial waiting week; and (2) a sub-class consisting of those in the main class who have applied for or attempted to apply for Pandemic Unemployment Assistance (PUA) benefits.
- C. Respondents are the Oregon Employment Department (OED) and David Gerstenfeld, the acting Director of OED (collectively OED).
- D. This Settlement Agreement (Settlement Agreement) is a final settlement of all claims that are asserted in the Action, and has the same preclusive effect as if it were a judgment following a judicial decision on the merits in a class action lawsuit.
- E. OED disputes the allegations in the Action. This Settlement Agreement is not an admission of liability, and OED denies that it is in violation of any laws.
- F. The parties represent and acknowledge that this Settlement Agreement is the result of extensive, thorough, and good faith negotiations. The parties further represent and acknowledge that the terms of this Settlement Agreement have been voluntarily accepted, after consultation with counsel, for the purpose of making this Settlement Agreement.
- G. The venue for all legal actions concerning this Settlement Agreement will be in the Multnomah County Circuit Court.
- H. Judge Katharine von Ter Stegge shall resolve any disputes that may arise under this Settlement Agreement pursuant to section IX below. Any decision Judge von Ter Stegge issues resolving disputes under this settlement will be in the form of a judgment appealable as would be any other judgment issued by a circuit court judge. If Judge von Ter Stegge is

unavailable, the Chief Judge of the Multnomah County Circuit Court will assign a judge to resolve the dispute. The parties shall retain their rights under Oregon law to object to any assigned judge other than Judge von Ter Stegge.

## **II. DEFINITIONS**

For the purposes of this Settlement Agreement only, the following definitions apply.

- A. "Effective Date" means the date on which this Settlement Agreement has been fully executed by all parties and an appropriate order approving it has been entered by the court.
- B. "UI" means traditional unemployment insurance.
- C. "EB" means the Extended Benefits program, including High Extended Benefits.
- D. "PUA" means the Pandemic Unemployment Assistance program established by Congress to provide COVID-19 emergency unemployment benefits for certain individuals who are not eligible for UI.
- E. "PEUC" means Pandemic Emergency Unemployment Compensation, which is for people who have run out of their UI benefits.
- F. "Identity Verification Issues" means any claim where OED is required to, or has reasonable cause to verify the identity of the customer before the agency may pay, or continue to pay, benefits to the customer, in order to detect and avoid identity theft fraud.

## **III. TIMELINESS REQUIREMENTS**

Except as indicated in Section IV, OED commits to the following steps in order to resolve the Action with finality:

- A. OED shall be in substantial compliance with the federal first payment timeliness requirements by March 1, 2021 reflected in the ETA 9050 report required by the U.S. Department of Labor (U.S. DOL) for the period ending March 31, 2021.
- B. OED shall be in substantial compliance with the federal non-monetary adjudication timeliness by April 1, 2021 reflected in the ETA 9052 report required by the U.S. DOL for the period ending April 30, 2021.
- C. OED will complete the initial processing of 80% of initial benefit claims for UI, and 80% of initial benefits claims filed on or before December 26, 2020 for PUA, within 21 days of the claim being filed. This initial

processing will include either sending a notification that the claimant has a valid claim and the amount of benefits they are potentially eligible for under that claim, or providing an appealable notification that the claimant does not have a valid claim under the program applied for. This term does not apply to applications that do not have enough identifying information to provide notification.

- D. For PUA claims filed after December 27, 2020, by March 31, 2021, OED will complete the initial processing, as described in Section III.C, of 80% of initial benefit claims within 21 days of the claim being filed.
- E. OED has instituted an initial focus adjudication initiative that successfully addressed the oldest claims in the adjudication queue. At the completion of this initial initiative in January 2021, OED will assess what worked about that project, and will institute a second focus adjudication initiative (Focus Adjudication Initiative) for the items in the adjudication queue on or about January 13, 2021. At that time, OED will take a snapshot of all issues that are known to need adjudication (Focus Adjudication Group).
- F. The Focus Adjudication Group will be comprised of anyone who, on the date the snapshot is taken, has an issue on one or more weeks that has been identified as requiring adjudication. Whether an issue has been identified as requiring adjudication will be measured by whether a folder has been set up in OED's imaging system for that issue to be assigned for adjudication. Most of these claims will also be included in, as a subset of, the claims included in the report described in Section V.B. The report described in Section V.B. will also include many other people's claims, many of which will never require adjudication, but some of which will later be determined to require adjudication.
- G. By March 1, 2021, OED will have issued a decision or payment on all issues within the Focus Adjudication Group.
- H. After the deadline for submitting the first report described in Section V.B, the parties will meet to negotiate a timeframe for resolving the items on that report. If the parties cannot, by May 8, 2021, agree on a timeframe for resolving the items on that report, the parties will present their proposals to Judge von Ter Stegge who will decide what timeframe and resolution shall apply.

#### **IV. SECTION III INAPPLICABLE IN CERTAIN EVENTS**

Section III shall be inapplicable:

- A. to any claims with potential identity verification issues;
- B. to any claims that experience delays because OED is waiting or has waited for other external parties (excluding employers) to provide necessary

information, including but not limited to immigration status information from the federal government, and wage information from other states or the federal government for combined wage claims;

- C. in the event of substantial and material changes in federal or state law, including but not limited to changes in U.S. DOL guidance that substantially affect OED's ability to comply;
- D. in the event that the number of initial or continued claims filed increases by 30% or more over the number of claims filed in the previous month;
- E. in the event that the number of issues referred for potential investigation (e.g., imprisonment, rejection of employment offers, etc.) increases by 30% or more over the number of such issues in the previous month;
- F. in the event that the COVID-19 pandemic, any other natural disaster, state of emergency, or public health crisis substantially interferes with OED's ability to comply with the agency's obligations (for example, if a COVID-19 outbreak within OED renders compliance impossible);
- G. in the event that budgetary factors outside of OED's control, including but not limited to state and federal budget cuts, render compliance impossible; and/or
- H. any other circumstance which Judge von Ter Stegge determines excuses performance.
- I. Subsections IV.C-H shall render Section III inapplicable for a time period presumed to be 90 days. This time period may be shortened or extended further by mutual agreement of the parties or as outlined in subsection IV.J..
- J. When circumstances trigger application of subsections IV.C-H, OED shall notify Oregon Law Center within 7 business days. If the parties disagree about the applicability of Section IV, or about whether the excuse period should be shortened or lengthened to some period other than 90 days, the parties shall follow the dispute resolution process in Section IX. If either or both of these two questions goes before Judge von Ter Stegge, the standard of review shall be whether substantial evidence, as that term is used in ORS 183.484(5)(c), supports the agency's contention that an excuse applies, and whether substantial evidence, as that term is used in ORS 183.484(5)(c), supports the duration of the agency's proposed period of excuse.

**V. REPORTING AND MEASURE OF COMPLIANCE WITH SECTION III.**

- A. Compliance with Section III, A-B, shall be measured based on reports that OED submits to the U.S. DOL. OED will submit the reports reflecting first payment timelines and non-monetary determination timeliness to Oregon Law Center within one business day of when they are submitted to U.S. DOL, starting with the reports for the period ending March 31, 2021.
- B. On a monthly basis, starting no later than 45 days after the Effective Date of this Settlement Agreement, OED will provide a report to Oregon Law Center containing a summary of the number of people who have claimed a week of benefits under UI, PEUC, EB or PUA and who have not either been paid for that week, or been notified by OED that they are not eligible for benefits for that week and the reason why, or been notified by OED about what additional information the person needs to provide or what additional action the person needs to take in order to potentially be eligible for benefits. This monthly report will address people whose weeks at issue are more than four weeks prior to the report date and include when the suspense code was put on that week at least four weeks prior to the report date. This report does not need to include people who have been paid under any employment program for the week in question.
- C. OED shall provide Oregon Law Center with monthly reports reflecting the status of UI and PUA claims covered by Section III.C-D.
- D. OED shall provide Oregon Law Center with monthly reports reflecting the progress of the Focus Adjudication Initiative described in Section III.E-G. The reports will include a static introduction stating (1) the date on which the snapshot was taken which assessed how many people's claims would be included in the Focus Adjudication Group; (2) the number of people with claims included in the Focus Adjudication Group; (3) the criteria for inclusion of claims in the Focus Adjudication Group described above in Section III.F. The reports will list the number of people with claims in the Focus Adjudication Initiative still waiting for adjudication at the time of the report. This reporting duty shall terminate after the month during which OED reports it has resolved all claims in the Focus Adjudication Group.
- E. OED will make the reports it creates under this Section available on its website.

**VI. DESIGNATION OF DEPARTMENT LIAISON**

- A. OED shall designate one or more people to serve as liaison and primary point of contact between class counsel and OED on the following issues:
  - (1) understanding the data and reports provided under Section V; and
  - (2) individual OLC client issues.
- B. OED may designate a DOJ lawyer or an OED employee as its liaison as appropriate.

**VII. SERVICES FOR PERSONS WITH LIMITED ENGLISH PROFICIENCY (LEP)**

- A. OED will make its regular UI initial claim application available in Spanish on the current Online Claim System. OED is making best efforts to complete this project as quickly as possible and anticipates it will be available by May 1, 2021. If unanticipated events render compliance impossible by May 1, 2021, then OED will communicate to OLC the reasons for the delay and the new anticipated date. If OLC is unsatisfied with the reasons or the proposed new date, the parties will take the matter to Judge von Ter Stegge for resolution.
- B. OED will make online applications for UI and PUA available in a minimum of ten languages, to be determined by OED's language assessment process and through its modernization project. Until this is achieved, OED will make paper and downloadable pdf applications in a minimum of ten languages.
- C. OED agrees to continue the following services for LEP individuals:
  - (1) Dedicated phone queues for individuals who speak Spanish, Russian, or Vietnamese (accessible through the 1-877-345-3484 toll free number); this line will also continue to offer an option for those who speak languages other than English with appropriate interpreters.
  - (2) Use of telephone interpreter services to communicate with people in languages other than English, Spanish, Russian, and Vietnamese, or when OED employees who are not fluent in Spanish, Russian, or Vietnamese are helping callers who prefer to speak in those languages.
  - (3) Maintain information about applying for benefits in multiple languages on OED's public facing website.

- (4) Maintain a contact us form or equivalent method for people to request that OED contact them, or someone seeking OED services, in a language other than English.
- D. OED will allow LEP individuals to access retroactive benefits to the same extent non LEP individuals are permitted to access retroactive benefits, consistent with state and federal law.
- E. OED will engage in outreach to the LEP population regarding availability of retroactive benefits as appropriate. OED's equity and inclusion council will create and OED will implement a plan to this effect. OED will share this plan with the Oregon Law Center.
- F. OED's equity and inclusion council will, on a regular basis, consult with LEP individuals and organizations advocating for LEP and immigrant communities to ascertain how well LEP populations are able to access and use OED's benefit programs and identify ways OED could better serve LEP individuals.

**VIII. PROCESS FOR COURT APPROVAL OF ENFORCEABLE CLASS-ACTION SETTLEMENT AGREEMENT**

- A. Upon execution of this agreement by all of the parties, the parties will jointly request approval of this proposed Settlement Agreement pursuant to Oregon Rule of Civil Procedure 32 D from the judge currently assigned to this case, the Honorable Judith Matarazzo. Prior to court approval, OED shall provide notice of this proposed Settlement Agreement to members of the class in such manner as Judge Matarazzo directs.
- B. If approved, the parties shall jointly submit an order and judgment for the court to enter this Settlement Agreement as a final order and judgment of the court. The court shall retain jurisdiction over the Settlement Agreement according to its terms until its termination.
- C. Upon court approval:
  - (1) The terms of the proposed Settlement Agreement shall control any future proceedings in this case.
  - (2) All class members shall have the right to enforce this Settlement Agreement through class counsel, Oregon Law Center.
  - (3) The Settlement Agreement shall have the same preclusive effect for class members as if it were a judicial decision on the merits in a class action lawsuit.

## IX. DISPUTE RESOLUTION AND ENFORCEMENT

- A. For purposes of this section, “substantial compliance” means something less than strict and literal compliance with every provision of this Settlement Agreement. Rather, deviations from the terms of the Settlement Agreement may occur, provided any such deviations are unintentional and so do not substantially defeat the object which the parties intend to accomplish, or to impair the structure of the Settlement Agreement as a whole.
- B. If Petitioners believe that OED has failed to be in substantial compliance with any obligation under this Settlement Agreement, Petitioners must, before initiating any court proceeding to remedy such failure or seek additional relief, give written notice to OED which sets forth with specificity the details of the alleged failure to remain in substantial compliance.
- C. OED shall have 7 business days from the date of such written notice to respond in writing by denying that the alleged failure to remain in substantial compliance has occurred, or by accepting the allegation of failure to remain in substantial compliance and proposing steps that OED will take, and by when according to OED’s best estimate, to cure the alleged noncompliance.
- D. If OED fails to respond within 7 business days or denies that it has failed to remain in substantial compliance, or fails to commence the steps it proposed to cure the alleged noncompliance within 10 days of its proposal (or another time frame if mutually agreed upon by the parties in writing), or if the Petitioners do not believe that OED’s steps will cure, Petitioners may seek appropriate relief from Judge von Ter Stegge.
- E. In any enforcement proceeding allowed under this Settlement Agreement, Petitioners shall bear the burden of proving a lack of substantial compliance with Section III. OED shall bear the burden of proving that any exceptions within Section IV apply to excuse performance with Section III.
- F. Appropriate relief shall be limited to that which is tailored to compel compliance with the Settlement Agreement and confined to the type of relief that a court may award to ensure compliance with an order to compel agency action pursuant to ORS 183.490.
- G. Judge von Ter Stegge shall determine how any hearing shall proceed and shall determine the scope and means of discovery, if any, in enforcement proceedings, but the parties agree that the scope and means of discovery shall be as narrow and cost-effective as possible in all instances, and



consistent with an expedited hearing schedule. Petitioners must make a showing of their need for discovery. OED may oppose the requested discovery.

## **X. JOINT PRESS RELEASE**

The parties agree to announce this settlement in a joint press release describing their desire to avoid unnecessary litigation and instead work together in improving OED's timeliness in serving unemployed Oregonians.

## **XI. TERMINATION OF THE SETTLEMENT AGREEMENT**

- A. This Settlement Agreement shall terminate:
- (1) upon 7 consecutive months of OED's substantial compliance with its terms or upon 10 non-consecutive months of substantial compliance (without application of Section IV), or upon 18 months following the Effective Date, whichever occurs first; or
  - (2) upon mutual written agreement by the parties.
  - (3) If OED has not achieved substantial compliance with the Settlement Agreement for 7 consecutive months or 10 non-consecutive months within 18 months following the Effective Date or in the event that Section IV.C-H has been applied for more than 9 months, Oregon Law Center may seek an appropriate extension of this agreement (of no more than an additional 6 months) from the court after following the notice and conferral provisions in Section IX. For any such extension, the parties agree to provide notice to then-existing class members in the same manner notice is provided to obtain approval of this agreement pursuant to Section VIII.
- B. Upon termination of this Settlement Agreement, the parties agree to file a joint notice with the court effecting termination.

## **XII. GENERAL PROVISIONS**

- A. Failure by any party to enforce this entire Settlement Agreement or any provision thereof with respect to any deadline or any other provision herein shall not be construed as a waiver, including the party's right to enforce other deadlines and provisions of this Settlement Agreement.
- B. The parties shall promptly notify each other of any court or administrative challenge to this Settlement Agreement or any portion thereof, and shall defend against any challenge to the Settlement Agreement.

- C. Nothing in this Settlement Agreement requires OED to take actions inconsistent with state or federal law or state or federal funding requirements.
- D. The signatures below of officials and attorneys representing Petitioners and OED signify that these parties have given their final approval to this Settlement Agreement. Each party to this Settlement Agreement represents and warrants that the person who has signed this Settlement Agreement on behalf of his or her entity or clients is duly authorized to enter into this Settlement Agreement and to bind that party to the terms and conditions of this Settlement Agreement.
- E. This Settlement Agreement and any documents incorporated by reference constitute the entire integrated Settlement Agreement of the parties. No prior or contemporaneous communications, oral or written, or prior drafts shall be relevant or admissible for purposes of determining the meaning of any provisions herein in any litigation or any other proceeding.
- F. This Settlement Agreement may be executed in counterparts, each of which shall be deemed an original, and the counterparts shall together constitute one and the same Settlement Agreement, notwithstanding that each party is not a signatory to the original or the same counterpart. All references to signature or execution of the Settlement Agreement shall be calculated from the date on which the last party executed the Settlement Agreement.

### **XIII. NOTICE**

When notice under this Settlement Agreement is to be provided to Petitioners, it will be provided by electronic mail to each of the following or their successors:

OREGON LAW CENTER  
522 SW 5th Avenue, Suite 812  
Portland, OR 97204

When notice is to be provided to OED under this Settlement Agreement it will be provided by mail to each of the following:

Attorney General  
Oregon Department of Justice  
1162 Court Street NE  
Salem, OR 97301-4096

General Counsel  
Oregon Department of Justice  
1162 Court Street NE  
Salem, OR 97301

Director of the Oregon Employment Department  
875 Union Street NE  
Salem, OR 97311-0024

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Oregon Employment Department

By: /s/ David Gerstenfeld 2/2/21  
Date

Printed Name: David Gerstenfeld

Title: Acting Director of the Oregon Employment Department

/s/ David Gerstenfeld 2/2/21  
Date  
David Gerstenfeld, in his capacity as Acting  
Director of the Oregon Employment  
Department

/a/ Florentina Flores De Vega 2/1/21  
Date  
Florentina Flores De Vega, Petitioner and  
Class Representative

/s/ Heather Franklin 2/1/21  
Date  
Heather Franklin, Petitioner and Class  
Representative

/s/ Htoo Ler Paw 2/1/21  
Date  
Htoo Ler Paw, Petitioner

/s/ Victoria Petrotta 2/1/21  
Date  
Victoria Petrotta, Petitioner

/s/ Brenda Cook 2/1/21  
Date  
Brenda Cook, Petitioner

/s/ Lisa Exterovich 2/1/21  
Date  
Lisa Exterovich, Petitioner

/s/ Abdelkadir Mokrani 2/1/21  
Date  
Abdelkadir Mokrani, Petitioner

/s/ Diana Oropeza 2/1/21

Diana Oropeza, Petitioner	Date
/s/ David Knell David Knell, Petitioner and Class Representative	2/1/21 Date
/s/ Brittney Ciani Brittney Ciani, Petitioner and Class Representative	2/1/21 Date
/s/ Stacey Quintero Stacey Quintero, Petitioner and Class Representative	2/1/21 Date
/s/ Kathleen Selvaggio Kathleen Selvaggio, Petitioner and Class Representative	2/1/21 Date
/s/ Tracy Solorzano Tracy Solorzano, Petitioner and Class Representative	2/1/21 Date
/s/ Erin LaCerra Erin LaCerra, Petitioner and Class Representative	2/1/21 Date

Approved: /s/ Justin Kidd

OREGON DEPARTMENT OF JUSTICE

2/2/21  
Date

Printed Name: Justin Emerson Kidd  
Of Attorneys for Respondents

Approved: /s/ Kelsey Heilman

OREGON LAW CENTER

Printed Name: Kelsey Heilman  
Of Attorneys for Petitioners

Date 2/2/21